Given the collective bargaining principles of the National Labor Relations Act, many questions have arisen concerning the status of academic senates at universities where faculty employee unions have been certified. This article explores the unique nature of the academic senate, its management and employee representation roles; the NLRA requirement of exclusive representation; and the nature of mandatory bargaining subjects. The author concludes that university administrations run the risk of unfair labor practice charges if they bargain with academic senates about wages, hours and terms and conditions of employment when a union exists, and that, likewise, unions may be disallowed from bargaining to impasse on matters concerning forms of faculty governance.

I. INTRODUCTION

Increasing numbers of faculty employee unions are being certified at campuses across the nation. These unions now stand alongside long-established faculty senates which traditionally have dealt with employment issues. This article explores the permissible roles of and interactions among college and university administrators, academic senates and committees, and faculty unions in the context of the collective bargaining scheme developed under the National Labor Relations Act. 

† Ph.D. candidate, Industrial Relations Department, Sloan School of Management, Massachusetts Institute of Technology; former Personnel Officer for Faculty Affairs and Campus Liaison Officer for Labor Relations at the University of Massachusetts/Boston. B.A. Economics, University of Massachusetts, 1972.


In Cornell University, 183 N.L.R.B. 329 (1970), the National Labor Relations Board [hereinafter referred to as the Board or NLRB] extended its jurisdiction over labor problems to private colleges and universities. Later in the same year, the Board limited its jurisdiction to those private educational institutions with gross annual operating expenses of at least $1 million, 29 C.F.R. § 102.1 (1976). The Board’s decision in Cornell University fails to deal with the difficult legal questions involved in fitting academe into the established practices and law of
Important collective bargaining principles established by the NLRA include exclusive representation by a union chosen by the majority of the employees, prohibition of employer interference with labor unions, and union duty to represent employees fairly. The NLRA further creates two categories—mandatory and permissive—into which all legitimate subjects of labor management concern fall. Parties are under a good faith duty to bargain on mandatory subjects, and unilateral action with respect to such matters is permitted only after the bargaining reaches an impasse. A party may act unilaterally, without such a bargaining to impasse duty if the subject is construed as permissive. As will be seen, these principles do not mesh perfectly with the present structure of academic institutions.

Fitting academia into this concept of collective bargaining presents unique problems. In particular, dealing with two faculty representatives—the union and the senate—in regard to employment issues raises the possibility of unfair labor charges. Yet if forms of faculty governance are mandatory subjects under the NLRA, the university administrator cannot unilaterally disband them without first bargaining to impasse.

The National Labor Relations Board has yet to grapple with the difficult area of mandatory subjects of bargaining in higher education. The area is unclear precisely because most debatable subjects are inexorably intertwined with the traditional academic system of self-governance.

---

4. Id. § 158(a)(2).
8. Some subjects of bargaining are "illegal". Neither party can insist on a contract provision which is illegal under the Act, and an illegal subject cannot properly be included in the agreement. See Associated Gen. Contractors, Evansville Chapter, Inc. v. NLRB, 465 F.2d 327 (7th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); Honolulu Star Bulletin, Ltd., 123 N.L.R.B. 395, enforcement denied on other grounds, 274 F.2d 567 (D.C. Cir. 1959); Amalgamated Meat Cutters and Butcher Workmen, Local 421, 81 N.L.R.B. 1052 (1949), enforced, 175 F.2d 686 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950). See also THE DEVELOPING LABOR LAW, supra note 6, at 435-39.
13. See text accompanying notes 21-79 infra.
14. See text accompanying notes 80-128 infra.
II.
TRADITIONAL DECISION-MAKING THROUGH THE ACADEMIC SENATE

Faculty members participate in deciding those matters of academic concern in which they have special expertise, primarily through the mechanism of academic senates, or through various committees of the senate, the university, or individual departments. These committees can bring to department heads, deans, and other administrators the recommendations of individuals, small groups (such as departments or Freshman English instructors), large groups (the entire campus, as in the case of senate committees), and very large groups (some or all campuses of a multi-campus university system) in attempts to influence decisions in matters of direct and indirect faculty concern. Although committees can be created by faculties and/or administrators in response to a particular need, most exist as a result of a departmental or campus-wide constitution formulated and ratified by the faculty and approved by the administration.

These committees, then, are the forms of faculty governance. This paper will focus on the largest, most common and representative form of faculty governance, the senate. Much of what will be suggested, however, should be applicable to other forms of faculty governance as well.

The scope of academic senate discussion and deliberation can be quite broad; and the definition of a senate’s jurisdiction and the impact of its recommendations varies with each college or university. However, the 1966 Statement on Government of Colleges and Universities (approved by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, and familiar to most faculty and administrators) offers the following definition of the range over which faculty ought to and often do participate in decision-making:

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.

The faculty sets the requirements for the degrees offered in course[sic], determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.

The faculty should actively participate in the determination of policies and procedures governing salary increases.

Areas involved in "curriculum, subject matter and methods of instruction" in practice include class size, academic calendar, course load and preparations, and other related matters. In addition, committees of the senate often make recommendations to chancellors and presidents concerning selection of administrative officials, campus budgets, building utilization, physical plant, academic long-range planning, and other areas which in industry would be considered management prerogatives.

In the typical collective bargaining scheme, the management bargains with the union over matters emanating from the employment relationship. In the context of universities, this scheme is complicated by the presence of academic senates. Senates are hybrids—serving management as well as employee representative functions. A 1972 report dealing with academic senates illustrates this overlap by contrasting academic senates with collective bargaining representatives:

First, although senates may have some basis for their existence in the documents of the institution, their scope of operations is dependent upon board or administrative approval.

Second, academic senates normally are dependent on institutional appropriation for their operating funds.

Third, many senates are based on individual campuses and do not reflect the statewide or multicampus nature of much of higher education.

Fourth, the membership of senates usually includes faculty, administrators, and, more recently, students, and in some cases the administration tends to dominate the senate.

Fifth, senates often do not provide an avenue from their own decisions.

The NLRA prohibits management from engaging in such acts as contributing support to labor organizations or bargaining over employment matters with any group other than the exclusive employee representative. The hybrid nature of the academic senates thus creates problems under the NLRA.

III.
SENNATES AS "LABOR ORGANIZATIONS" UNDER THE NATIONAL LABOR RELATIONS ACT

A. Development of the definition of "Labor Organization"

Section 2(5) of the NLRA reads:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in

---
18. Id. at 3-7.
20. Id. § 158(a)(5).
which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 21

Board interpretation of what committees constitute "labor organizations" under the Act has been consistently broad over the years. The courts have typically upheld Board definition. In 1946, in NLRB v. Jas. Matthews & Co. 22 the employer appealed an NLRB order to disestablish a small advisory committee called the "Junior Board"; he maintained that such committee did not deal with management, but only made recommendations to management (on issues of wages, hours and working conditions) which made the final decision. The Court of Appeals for the Third Circuit concurred with the Board's finding that the committee was a labor organization under section 2(5) of the Act, noting that the "[f]inal decision is always with management. . . ." 23

In Indiana Metal Products Corp. v. NLRB, 24 the Court of Appeals for the Seventh Circuit upheld the Board with respect to its decision that an "Advisory Committee" of nine employees which had no bylaws, officers, constitution, dues or treasury, and which from time to time made recommendations (on wages, hours, and working conditions) that were frequently followed by management, was a labor organization. 25

In the 1959 case of NLRB v. Cabot Carbon Co., 26 the Supreme Court took up the question of whether employer supported "Employee Committees," whose by-laws essentially stated "that the purpose of the Committees is to provide a procedure for considering employees' ideas and problems of mutual interest to employees and management," 27 were labor organizations. The Employee Committees at the Cabot Carbon plants never sought to negotiate a collective bargaining agreement; there were various certified labor organizations representing Carbon employees who undertook that task. 28 However, the committees handled grievances at nonunion plants and
made proposals and requests concerning such matters as seniority, job classifications, work scheduling, and facility improvement that were frequently granted by plant officials. The Supreme Court held that because they consider labor problems these committees were "dealing with" management; that the words "dealing with" in section 2(5) were intended by Congress to be broader than the term "bargaining collectively with"; and that, therefore, these committees were "labor organizations." The Supreme Court also placed heavy emphasis on the "in whole or in part" language of section 2(5). This made possible still further broadening of the meaning of "labor organization."

The degree to which the NLRB and the courts have been willing to treat the definition of labor organization expansively is illustrated by a line of cases decided by the Court of Appeals for the Seventh Circuit. In 1962, in *NLRB v. Thompson Ramo Wooldridge, Inc.*, that court upheld the NLRB's finding that the employer "recognized that a function of an employee association was presentation of individual grievances, and that this function was enough to justify the finding that the Association was a 'labor organization.'" The court also noted that the fact that the committee merely conveyed information to the management without specific recommendations was not a determining factor, because "express recommendation is not essential to 'dealing,' if discussion . . . was designed to remedy grievances."

In the 1971 case of *NLRB v. Ampex Corp.*, the employee organization at issue, known as the "Communication Committee," was clearly separate from the grievance system, lacked formal structure (every employee served on a rotating basis), and discussed matters which "ranged widely

29. *Id.* at 211-13.
31. 360 U.S. at 213.
32. *See, e.g., NLRB v. Drives, Inc.*, 440 F.2d 354 (7th Cir.), cert. denied, 404 U.S. 912 (1971) (advisory board which discussed the adequacy of plant facilities and other working conditions found to be a labor organization). 440 F.2d at 359. *See also NLRB v. Erie Marine, Inc., Div. of Litton Indus.,* 465 F.2d 104 (3d Cir. 1972) (Communication Sessions Committee); *Utrad Corp. v. NLRB*, 454 F.2d 520 (7th Cir. 1970) (committee organized primarily for social activities which did, however, make some recommendations on wages, hours and conditions of work held to be a labor organization); Doses Sixth Ave., Inc., 225 N.L.R.B. No. 114, 93 L.R.R.M. 1091 (1976) (ad hoc negotiations committee); Freemont Mfg. Co., 224 N.L.R.B. No. 79, 92 L.R.R.M. 1508 (1976) (Progress Team); Lane Aviation Corp., 211 N.L.R.B. 824 (1974) (Employee Idea and Development Council); Clapper's Mfg., Inc., 186 N.L.R.B. 324 (1970), enforced, 458 F.2d 414 (3d Cir. 1972) (Employee Committee); Walker Process Equip., Inc., 163 N.L.R.B. 615 (1967) (Activities Committee organized for recreational purposes held to be a labor organization because it was permitted to deal with plant superintendent on some grievances and fringe benefits).
33. 305 F.2d 807 (7th Cir. 1962).
34. *Id.* at 810.
36. 442 F.2d 82 (7th Cir.), cert. denied, 404 U.S. 939 (1971).
beyond the subjects concerning which employers and labor organizations normally deal."37 The employer argued that the committee was like a "suggestion box, made less impersonal," claiming it was "a means of bringing the monolithic corporation into relevant contact with its people."38 The 7th Circuit disagreed, stating: "We might well be persuaded that this . . . [committee] was not a labor organization in the ordinary sense of the term. The statutory definition, however, is very broad."39

In 1972, this same court dealt with similar facts but a new argument when a hospital contended that its "Hospital Employees Labor Program" had not met the requirements of the Labor-Management Reporting And Disclosure Act and therefore could not represent itself as a labor organization in filing a charge before the NLRB.40 This time the court held that the Act "only requires that the complaining employees participate in the charging association and that the latter exists for the purpose of dealing with employers."41

B. Case Law Regarding College and University Labor Organizations Under Section 2(5)

Very little has come before the NLRB in the way of cases on senates or committees as labor organizations.42 In the 1972 Fordham University case,43 a local chapter of the American Association of University Professors (AAUP) was found to be a labor organization. In the succeeding Manhattan College case,44 the Board decided that both a local chapter of the AAUP and a local chapter of the New York State Teachers Association were labor organizations. In 1975, the NLRB found that a faculty association at Yeshiva University was also a labor organization.45 But in each of these

---

37. Id. at 84.
38. Id. In an earlier Board case, an employee "suggestion committee" was found to be a labor organization because at committee meetings certain complaints regarding seniority policy came up and were discussed. Certain-Teed Prods. Corp., 147 N.L.R.B. 1517 (1964).
39. 442 F.2d at 84.
40. Von Solbrig Hospital v. NLRB, 465 F.2d 173 (7th Cir. 1972). Hospitals at this time had just come under the jurisdiction of the NLRB.
41. Id. at 174 (emphasis added). In an earlier case before the Court of Appeals for the District of Columbia the question was whether an individual could be a labor organization if he wishes to represent employees on the subject of wages, hours, and working conditions. The NLRB had certified the individual, Mr. Gray, after the results of an election. The Court overturned the Board's ruling, and found the employer guilty of a section 8(a)(3) violation. Schultz v. NLRB, 284 F.2d 254 (D.C. Cir. 1960).
42. Likewise, not many public universities and colleges have come before state boards on the same issue. But see Wakshull v. Helsby, 315 N.Y.S.2d 371 (1970) (Faculty Senate at SUNY found to be an employee (labor) organization under New York State Taylor Law).
44. 195 N.L.R.B. 65 (1972).
45. Yeshiva Univ., 221 N.L.R.B. 1053 (1975). The University unsuccessfully argued that the Association could not be a labor organization because three supervisors had participated in organizing it. For a well-known non-faculty university case, see Yale Univ., 184 N.L.R.B. 860 (1970), where the party sought to represent a group of employees although it had no written
cases the association in question had organized and existed for the avowed purpose of seeking representative status, wishing to be placed on the ballot in a certification election, which thereby rendered the decisions, from the Board's point of view, virtual foregone conclusions. The next step would logically be to recognize not only organizations with stated interests in formal collective bargaining on behalf of faculty members, but also to recognize committees interested in presenting to administrators recommendations with regard to wages, hours and terms and conditions of employment.

In spite of a trend toward inclusion of faculty groups under the section 2(5) definition, in one university case the NLRB found that a pre-existing faculty senate was not a labor organization. Because it stands alone, and because it appears to fly in the face of established law, *Northeastern University* will be reviewed in some detail.

First, all the other university cases involved employee groups which wished to be recognized as labor organizations. In *Northeastern University*, the administration/employer contended, perhaps surprisingly, that the faculty senate was a labor organization. It advanced this argument to support a contention that the faculty senate, as a labor organization, and the University had already entered into a collective bargaining agreement memorialized by the faculty handbook. This, it was said, constituted a contract bar to University recognition of any other group as a bargaining representative.

Second, Board consideration of whether the Senate qualified as a labor organization may be *obiter dicta*. As dissenting panel member Kennedy aptly stated: "Since I agree with my colleague that the faculty handbook does not constitute a contract bar, it is unnecessary for me to decide whether the Northeastern University Faculty Senate qualifies as a 'labor organization' within the meaning of Sec. 2(5) of the Act." 47

Third, the majority opinion appears contrary to the precedent set down by the Supreme Court in *Cabot Carbon*. 48 The panel decision sets forth the functions of the faculty senate by quoting from the senate's charter as follows:

1. To act as a co-ordinating body to establish mutually satisfactory academic goals and standards among the various Colleges and Divisions.

2. To be consulted either as a whole body or in appropriate committee on all policies, proposals, and problems of faculty

---

47. *Id.* at 256 n.20.
48. See text accompanying notes 26-30 *supra*. 
concern, including such matters as the creation of new colleges, new campuses, and new departments.

3. To initiate consideration and recommendation on any matter of faculty concern.

4. To undertake such legislative and advisory functions in connection with the work of the University as may be referred to it by the President and the Board of Trustees.

5. To provide communication between the Administration and University Faculty.\(^{49}\)

The panel then gave the following justification for holding the faculty senate to not be a "labor organization": "We find that the Faculty Senate functions as advisory committees and makes recommendations (which are totally different from bargaining demands that a union would make upon an employer during contract negotiations) to the president."\(^{50}\) However, in *Cabot Carbon* the Supreme Court stated:

> Whether those proposals and requests by the Committees, and respondents' consideration of and action upon them, do or do not constitute "the usual concept of collective bargaining" (256 F.2d at 285), we think that those activities establish that the Committees were "dealing with" respondents, with respect to those subjects, within the meaning of § 2(5).\(^{51}\)

Therefore, senate functions of "acting, consulting, initiating, undertaking, and providing communications" appear to be "dealing with" the university administration within the definition developed by the Supreme Court, the federal courts, and the NLRB. The validity of the *Northeastern* case must be questioned. The proper conclusion would seem to be that college and university senates are labor organizations within the meaning of the NLRA if they deal with any issue which may be considered wages, hours, or terms and conditions of employment.

**C. Senates as Labor Organizations**

If academic senates are found to be labor organizations, a section 8(a)(2) unfair labor practice problem arises because of their structure: administrations contribute to and support such organizations, and administrators may be members of them. Section 8(a)(2) of the NLRA reads as follows: "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial support to it. . . ."\(^{52}\)

In many of the industrial cases, employers were found to have committed section 8(a)(2) unfair labor practices—some because they dominated or interfered with employee committees, but others because they merely

---

49. 218 N.L.R.B. at 248 (emphasis added).
50. Id. (emphasis added).
51. 360 U.S. at 214 (emphasis added).
supported those committees. For example, in \textit{NLRB v. Drives, Inc.}, elected employee representatives from each department were compensated in the form of regular wages for time spent serving on the advisory board and paid an additional $50.00 per year for this service. A section 8(a)(2) charge was upheld by the court. The relationship between this kind of illegal support and the situation which exists with regard to senates cannot be overlooked. As Mortimer and Lozier note, the "second" feature of academic senates is that they are normally dependent on institutional support for operating funds. Senates do not receive voluntary contributions; they rely on college or university budgets for clerical and sometimes administrative support, for supplies, travel and meal allowances, space, postage and telephone costs; and individuals are compensated in one way or another for the usually very substantial amount of time they devote to the committees. Again to refer to Mortimer and Lozier, a great number of committees include administrators, particularly at smaller institutions of higher education, it is not hard to imagine cases of administrative dominance of the senate. Consequently, in the period between a union petition and an election, a college or university should consider whether to continue such assistance or support to a senate. The issue of the senate as a labor organization might well arise before the NLRB in an unfair labor practice charge case under section 8(a)(2) if the administration were to contribute assistance.

IV. EXCLUSIVE REPRESENTATION IN THE HIGHER EDUCATION CONTEXT

If senates are labor organizations under the NLRA, administrators of universities (with both senates and faculty/employee unions) must confront provisions of the NLRA which mandate that once a majority of the employees have chosen a representative for the purpose of collective bargaining with respect to wages, hours, and other conditions of employment, the

53. See, e.g., \textit{NLRB v. M. Lowenstein & Sons}, 121 F.2d 673 (2d Cir. 1941). In the domination or interference case, an employer is usually ordered to disband the committee; in the support case it is more likely that an order will issue that the employer cease and desist from supporting the committee.
54. 440 F.2d 354 (7th Cir. 1971).
55. This practice does not depart significantly from the university practice of awarding merit (or portions of merit) increases for service on university senates or committees.
56. See note 17 supra.
57. In a speech delivered to the 1974 AFT Conference, Mortimer points out that the Academic Senate at Pennsylvania State University has an annual budget of $73,000.00. K. Mortimer, \textit{Research Data on Tenure and Governance Under Collective Bargaining} at 13 (Nov. 16, 1974) (Penn. State University Center for the Study of Higher Education).
59. A union might want, for example, to keep a university administration from "dealing with" its senate just before an election on issues such as guidelines for merit increases.
employer must deal with that representative exclusively.\textsuperscript{61}

Section 9(a) of the NLRA reads as follows:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.\textsuperscript{62}

Section 8(a)(5) of the Act reads as follows: “It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.”\textsuperscript{63} These provisions, taken together, mean that the employer can deal only with the exclusive representative with regard to mandatory subjects, and therefore, the university administration violates section 8(a)(5) if it deals with the senate as to such issues when there is a union.

The 1944 Medo Photo Supply Corp.\textsuperscript{64} case involved a situation where employees informed the employer that they would leave the union which was their certified bargaining agent if the employer increased their wages. The employer granted the increase, and then refused to deal further with the certified union. In determining whether Medo Photo had violated sections 8(a)(2) and 8(a)(5) of the NLRA, the Supreme Court examined the meaning of “exclusive representatives.” The Court found that the employer’s duty to bargain collectively with the representatives chosen by his employees and certified by the NLRB, “exacts ‘the negative duty to treat with no other’”\textsuperscript{65} and that the company “was not relieved from its obligations [to bargain exclusively with the union] because the employees asked that they [these obligations] be disregarded.”\textsuperscript{66} Subsequent cases have followed the tenet that firms whose employees have elected an exclusive bargaining agent may not bargain over wages, hours, or working conditions, with employee committees\textsuperscript{67} or individual employees.\textsuperscript{68}

\textsuperscript{61.} Id. § 158(a)(5).
\textsuperscript{62.} Id. § 159(a).
\textsuperscript{63.} Id. § 158(a)(5).
\textsuperscript{64.} 321 U.S. 678 (1944).
\textsuperscript{65.} Id. at 684, quoting from NLRB v. Jones & Laughlin Corp., 301 U.S. 1, 44 (1937).
\textsuperscript{66.} Id. at 687. See also National Licorice Co. v. NLRB, 309 U.S. 350 (1940).
\textsuperscript{67.} E.g., NLRB v. Goodyear Aerospace Corp., 497 F.2d 747 (6th Cir. 1974), where Goodyear “went beyond the free expression of views, argument or opinion guaranteed by § 8(c) of the NLRA” in calling for a “partnership solution” to company problems.
\textsuperscript{68.} E.g., Carpenters Union v. American Superior, 86 L.R.R.M. 2682 (W.D.Ark. 1974).
Substantial attention is paid to the importance of the term "exclusive representatives" in the famous General Electric case.69 General Electric's efforts to deal with the local rather than the national union were analyzed by the Trial Examiner to represent "an attempt by the employer to bypass the union by dealing directly with a segment of the group represented by the union tantamount to dealing directly with employees. As such, it was in clear derogation of the union's status and authority" as exclusive bargaining agent.70 The Board agreed and commented further that "[o]n the part of the employer, it requires at a minimum recognition that the statutory representative is the one with whom it must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees."71 Finally, the Board adopted the Trial Examiner's proposition that "the employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees."72 The Court of Appeals for the Second Circuit affirmed the Board's arguments in a lengthy decision, noting that the doctrine of exclusivity applies even in cases where offers tendered directly to employees are no better than those being discussed with the bargaining agent.73

In Crane and Breed Casket Co.,74 the employer refused to recognize the mine workers union as the representative of Crane and Breed employees on the grounds that a collective bargaining contract between Crane and Breed and the casket makers was a bar to both such recognition and an election. The mine workers argued that the casket makers union was defunct, and the agreement between the casket makers and the casket company was therefore no bar to an election. The Board found the casket makers union not to be defunct and ruled that the collective bargaining agreement was a bar. Under that bargaining agreement, casket makers was the exclusive representative; Crane and Breed was not legally permitted to deal with any other labor organization on any issue pertaining to wages, hours, or working conditions.

The significance, then, of the definition of "exclusive representatives" lies in the concept of what employers (specifically college and university administrators) may not do. Employers run the risk of a section 8(a)(5) unfair labor practice charge if they deal with either individual groups of employees or other labor organizations on mandatory subjects of bargaining. College and university senates, as groups of employees, would certainly be among those types of labor organizations with which they could not so bargain.

70. 150 N.L.R.B. at 263.
71. Id. at 194.
72. Id. at 195.
Section 8(a)(5) can also be raised in the context of breach of fair and equal representation of employees within the bargaining unit. Mortimer and Lozier point out in their "fourth" attribute of senates,\(^{75}\) that most senates include representatives of groups other than faculty who may not be in the certified bargaining unit, and, conversely, the scope of college and university bargaining units has been enlarged to include many employees who may not be represented in the senate.\(^{76}\) Consider a situation in which a faculty senate committee obtains some benefit for the faculty—for instance, released time for "professional improvement." In light of \textit{Vaca v. Sipes}\(^{77}\) and subsequent fair representation cases,\(^{78}\) librarians or counselors, as professional members of the bargaining unit unrepresented in the senate, might bring unfair labor practice charges against the university and union on the theory that they were not being fairly represented in the collective bargaining process.\(^{79}\) College and university administrators, as well as unions, should thus be aware of the potential legal and political ramifications of equal representation problems in institutions where the bargaining unit is not composed of exactly the same constituency as the senate.

\section*{V. \hspace{1em} FORMS OF GOVERNANCE AS MANDATORY SUBJECTS OF BARGAINING}

University administrations may desire to disband senates to avoid potential unfair labor practices. However, if academic senates, themselves, are mandatory subjects of bargaining under the NLRA, the university cannot unilaterally dissolve them without first bargaining to impasse with the union. Section 8(d) of the Act reads as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and condi-

\footnotesize{\textit{\textsuperscript{75}} Mortimer & Lozier, \textit{supra} note 17.  
\textit{\textsuperscript{76}} \textit{E.g.}, Northeastern Univ., 218 N.L.R.B. 247 (1975) (research associates and counselors in teaching and research counseling, and in the testing center); Manhattan College, 195 N.L.R.B. 65 (1972) (librarians and non-teaching athletic coaches).  
\textit{\textsuperscript{77}} 386 U.S. 171 (1967).  
\textit{\textsuperscript{78}} \textit{E.g.}, Retana \textit{v. Apartment, Motel, Hotel and Elevator Operators}, 453 F.2d 1018 (9th Cir. 1972); Brock \textit{v. Bunton}, 385 F. Supp. 127 (E.D.Mo. 1974).  
\textit{\textsuperscript{79}} Such an argument might run along these lines: allowing the faculty—only a portion of the collective bargaining unit—to have two forums (the Senate and the union) in which they are able to negotiate for and obtain benefits from the college, while the other members of the unit have only one forum (the union), is inherently unfair to non-faculty members of the unit. The acquiescence of the college administration and the union in this inherently unfair state of affairs is arguably a violation of the duty of fair representation. \textit{Cf. Steele \textit{v. Louisville & N. R.R.}}, 323 U.S. 192 (1944) (union must fairly represent all members of the collective bargaining unit, even those who were not members of the union; failure to do so and the Railroad's acquiescence in this are violations of the Railway Labor Act).}
tions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

Section 8(d), taken together with sections 8(a)(5) and 9(a), constitute the statutory guarantee of collective bargaining over issues vitally important to the employees' terms and conditions of employment.

Mandatory topics in college and university collective bargaining have traditionally included wages, hours, and other benefits such as merit increases, layoffs, insurance, and retirement plans. Permissive topics have included such subjects as working conditions and faculty participation in the selection of administrators, in plans for building utilization, and in long-range physical plant planning, which do not have vital impact on "other terms and conditions of employment." The line between mandatory and permissive subjects is difficult to draw. Ralph Brown suggests:

Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size; class size to the range of offerings; and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policy. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.

The NLRB and the courts, however, have not heard many cases which clarify the line between mandatory and permissive subjects in higher education. Part of the reason is that academic collective bargaining is a new phenomenon; another part may be the tendency of college and university administrators to bargain over a very wide range of issues without regard to

---

84. E.g., NLRB v. Batchelder, 120 F.2d 574 (7th Cir. 1941) (implying non-reappointment).
85. E.g., W.W. Cross & Co., 174 F. 2d 875 (1st Cir. 1949) enforcing 77 N.L.R.B. 1162.
86. E.g., Inland Steel Co. v. NLRB, 174 F.2d 247 (7th Cir. 1948), enforcing 77 N.L.R.B. 1, cert. denied, 336 U.S. 960 (1949).
87. Cf. NLRB v. Ford Radio and Mica Corp., 258 F.2d 457 (2d Cir. 1958) (conditions of foreman's employment a prerogative of management). See also text accompanying note 124, infra.

Whoever heard of the union in industry helping to choose the corporation, or the president, the plant superintendent, or the shop foreman? Do unions in industry decide what should be bought, or what processes should be used? The traditional structure of the University is that faculty members have a role . . . that reaches far beyond even the wildest dreams of the most radical unions.
whether they might be mandatory or permissive. Indeed, the practice of most four-year institutions negotiating with the AAUP has been to agree to wholesale incorporation of senates and most of their functions into the contract.\textsuperscript{9} Academic senates may not be construed as mandatory subjects if they can be unilaterally disbanded by the university administration.

The NLRB upheld an employer’s unilateral disbandment of an employee organization in \textit{Jefferson Chemical}.\textsuperscript{91} In that case, the newly certified union wished to bargain over the continuance of an “Operations Improvement Committee,” and charged that the employer had committed a section 8(a)(5) unfair labor practice by unilaterally abolishing the committee. The “Operations Improvement Committee” consisted of six employees who served on a rotating basis, along with two representatives of management. It dealt with plant safety and other conditions of employment. The Board adopted the reasoning of the Administrative Law Judge with regard to the Committee:

Viewed in this light,\textsuperscript{92} the record in this case does not preclude a finding that Respondent has refused to bargain in violation of the Act simply because there is no evidence it acted in bad faith when it made the unilateral changes at issue. The mere fact, as already found, that the changes were made without any opportunity for bargaining “may be sufficient standing alone, to support a finding of refusal to bargain.” “May be” becomes “is” if the changes cannot “be justified by any reason of substance.” In my opinion, Respondent has advanced a reason of substance . . . as to its abolition of the Operations Improvement Committee. \textit{If it had continued to deal with the employee members of that committee as the representatives of all the employees in the unit for which the Charging Party had been certified, it would, in fact, have violated the duty imposed on it by the Act to deal exclusively with the Charging Party.}\textsuperscript{93}

The employer in \textit{Jefferson Chemical} tried to avoid committing a sections 8(a)(2) and 8(a)(5) unfair labor practice. However, the effect of his actions was to prevent his employees from obtaining “two bites at the apple” by negotiating benefits not received in the contract through the Operations Improvement Committee. The two forms of employee representation in \textit{Jefferson Chemical} are analogous to the dual employee representation which occurs in faculty collective bargaining. Bernard Jay Williams, of the University of Maryland, describes two situations which eventually result when the union and academic senate exist side by side:

\begin{itemize}
  \item \textsuperscript{90} See Appendix, \textit{infra}, for examples.
  \item \textsuperscript{91} Jefferson Chem. Co., 200 N.L.R.B. 996 (1972).
  \item \textsuperscript{92} The Administrative Law Judge is referring here to his preceding discussion of NLRB v. Katz, 369 U.S. 736 (1962), and NLRB v. Cone Mills Corp., 373 F.2d 595 (4th Cir. 1967), the implications of which are that unilateral action may be per se evidence of refusal to bargain.
  \item \textsuperscript{93} Jefferson Chem. Co., 200 N.L.R.B. at 1001 (emphasis added).
\end{itemize}
In the first, both the union and the senate are comprised of essentially the same membership. For example, let us say that the union won by a landslide election. This single cohesive group calls itself a "union" at the union meeting and a "senate" at the senate meeting. . . . What is not won at the bargaining table will surely show up on the floor of the senate notwithstanding any prior gentleman’s understanding between management and the union-senate concerning separate spheres of jurisdiction over the subject matter. . . . Management will not enjoy the year or two of "industrial peace" for the term of the contract, which industry often views as one of the few fruits on the collective bargaining tree. Management here becomes the little white ball in a continuous union-senate game of ping pong.

2. The opposite situation arises where there is a clear split of opinion over the appropriateness of collective bargaining among the professoriate. The union wins recognition by a small margin, and, as a temporary political gesture during the campaign, claims that its primary goal is the continuance of a strong and active faculty senate. The old guard that believes in the virtues of a senate sees the election as a contest between union and senate, and thus constitutes the minority vote. . . . Under this scheme, both organizations are themselves essentially in a power conflict. . . . The necessity for survival requires that both organizations be creative in their demands.94

There are, then, a number of ways in which the question of the legal status of forms of governance as mandatory topics of bargaining can come before the Board. The issue may arise as a result of the college administration’s refusal to bargain over governance, or as a result of union insistence to impasse on matters of governance. It might also arise when a union charges that a college or university administration has bypassed the union to deal directly with the senate or committee. Alternatively, the administration may decide to resolve the problem of conflicting bargaining units by unilaterally dissolving its senate, thereby rendering it just that more difficult for a union to argue that the non-existent senate should be wholly incorporated into the contract, or recreated in a different form. On the basis of its own precedent, the Board would be hard pressed to find such dissolution to be unlawful.

Can an exclusive bargaining representative insist to impasse on the composition of a committee to handle some subject of governance? Although the NLRB and the federal courts have not dealt directly with this problem, several state courts and boards have decided this issue.

In the Rutgers case,95 the AAUP insisted on the following two provisions: (1) that "The administration and AAUP shall appoint a committee to

---

94. Williams, Faculty Bargaining: Exclusive Representation and the Faculty Senate, J. COLLEGE & UNIV. PERSONNEL ASS’N 54 (September 1973).

provide for faculty representation on the Promotion Review Committee equal to administrative representation"; and (2) that "The AAUP shall appoint one member to any standing or ad hoc committee appointed by any administrator and which has a bargaining unit member among its members." With regard to the latter, the New Jersey Public Employment Relations Commission noted, "It is assumed, although unspecified in the demand, that the functions of these committees are managerial. . . ." The Board held that although the University must bargain over the impact of decisions made by any committees on the terms and conditions of employment of any bargaining unit member, neither AAUP demand for negotiation over the composition of committees was a mandatory subject. In fact, ". . . the present collegial system of peer evaluation regarding tenure and promotions within the unit also is beyond the required scope of negotiations." Further, "if there were AAUP representatives on such a committee, it would have the anomalous effect of putting the AAUP to at least a certain extent on both sides of the negotiations table: as a management representative on the one hand, and as the exclusive representative of unit members on the other." Analogously, in Ohio Creek Education Association v. WERC, the Wisconsin Circuit Court held that a teachers association's demands for the establishment of a minimum number of curriculum committees and a steering committee, and for negotiation over the composition of the committees, did not constitute mandatory topics of bargaining.

A similar reluctance to extend the scope of mandatory bargaining appears in a number of United States Supreme Court decisions. In Fibreboard Paper Products v. NLRB, the Court indicated that while industrial bargaining practices are not determinative, it is appropriate to examine such practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. The court further found that the terms "wages, hours and conditions of employment" are meant to be words of limitation. In Pittsburgh Plate Glass, the Court extended this Fibreboard reasoning:

96. Id. at 12.
97. Id. at 14.
98. Id.
99. Id. at 14-15.
100. 91 L.R.R.M. 2821 (Wisc. Cir. Ct. 1975) The Wisconsin public employment collective bargaining statute under which the case was decided provides: "The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees." Wis. Stat. § 111.70(1)(d) (1975). See text accompanying notes 119-28 infra.
102. Id. at 211.
103. Id. at 210. See also id. at 217-20 (Stewart, J., concurring).
Even if industry commonly regards [retirees’ benefits] as a statutory subject of bargaining, that would at most, as we suggested in \textit{Fibreboard Corp. v. NLRB}, reflect the interests of employers and employees in the subject matter as well as its amenability to the collective bargaining process; it would not be determinative. Common practice cannot change the law. \footnote{Id. at 176 (citations omitted). The Justices also noted, “[B]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining,” thereby firmly dispensing with any notions of the weight of traditional practices. \textit{Id.} at 187.}

Taken together, these two decisions caution against deciding issues of mandatory bargaining subjects on the basis of a special set of facts in such a way as to cause a negative impact in the larger context of collective bargaining. As Professor Summers points out, a contrary decision to mandate the negotiation of composition of committees to deal with “‘wages, hours, and other terms and conditions of employment’” would have serious implications for all of the industrial establishment. \footnote{\textit{SUMMERS, supra} note 89.}

In \textit{Connecticut Light and Power Co. v. NLRB}, \footnote{476 F.2d 1079 (2nd Cir. 1973).} the Court of Appeals for the Second Circuit held that although insurance benefits were an established mandatory topic of bargaining, the identity of the insurance carrier was not a mandatory topic. The court clearly separated the subject matter of the issue from the vehicle by which it is implemented, in much the same way as the New Jersey Board in \textit{Rutgers} separated the issue of the composition of the Promotion Review Committee from the mandatory subject of promotion and tenure. As the Court of Appeals for the Fourth Circuit indicated in \textit{NLRB v. Davidson}, \footnote{318 F.2d 550 (4th Cir. 1963).} it is the particular proposal and not merely the problem to which it is addressed that must concern “‘wages, hours, and other terms and conditions of employment’” in order that the proposal be a mandatory subject of bargaining. \footnote{\textit{Id.} at 557.} It is stretching the issue to maintain that the composition of governance committees, as opposed to the subject matter treated through the mechanisms of governance, “vital
duly affects the ‘terms and conditions’ of [faculty’s] employment.”\footnote{This was the standard applied in \textit{Connecticut Power & Light Co. v. NLRB}, 476 F.2d 1079, 1083, (2d Cir. 1973) quoting from \textit{Pittsburgh Plate Glass} (emphasis in original). In \textit{Westinghouse Elec. Corp. v. NLRB}, 387 F.2d 542, 548 (4th Cir. 1967), the court said: In the instant case we arrive at the conclusion, one which we believe is not inconsistent with past pronouncements of this Court, that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment. The case before us [on bargaining over increased food prices in vending machines] does not even remotely involve any question of job security or any other issue which employees could traditionally consider “vital.”}

\footnote{105. Id. at 176 (citations omitted). The Justices also noted, “[B]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining,” thereby firmly dispensing with any notions of the weight of traditional practices. Id. at 187.}

\footnote{106. \textit{SUMMERS, supra} note 89.}

\footnote{107. 476 F.2d 1079 (2nd Cir. 1973).}

\footnote{108. 318 F.2d 550 (4th Cir. 1963).}

\footnote{109. Id. at 557.}

\footnote{110. This was the standard applied in \textit{Connecticut Power & Light Co. v. NLRB}, 476 F.2d 1079, 1083, (2d Cir. 1973) quoting from \textit{Pittsburgh Plate Glass} (emphasis in original). In \textit{Westinghouse Elec. Corp. v. NLRB}, 387 F.2d 542, 548 (4th Cir. 1967), the court said: In the instant case we arrive at the conclusion, one which we believe is not inconsistent with past pronouncements of this Court, that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment. The case before us [on bargaining over increased food prices in vending machines] does not even remotely involve any question of job security or any other issue which employees could traditionally consider “vital.”}
UNIVERSITY GOVERNANCE

The Board appears to agree. In St. John's University,¹¹¹ where the union filed a section 8(a)(5) unfair labor practice charge because University administration refused to bargain over a proposal on selection procedures for various administrators, and over faculty representation on the University’s Board of Trustees, the Regional Director ruled that the University was not obligated to bargain over those issues. The proposal was viewed as one in which the union expected to participate in the selection of individuals who, once appointed, became part of the form of institutional governance, or alternatively, as a proposal to participate in certain managerial functions with clearly resultant conflicts of interest.

The Fortieth Annual Report of the NLRB: Fiscal Year 1975 contains a lengthy treatment of a university case involving faculty participation in selection of administrators, under the heading "'Collegiality' as a Nonmandatory Subject of Bargaining."¹¹² In the report, the General Counsel states:

Our conclusion that the Union’s proposals did not constitute mandatory subjects of bargaining was based on several considerations. The proposals basically concerned managerial rights and not terms and conditions of employment within the meaning of Section 8(d). They related to the selection of supervisory and administrative personnel. . . . Furthermore, the proposals concerned the selection of management personnel who acted as representatives of the Employer for purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B). . . . As it is basic to the collective bargaining process contemplated by the Act that each party act through a bargaining representative of its own choice and as that policy is clearly reflected in Section 8(b)(1)(B) of the Act, the selection of the bargaining representative was not considered subject to the bargaining process itself.¹¹³

This reasoning by the Board raises an interesting point about the importance under the NLRA of the roles played by organizations such as academic senates. In 1974, the Supreme Court held in NLRB v. Bell Aerospace Co.¹¹⁴ that all managerial employees are excluded from coverage under the Act. Therein it referred to an earlier Board decision where the Board defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the deci-

¹¹¹ St. John's Univ., an unreported case cited in 10 CHRONICLE OF HIGHER EDUC. 1 (No. 4, Mar. 17, 1975).
¹¹² LABOR RELATIONS YEARBOOK, FEDERAL GOVERNMENT IN LABOR RELATIONS 273 (BNA 1975).
¹¹³ Id. at 274-75 (emphasis added).
sions of their employer. . . .” The Court in *Bell Aerospace* concluded that the Board had moved recently to a much more restrictive policy on managerial exclusion than had been approved by the courts. Although neither the Board nor the courts have dealt with the issue directly, *Bell Aerospace* suggests that regardless of the distinction between mandatory and permissive subjects, since senators and committee members perform managerial functions when they deal with the substance of governance, they should be excluded from the bargaining unit as managers. Further, the idea that the nature of the governance function is sufficient to place it outside the collective bargaining unit altogether, lends credence to the supposition that these forms of governance should not be mandatory topics of bargaining.

Since the *St. John’s University* case, the Board has not dealt directly with the question of forms of governance as a mandatory bargaining subject. However, in March of 1977 the General Counsel’s Office issued its opinion in *Endicott College*, in which the issue, arising as a result of cross-filed sections 8(a)(5) and 8(b)(3) refusal to bargain charges, was a “disputed provision of an expiring collective bargaining contract involving ‘governance’ of the college.” The General Counsel held as follows:

The prior contract [between the College and the NEA] contained, *inter alia*, a section called Appendix A, which the Union was seeking to retain in the new agreement.

Appendix A, entitled “Governance”, describes in a general outline format the procedures and purposes of Faculty Meetings, the Academic Policy Committee and the Curriculum Committee. Topics covered include the selection and duties of committee officers, the composition of the committees, a provision for the establishment of new committees, and preparation of agendas for faculty meetings.

. . . No attempt, however, was made by the Union, when faced with the Employer’s rejection of its proposed Appendix A, to submit

---

115. *Id.* at 286, quoting from Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947).

A further definition is provided in footnote 16 of *Bell Aerospace* (Id. at 288), quoting from Mr. Chief Justice, (then Circuit Judge) Burger’s opinion in Retail Clerks International Ass’n v. NLRB, 366 F.2d 642, 645 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967): “The Board also excludes from the protection of the Act as managerial employees, ‘those who formulate, determine and effectuate an employer’s policies.’” No case has yet tested whether the *Bell Aerospace* definition of managerial employees is disjunctive.

116. In two representation proceedings, the Board has refused to pass upon “lurking issues” relative to “the validity and continued viability” of certain faculty groups under the Act. The faculty groups in those cases were described as “elected groups” to which the academic institutions had delegated a combination of functions, some of which are, in the typical industrial situation, normally more clearly separated as managerial on the one hand and as representative of employee interests on the other. Irving, *Report on Case-Handling Developments at NLRB*, 91 Lab. Rel. Rep. [BNA] 6, 13 (1976) (citations omitted).

a modified proposal or to attempt to separate out for discussion those parts of Appendix A which, . . . were mandatory subjects of collective bargaining, from those which were non-mandatory, or permissive subjects. . . .

. . . Although both parties may, at the consent of the other, delegate bargaining authority to the governance committee, neither party can insist to the point of impasse that such delegation occur. Therefore, the subject of delegation to a group, such as a faculty senate or committee structure, of the power to negotiate concerning wages, hours, or other conditions of employment within the ambit of Section 8(d) of the Act would appear to be inherently permissive in nature. . . .

It would also appear that, at any time, either party may unilaterally rescind a prior delegation of bargaining authority and insist that the other party bargain exclusively with it concerning mandatory subjects of collective bargaining.

. . . To the extent that the proposal thus deals with the work responsibilities of unit employees, it is encompassed in Section 8(d)’s "terms and conditions of employment."¹¹⁸

To paraphrase the opinion of the General Counsel: governance per se is unequivocally not a mandatory subject for bargaining under section 8(a)(5). If an existing governance body exercises functions touching upon subjects of wages, hours, or terms and conditions of employment, a union may insist that the employer deal exclusively with it rather than the senate concerning such subjects. Conversely, the employer may unilaterally abrogate the responsibility of committees or a senate to deal with such subjects on behalf of administration and deal with the union exclusively.

However, under the General Counsel’s opinion, if the employer were to insist that faculty serve on such a governance body, or if he were to make such service a condition precedent to tenure or any other form of professional advancement, then the very existence of the governance body would itself become a mandatory subject of bargaining under section 8(d). This is clear because the employer would effectively be making such service a “working condition” within the meaning of the Act.

Some state courts have narrowly construed teachers’ statutorily created bargaining rights. In Oak Creek Education Association,¹¹⁹ the Wisconsin court found that class size, contact hours, and numbers of preparations were not mandatory subjects. In Aberdeen Education Association v. Aberdeen Board of Education,¹²⁰ the Supreme Court of South Dakota decided that

¹¹⁸. Id. Footnotes omitted.
¹²⁰. 215 N.W.2d 837 (S.D. 1974). The statute in question gave the collective bargaining representative the right to bargain over "rates of pay, wages, hours of employment, or other conditions of employment." S.D. COMPIL. LAWS ANN. § 3-18-3 (1974). A concurring opinion distinguished South Dakota’s public employment statute from that at issue in West Hartford
class size, a schoolwide guidance and counseling program, mandatory retirement of administrators, elementary planning period, and budget allowances were not mandatorily negotiable. The Connecticut Supreme Court, in *West Hartford Education Association v. DeCouray*, declared that length of the school day, the school calendar, and guidelines for extracurricular activities of teachers were management (board of education) prerogatives, but that class size and teacher work loads were mandatory topics.

At least one court, however, has broadly construed the scope of teachers' statutory collective bargaining rights. The Nevada Supreme Court found that classroom preparation time, professional improvement, student discipline, school calendar, instructional supplies, and teacher performance and teacher load, as well as class size, were all mandatory subjects of bargaining.

There have also been university cases decided by state labor boards. In *Rutgers University*, the New Jersey Public Employment Relations Commission ruled on a large number of issues contested between Rutgers and the AAUP. Although the Commission found that a few of the issues raised by the employees' collective bargaining representative were mandatory bargaining subjects, such as procedures to be followed in selecting department advisors, for example, *Rutgers University*, *New Jersey P.E.R.C. No. 76-13 (Jan. 23, 1976)*. The public employee bargaining statute under which the determination was made was the New Jersey Labor Mediation Act, *N.J. STAT. ANN. § 34:13A-5.3 (West Supp. 1976)* which requires public employers to negotiate with the bargaining representative of public employees over "[p]roposed new rules or modifications of existing rules governing working conditions" and to "negotiate in good faith with respect to grievances and terms and conditions of employment." *New Jersey P.E.R.C. No. 76-13 at n.6.*
chairmen and the academic calendar as it affects the terms and conditions of employment, by and large the decision narrowly construed the university's duty to bargain. Union demands to "have a role with respect to those items of the University budget that have an impact on terms and conditions of employment," 125 to be consulted on "proposals for expansion, reduction or reallocation of any of the University's physical facilities," 126 bargain over any studies of productivity, negotiate over the academic calendar, set a minimum on numbers of faculty positions filled, involve faculty in the selection of administrators, negotiate class size, summer school salaries and benefits, submit affirmative action plans for prior AAUP approval, and negotiate over tenure quotas, were found to be permissive rather than mandatory subjects of bargaining. 127

In sum, there is no real consistency in the way states have treated these issues, and answers as to what the NLRB and the federal courts will do with them may take many years to evolve. Until questions of the legal status of senates in relation to the principle of exclusive representation, and of forms of governance as mandatory subjects are fully resolved, college and university administrators will run the risk of violating sections 8(a)(5) and 8(a)(2) if they continue to test unions by dealing with senates and committees over such matters. 128

VI.
CONCLUSION

Senates and other faculty committees as they now function can be considered labor organizations under the NLRA. Thus, it is illegal to deal with them on issues of wages, hours, and terms and conditions of employment when faculty members are represented by an exclusive bargaining representative. Further, as a consequence of their legal standing, it is consistent with the intention of the Act for administrations to disband their senates and committees entirely in order to avoid committing unfair labor practices. There is also evidence that college and university administrations

125. Id. at 8.
126. Id. at 15.
127. See also Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975), in which the court tried to reconcile sections of the Pennsylvania Public Employee Relations Act, PA. STAT. ANN. tit. 43, §§ 1101.701-.703 (Purdon Supp. 1976), giving public employees the right to bargain over "wages, hours and other terms and conditions of employment" subject to public employers' right not "to bargain over matters of inherent managerial power." The court stated that managerial discretion not to bargain was limited to issues over which the public employer was statutorily prohibited from bargaining away any power. Because the contested issues were phrased ambiguously and because the court wanted the Pennsylvania Labor Relations Board to decide the case in light of this interpretation of the statute, the case was remanded.
128. Note that even though a mandatory topic is not discussed in negotiations or contract, it still may not be dealt with except through the certified bargaining agent. See Southland Paper Mills, Inc., 161 N. L. R. B. 1077 (1966).
illegally "contribute financial and other support" to senates and committees, and frequently even "dominate or interfere" with them. Before the Board and the courts finally decide the question of academic governance as a mandatory topic of bargaining, it would be appropriate and illuminating to consider the analogy in industry: "Suppose that a company were to insist to impasse with a certified union that a pre-existing company-dominated employee committee (which met, as senates do, the definition of a labor organization) be incorporated into the contract. . . . Would this be an 8(a)(5) violation?"129

There should be no difference between that situation and one in which the AAUP insists on institutionalizing an academic senate through the collective bargaining agreement. Both constitute illegal bargaining under the Act. Moreover, the answer under the law to the primary question herein—whether forms of governance are mandatory subjects of bargaining—must be, that they are not.

APPENDIX

Examples of Governance Clauses in Contracts Negotiated in Four-Year Institutions of Higher Education by the AAUP.

I. St. John's University: Contract Negotiated for the Term 1974-77.

Section 2.5 reads as follows:

The presently constituted organizations within the University (e.g., the University Senate, Faculty Councils, Departmental Personnel and Budget Committees, etc.) or any other or similar body composed in whole or in part of the faculty, shall continue to function at the University, provided that the actions thereof may not directly or indirectly repeal, rescind or otherwise modify the terms and conditions of this Agreement. (at p.3)

II. University of Delaware: Agreement entered into the 5th day of September, 1975.

Memorandum of Understanding in Relation to Article XV reads as follows:

Under Article XV the parties understand that the Board of Trustees, the University of Administration (sic), and the University Faculty Senate upon approval by the Administration and the Board, have undiminished power and authority to establish, change or eliminate policies.

The parties also understand that the privileges of the Faculty provided in the Trustee Bylaws to advise upon proposed policy and to recommend policy also remain undiminished by this contract.

Since in the past, proposals by the Administration to establish, change or eliminate policies have been presented for review and comment by faculty committees, the college senate(s), and the University Faculty Senate, the parties agree that those procedures shall be followed in the future. (at 24)