Comment

State Court Interpretation of Teacher Collective Bargaining Statutes: Four Approaches to the Scope of Bargaining Issue

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In recent years there has been a marked increase in the number of states adopting collective bargaining statutes that cover public school teachers. The judicial interpretation of these statutes has focused on the meaning of their various "scope of bargaining" provisions. A court's decision as to whether a specific subject is bargainable is determined by the court's underlying assumptions about the nature of the collective bargaining process and how the court characterizes the relationship of the negotiating parties. The author examines four approaches which the courts seem to have adopted and discusses the implicit assumptions of each, the implications, and the relative strengths and weaknesses. She concludes that the best conceptual approach is the one that allows for the inclusion in the negotiation process of differing perspectives on the nature of education as well as on the nature of the political process.

INTRODUCTION

With the adoption of the Rodda Act¹ on September 22, 1975, California joined the growing list of states that have adopted collective bargaining laws covering public school teachers. It is not surprising that a major item of controversy in the judicial interpretation of these statutes has been the meaning of their various "scope of bargaining" provisions.² There are two


¹ The Rodda Act, CAL. GOV'T CODE §§ 3540-3549.3 (West Supp. 1977), became fully effective July 1, 1976. Its predecessor, the Winton Act (1965 Cal. Stats. ch. 2041, § 1, as amended 1970, 1971, 1972; repealed by the Rodda Act, 1975 Cal. Stats. ch. 961, § 2) was a "meet and confer" statute (see note 3 infra), as are the other California statutes covering local and state public employees, the Meyers-Milias-Brown Act, CAL. GOV'T CODE §§ 3500-3510 (West 1977), and the Brown Act, CAL. GOV'T CODE §§ 3525-3536 (West 1977).

² The debate over public sector collective bargaining has followed the trends observed and described by R. WOODWORTH & R. PETERSON, COLLECTIVE NEGOTIATIONS FOR PUBLIC AND PROFESSIONAL EMPLOYEES 14-15 (1969) [hereinafter cited as WOODWORTH & PETERSON]. Now
basic issues of interpretation: (1) What subjects are included within the scope of the mandatory duty to bargain? and (2) Are subjects outside the mandatory duty to bargain permissive or prohibited?

It is the position of this presentation that state court resolution of these issues has thus far proceeded from one of four basic conceptual models, derived from assumptions about the nature of the negotiating process and the functions of the negotiating parties in the context of teacher collective bargaining. This presentation will examine the analytical implications of the four models, and theoretical or practical objections which might be or have been raised to each. Attention will then be given to additional educational policy considerations which may be of assistance in determining which approach is best adapted to collective bargaining in the particular context of public education.

Teacher collective bargaining statutes are a fairly recent development. In 1966 only three states provided collective bargaining rights for public school employees; ten years later twenty-four states and the District of Columbia had adopted full-fledged collective bargaining statutes. These

that approximately half of the states have adopted collective bargaining statutes for teachers, the debate has moved from the “organizing” stage, where the major issue is recognition of collective bargaining rights, to the “contract development” stage, where the major issue is the scope of the contract. As these patterns have developed in private industry, according to Woodworth and Peterson, there may yet be a third stage analogous to “contract administration,” where the focus is upon “making the structure work.”

3. The states providing collective bargaining for teachers prior to 1965 were:
Jurisdictions adopting teacher collective bargaining laws since 1965 are:
statutes provide for bilateral decisionmaking by school boards and employees through good faith negotiations leading to mutually binding agreements for a specific term.

These new statutes are unlike "meet and confer" public labor relations statutes in that they explicitly provide for the adoption of binding contracts enforceable by grievance arbitration or through the courts. They also establish impartial administrative boards to supervise the negotiating process through unfair labor practice proceedings and to assist in conducting representation elections and in resolving impasses.  

"Meet and confer" statutes may to some extent be binding upon boards of education (see, e.g., San Francisco v. Cooper, 13 Cal. 3d 898, 535 P.2d 403, 120 Cal. Rptr. 707 (1975), the primary purpose of such statutes is "communication." See Note, Collective Bargaining and the California Public Teacher, 21 Stan. L. Rev. 340, 364 (1969). As long as teachers are given an opportunity to state their views and concerns, the
The major respect in which the rights of public employees under these statutes differ from those of their private employee counterparts under the National Labor Relations Act is in the method of dispute resolution: thirteen of these statutes contain absolute no-strike provisions, while only eight provide even limited protection for this type of "concerted activity." On


Teachers have been described as occupying a "middle ground" among public employees.

On the one hand, the public teacher provides an essential service to the community for which the private marketplace offers no adequate substitute. On the other hand, this area of public employment may be one in which work stoppage would not cause direct and immediate harm to the public's welfare.

Note, Collective Bargaining and the California Public Teacher, 21 STAN. L. REV. 340 (1969). Jurisdictions in which the collective bargaining law covering teachers contains an absolute no-strike provision are:

Indiana: IND. CODE ANN. § 20-7.5-1-14 (Burns 1975).
Maryland: MD. ANN. CODE art. 77, § 160A(m) (1957).
Wisconsin: WIS. STAT. ANN. § 111.89 (West 1974).

States providing at least a limited right to strike for teachers, perhaps depending on court interpretation, are:

Hawaii: HAW. REV. STAT. § 89-12 (Supp. 1975) (if no arbitration and HERB certifies no danger to public).
Minnesota: MINN. STAT. § 179.64(7) (Supp. 1977) (if non-essential service and employer refuses arbitration).
Montana: MONT. REV. CODES ANN. § 59-1603 (Supp. 1975) (protection for "concerted activities").
Vermont: VT. STAT. ANN. tit. 16, § 2010 (Supp. 1977) (unless clear and present danger to sound educational program).
the other hand, major legislative attention has been given to alternative methods of impasse resolution, including mediation, fact-finding, and various forms of interest arbitration.6

In the context of judicial interpretation of the scope of bargaining provisions of the National Labor Relations Act the terms "mandatory", "permissive" and "prohibited" have developed specialized meanings which have implications for interpretation of public sector collective bargaining statutes. "Mandatory" subjects are those about which employers (and employees) are obliged to negotiate in good faith.7 Refusal to discuss

6. "Impasse" refers to the inability of the parties to agree on a contract or contractual provision. "Mediation" is used in its general private sector sense, i.e., the use of a neutral "go-between" to facilitate resolution of differences between the parties by enhancing communication. "Fact-finding" is a term widely used in public-sector labor relations to describe the function analogous to advisory arbitration in the private sector. Hearings are conducted and findings or recommendations are made as to the manner in which the dispute should be resolved, but neither party is bound by such conclusions. "Interest arbitration" refers to the binding resolution of impasse disputes by some party other than the employer and employees. It is to be distinguished from "grievance arbitration," which also involves resolution by a third party but only as to the interpretation or application of the terms of an existing contract. "Voluntary interest arbitration" refers to explicit statutory authorization for the parties to submit their impasse to binding arbitration. Either side can refuse to be a party to such arbitration initially, but once having agreed to participate must abide by the results. "Mandatory interest arbitration," on the other hand, refers to binding arbitration that is imposed upon the parties by statute despite the objections of one or both of the parties.

All of the collective bargaining statutes cited in note 3 supra provide at least for mediation and fact-finding. Seven states currently provide for mandatory interest arbitration of disputes between teachers and school boards:

Florida: FLA. STAT. § 447.403 (West Supp. 1977) ("Special master" appointed by administering board (PERC)).
Minnesota: MINN. STAT. ANN. § 179.69 (West Supp. 1977) (provides voluntary interest arbitration, but grants employees the right to strike if employer refuses to arbitrate).
Nebraska: NEB. REV. STAT. § 48-810 (1943) (Court of Industrial Relations).
Oregon: OR. REV. STAT. § 243.726 (3) (c) (1975) (if court enjoins strike).
Rhode Island: R.I. GEN. LAWS §§ 28-9.3-9 to -12 (1968) (limited to non-monetary items). Nine other states provide for voluntary interest arbitration:
Indiana: IND. CODE § 20-7.5-1-13(c) (1975).
Massachusetts: MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1977-78).
Wisconsin: WIS. STAT. § 111.77 (West Supp. 1974).

7. The requirement is an elastic one, although a number of per se violations have been developed by the National Labor Relations Board and the courts. Concessions need not be made by either side, but there must be exhibited a willingness to find a common ground on which to agree. See generally, The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 271-309 (C. Morris ed. 1971) [hereinafter cited as DEV. LAB. LAW] and The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 163-77 (Cum. Supp. 1971-75, A. Bioff, L. Cohen, and K. Hanslow eds. 1976) [hereinafter cited as DEV. LAB. LAW 1975].
such an item may result in an unfair labor practice charge and perhaps also in a court order to negotiate.\(^8\) Furthermore, unilateral action taken by an employer on a mandatory subject may result in an order to restore the *status quo ante.*\(^9\) Finally, employees and employers may "insist to impasse" about such items. This means that they may condition their agreement to a final package upon satisfactory resolution of such issues. They may also, in the private sector, resort to strikes and lockouts over such issues if no agreement is reached at the table without committing an unfair labor practice.\(^10\) In the public sector, this may mean, in the jurisdictions which prohibit such tactics, that these issues must or may be included (unless specifically exempted by the statute) for consideration by a fact-finding or an interest arbitration panel.

"Permissive" subjects under the NLRA need not be discussed by either side at the bargaining table, and employers may act unilaterally without incurring unfair labor practice charges.\(^11\) Neither side may insist upon such items to impasse.\(^12\) In the private sector, this means that the union may not strike in order to persuade the employer to accede to its demands on such an issue. In public employment, where strikes are not permitted, such an item would not be considered by any panel attempting to resolve the dispute.\(^13\) A permissive subject may, however, be included in contracts when both sides agree. If such an issue is included, it becomes binding and enforceable through grievance arbitration or court proceedings. In other words, it is left up to the parties themselves to determine whether such subjects are discussed at the bargaining table and perhaps included in negotiated contracts.

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8. Although such a remedy may appear to have little significance since the employer may simply refuse to make concessions to the union position, it may be of considerable importance in the public sector where patterns of bargaining are just being established. An unfair labor practice committed by the employer during negotiations may also result in court denial of a Board injunction against a strike on "equitable" grounds. *See* Holland School Dist. v. Holland Educ. Ass'n, 380 Mich. 314, 157 N.W.2d 206 (1968); City and County of San Francisco v. Cooper, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975).

9. NLRB v. Katz, 369 U.S. 736 (1962). In the private sector, mandamus relief may also be available to prevent a threatened unilateral action. In the private sector, such unilateral actions are permitted after "impasse" is reached. *See* DEV. LAB. LAW, *supra* note 7, at 330-32. It has been argued, however, that in the public sector the duty to bargain should extend *beyond* impasse where employees lack the right to strike. *See* Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973).


13. An interesting exception is *Minn. Stat. Ann.* § 179.72(7) (West 1976) providing that such items may be considered by the arbitrator if included in the employer's final position. In Board of Higher Educ., 7 PERB ¶ 3028 (1974), on the other hand, the Public Employment Relations Board held that it was an unfair labor practice for an employee organization to insist on submitting non-mandatory subjects to a fact-finder. Reported in Clark, *The Scope of the Duty to Bargain in the Public Sector*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 81, 86 n.30 (A. Knapp ed. 1977) [hereinafter cited as LAB. REL. LAW PUB. SECTOR].
"Prohibited" subjects under the NLRA are neither properly discussed at the bargaining table nor properly included in collective bargaining agreements. Contractual terms covering such subjects are void and unenforceable. Grievance arbitration awards based upon such provisions will be refused enforcement by the courts.\(^\text{14}\)

Of course, these patterns are not necessarily imported wholesale into the public sector context by legislatures or by the courts. The unilateral action prohibition, for example, is not necessarily tied to the requirement that an item be discussed at the bargaining table.\(^\text{15}\) Nor does consideration by a fact-finding or an interest arbitration panel necessarily follow from treating an item as subject to mandatory bargaining.\(^\text{16}\) For purposes of this analysis, however, it will be assumed, unless otherwise noted, that the terms carry the remedial implications indicated above.

While legislatures may have attempted to define the scope of mandatory, permissive or prohibited subjects, the meaning of such terms in teacher collective bargaining statutes is open to judicial interpretation. Most statutes define mandatory subjects in terms borrowed from the National Labor Relations Act: "wages, hours of employment, or other conditions of employment."\(^\text{17}\) Some legislatures have used terminology that suggests a narrower scope. The Indiana statute, for example, refers only to "salary, wages, hours, and salary and wage related fringe benefits."\(^\text{18}\) Other statutes use terms that might suggest a coverage broader than the National Labor Relations Act. The Kansas collective bargaining law covering teachers refers to the "terms and conditions of professional services."\(^\text{19}\) The Oregon statute applies the duty to bargain to "employment relations."\(^\text{20}\)

\(^{14}\) Private sector cases are rare and involve closed shop, hiring hall preference for union members, "hot cargo" clauses, and similar items. Dev. Lab. Law, supra note 7, at 435-36.

\(^{15}\) See, e.g., State Employees Labor Relations Act, Me. Rev. Stat. tit. 26, § 979-D (1964), defining "collective bargaining" itself in terms of a duty to meet and negotiate upon request, but implying no continuing duty to bargain.

\(^{16}\) See, e.g., Rhode Island School Teachers Arbitration Act, R.I. Gen. Laws Ann. §§ 28-9.3-9 to -12 (1968), excluding monetary items from interest arbitration. Cf. the opposite policy conclusion reached by the court in the interpretation of proper subjects for interest arbitration under Maine's statute, City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 386 (Me. 1973), discussed in Section III infra.

\(^{17}\) 29 U.S.C. § 159(a) (1970). States using similar formulations include:
The courts' function is to apply these general terms to the specific proposals related to class size, preparation time, school calendar, and so on, which are submitted by teacher associations or which appear in collective bargaining agreements. In many instances an initial determination may already have been made by an administering public employment relations board. The court must still consider, however, whether the board has exceeded its statutory authority or authorized local school boards to exceed theirs. At other times, the court will be without guidance from such boards because of the procedural context in which the case arises. Some legislatures have attempted to guide both boards and courts by specifically listing matters within the scope of mandatory bargaining. Of course, such lists are never quite long enough.

Similar questions arise as to matters not within the scope of mandatory bargaining. The definition of the scope of bargaining in the National Labor Relations Act has been held to be, in itself, a phrase of "limitation"; certain subjects are reserved, by implication, to the exclusive control of management. Some statutes spell out specific lists of "management prerogatives." Others specify simply that "educational policies" shall not be included in wages, hours, or working conditions. How these terms are to be defined, the result when management rights or educational policy overlap with working conditions, and whether contract terms that appear to fall within this area can be enforced are all questions which the courts must resolve. In answering these questions, the courts are influenced to a large degree by their basic view of the collective bargaining relationship. How a court will resolve a particular issue, how broadly or narrowly a court will define the scope of the collective bargaining provision, is determined by the underlying assumptions that it makes about the nature of the negotiating process and about the function of the negotiating parties. It is well to make these judicial attitudes explicit.

Many courts, perhaps the majority, appear to have in mind a "Private Sector" model; they focus upon the employer-employee relationships which have developed in the private sector during the evolution of collective

21. For example, the question may initially arise when the board of education asks for an injunction against arbitration of a particular clause of the contract on the grounds that it is not a mandatory subject of bargaining but a prohibited subject. E.g., Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973).

22. The Nevada legislature has been the most ambitious; NEV. REV. STAT. § 288.150(2) (1975) lists twenty specific items included in mandatory bargaining; in § 288.150(3) (1975) are six items that are not to be included in bargaining.


24. For example:
   Hawai'i: HAW. REV. STAT. § 89-9(d) (Supp. 1975).

bargaining under the National Labor Relations Act. The question emphasized by these courts is how the private sector collective bargaining relationships can best be analogized to various public sector educational issues. Other courts, adopting the ‘‘Public Management’’ approach, focus instead upon the relationships between government (the employer) and private citizens (the employees), and ask to what extent the latter can be permitted to deal with the former as equals. Courts following the ‘‘Political Process’’ approach focus upon the political nature of the relationship between citizens (including employees) and governmental decision makers (school boards). Courts adopting the ‘‘Professional Employment’’ model focus upon the peculiar relationship between professional employees and their institutional employers.

Both the Private Sector and Public Management models have essentially taken private sector conceptions of the scope of bargaining and applied them by analogy to the public education setting, though with opposite results. Courts which have adopted the Private Sector model take the position that if an item is related to wages, hours, and working conditions (as defined in private industrial collective bargaining traditions and rulings), then the item is bargainable. And unless the item demonstrably infringes upon the core of management’s entrepreneurial function, it is mandatorily bargainable. The Public Management model courts, in contrast, take the position that if an item is related to management prerogatives (again, as they are defined in the private collective bargaining context), the item is not bargainable.

Both the Political Process model courts and the Professional Employment model courts focus more directly upon the aspects of collective bargaining which are peculiar to the public education setting, again with opposite results. The courts adopting the Political Process approach conclude that educational policy decisions must be specifically protected from collective bargaining limitations, while courts adopting the Professional Employment model conclude that such decisions should be included in collective bargaining.

This presentation will examine the analytical processes involved in the application of all four models to specific items and will look at the differences between approaches with respect to certain subjects often at issue between teachers and school boards. A consideration of the advantages and disadvantages of each model will show that the Professional Employment approach offers the greatest potential for equitable resolution of labor disputes in the setting of public education.

I

PRIVATE SECTOR MODEL

The major concern of these courts is to implement the presumed legislative intent of preventing the disruption of educational services by
granting to teachers collective bargaining rights analogous to those of private sector employees. This position dictates two conclusions. First, the scope of mandatory bargaining should be as broad (or as narrow) as it is in the private sector. The questions to be resolved by these courts are: (1) How broad is the mandatory scope of bargaining in the private sector? and (2) What are the appropriate analogies in the context of public educational employment? Second, employers, as in the private sector, are permitted, even though they may not be required, to include in collective bargaining agreements all matters within their discretionary authority, i.e., all matters not “contrary to law.” Under this approach, any issue which is not specifically prohibited by the statute is permissive. Provisions concerning areas of “management prerogatives” or statutory duties of school boards, as well as areas covered by alternative systems of dispute resolution, such as the issue of tenure, may be included in contracts and enforced by grievance arbitration machinery.

A. Scope of Mandatory Subjects: Duty to Bargain

The decision that best illustrates the Private Sector approach is West Hartford Education Association v. DeCourcy. The Connecticut Supreme Court noted that the state statutes dealing with public sector labor relations were closely patterned after the National Labor Relations Act. Therefore, the judicial and board interpretations of the federal act covering the private

26. Commentators have generally deplored strikes by public employees. See, e.g., Wellington & Winter, The Limits of Collective Bargaining in Public Employment 78 Yale L.J. 1107, 1123-25 (1969) [hereinafter cited as Wellington & Winter, Limits], or Zagoria, The Future of Collective Bargaining in Government, in Public Workers and Public Unions 166-7 (S. Zagoria ed. 1972). Their position is epitomized by Franklin Delano Roosevelt’s statement that strikes by public employees are “unthinkable and intolerable,” quoted by the court in Norwalk Teachers Ass’n v. Board of Educ., 138 Conn. 269, 83 A.2d 482, 484 (1951). Nevertheless, the “unthinkable” has become almost commonplace as teachers and other public workers have discovered that “the power to strike [is] of far greater relevance than the right to strike.” Zack, Impasses, Strikes and Resolutions, in Public Workers and Public Unions, at 102.

27. It should be noted that the National Labor Relations Board in 1970 asserted jurisdiction over private universities and colleges with gross annual revenues of at least one million dollars. Cornell Univ., 183 N.L.R.B. 329 (1970), reversing Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951). The ruling has been extended to private elementary and secondary schools, 39 Fed. Reg. 43410 (1974), and Judson School, 209 N.L.R.B. 677 (1974). It will be interesting to see what influence NLRB decisions on the scope of bargaining in the educational setting will have upon these courts. For an interesting discussion of the aftermath of Cornell, see Pollott & Thompson, Collective Bargaining on the Campus: A Survey Five Years After Cornell, 1 Indus. Rel. L.J. 191 (1976).

28. As will be seen infra the disputes regarding the breadth of the phrase “contrary to law” in the public sector may appear to take the courts beyond the range of private sector controversies. It should be noted, however, that the National Labor Relations Board and the courts had struggled with similar “public policy” arguments regarding “hot cargo” agreements before the enactment of section 8(e) as part of the 1959 Landrum-Griffin amendments to the National Labor Relations Act. Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1970 and Supp. V 1975). See Teamsters Local 554, 110 N.L.R.B. 1769 (1954), and general discussion in Dev. Lab. Law, supra note 7, at 645-49.

sector were of "great assistance and persuasive force." The court noted that court and board interpretation of the phrase "terms and conditions of employment" in the National Labor Relations Act had expanded to include such items as company rules and hiring practices, safety conditions, work loads, and dues checkoff. On the other hand, the Supreme Court in Fibreboard Paper Products Corp. v. NLRB had held that the phrase "terms and conditions of employment" also implied limits to the scope of mandatory bargaining. According to Mr. Justice Stewart's concurring opinion in Fibreboard, managerial decisions that "lie at the core of entrepreneurial control" are not subject to the duty to bargain. The Connecticut court agreed, noting that "[t]he notion that decisions concerning the 'core of entrepreneurial control' are solely the business of the employer has a special kind of viability in the public sector." "Educational policy," the court said, is the parallel concept in the context of teacher collective bargaining. Just as Stewart had defined the decisions that lie outside the area of mandatory negotiations in the private sector as "fundamental to the basic direction of the corporate enterprise," so the Connecticut court defined "educational policy" decisions as "those which are fundamental to the existence, direction and operation of the [educational] enterprise." Such decisions are not subject to the duty to bargain.

The two other factors taken into consideration by the West Hartford court in its interpretation of the general statutory mandate also closely parallel traditional interpretation of the National Labor Relations Act. First, the Connecticut court considered the "history and customs of the industry in collective bargaining" in determining the appropriate scope of mandatory negotiations. Second, the court considered the legislative policy underlying the Teacher Negotiations Act. The presumed legislative intent was that issues of prime importance to employees be resolved peacefully through the

30. 295 A.2d at 534.
32. 379 U.S. 203, 223 (Stewart, J. concurring), Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessary to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.
34. 295 A.2d at 536.
35. 295 A.2d at 536. The majority opinion in Fibreboard applied a similar standard: "While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964).

Significantly, in Connecticut there was a pre-statute history of teacher collective bargaining as a result of the ground-breaking decision in Norwalk Teacher's Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951).
process of collective bargaining, even if this "divests boards of education of
some of the discretion which they otherwise could exercise under the
[education code]."36 The court noted that the resolution of disputes through
collective bargaining was also the "basis of federal labor policy."37

These principles were applied by the court to teacher association
proposals related to class size (the number of pupils per class) and teacher
load (the number of classes for which a teacher was responsible per day or
per week). The court found that both proposals were within the area of the
mandatory duty to bargain. Both were related to the "amount of work"
expected of a teacher, a "traditional indicator" in the private sector of
mandatory subjects of negotiation. The court also considered the "history
and customs" of teacher collective bargaining in Connecticut. It noted that
of the ninety-one teacher contracts negotiated in the state, sixty-one had
provisions related to class size, and forty-one had provisions related to
teacher load.38

In contrast, the court found that certain aspects of the teacher proposal
relating to extracurricular duty assignments were not within the scope of the
duty to bargain. To the extent that such proposals might determine whether
extracurricular activities would be sponsored by the school and, if so, which
ones, they were outside the area of mandatory negotiations. Such decisions
involved the "existence, direction and operation of the enterprise." The
board, however, was obligated to bargain about the assignment and
compensation of teachers to such duties.39

Other Private Sector model courts have also defined the basic scope of
"working conditions" in terms of matters of traditional concern to private
sector employees, such as job security or compensation.40 They have not,
however, tended to be so expansive in their view of what constitutes the
appropriate analogy in the teacher collective bargaining context to what has
been called, in the private sector, the "effort
bargain."41 These courts have
also tended to apply the Fibreboard limitations upon the scope of mandatory
subjects more broadly.

36. West Hartford, 295 A.2d at 536. There is considerable evidence that this has been the
major impetus for the enactment of public sector collective bargaining laws. See New York
Governor's Committee on Public Employee Relations (Taylor Committee), Final Report, in B.
(Hickman Commission), Report and Recommendations, in Meltzer at 1015-16 (1970), which
even considered the right to strike itself as a "safety valve which will in fact prevent strikes."
[emphasis omitted]
37. 295 A.2d at 536.
38. Id. School calendar was excluded from the scope of bargaining on the grounds that the
term "hours" had been omitted from the phrase otherwise copied from the NLRA.
39. Id.
(job security and compensation); Board of Educ. v. Associated Teachers, 30 N.Y. 2d 122, 282
New York, for example, has adopted the "educational policy" characterization of the *Fibreboard* limitation. But in *West Irondequoit Teachers Association v. Helsby* the New York Court of Appeals used that limitation to reach an opposite conclusion from the Connecticut court on the issue of class size. It excluded class size from mandatory bargaining as a "basic element of educational policy bearing on the extent and quality of the service rendered."42 This parallels the private industry view that "a company has the right to know it can develop a product and get it turned out . . . [or] devise a way to improve a product and have that improvement made effective. . . ."43

Other courts have rejected the "educational policy" analogy and have focused instead upon the portion of Justice Stewart's opinion that excludes those items which "impinge only indirectly" upon working conditions or job security. According to Justice Stewart, "[d]ecisions concerning the volume and kind of advertising expenditures, product design, the manner of financing and sales" all may ultimately affect the number of products sold and therefore the number of jobs available. The effect of these decisions upon job security, however, is so "indirect and uncertain" that they should not be subject to the mandatory duty to bargain (nor, of course, to the concomitant restriction on unilateral action during the course of the contract).44

Private Sector model courts differ considerably in their assessment of such issues in the teacher collective bargaining context. At least one court has applied this line of cases from the private sector, for example, to exclude from the mandatory area proposals related to released time for teacher-parent conferences, teacher aides, class size, elementary preparation time, and budget allowances.45 The Kansas Supreme Court said that the test in the school setting was "how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect upon the operation of the school system as a whole."46 This test has been adopted by other Private Sector model courts in their attempt to follow what they see as the spirit of *Fibreboard*: striking a proper "balance" between the interests of management and of labor.47

Private Sector model courts have also attempted to achieve this "balance" by applying the "impact doctrine." While basic policy decisions are

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reserved for unilateral school board action, their "impact" upon wages, hours, and working conditions remains mandatorily bargainable. Similar private sector decisions have, for example, preserved management's right to act unilaterally to close a plant but have required boards to bargain about the effects of such a decision upon the work force.\(^{48}\) This was the principle applied by the *West Hartford* court when it distinguished the decision of the board to support certain extracurricular activities from the effect of such a decision upon teachers' duties. In the *West Irondequoit* decision the New York Court of Appeals explicitly applied the impact doctrine to the issue of class size. Although the question of whether particular classes would be composed of 25, 28, or 32 pupils could be unilaterally resolved by management, the effects of such decisions upon working conditions were bargainable. The district would be required, the court said, to bargain about a proposal that compensations or benefits for individual teachers would vary depending upon class size.\(^{49}\)

In practice, the line between "impact" and "policy" may be difficult to draw. What should be the result with regard to a teacher-association proposal that teachers with classes larger than an agreed-upon number be given extra compensation? One court determined that the extra compensation was bargainable but that the school board could set the optimal number as high as it wished.\(^{50}\)

In general, Private Sector model courts search for an acceptable "compromise between labor and management" in the definition of mandatory subjects of bargaining.\(^{51}\) The courts attempt to preserve, through "balancing" or through the "impact doctrine," what they perceive to be the major elements of concern to each side: management's right to act unilaterally with regard to the nature and quality of services, and labor's right to establish fair hours and adequate compensation for individual teachers.

### B. Scope of Permissive Subjects: Arbitrability

If Private Sector model courts are not particularly consistent in defining mandatory subjects, they agree that public employers have very broad discretion to include items in collective bargaining agreements if they choose to do so. In the influential decision *Board of Education of Huntington v. Associated Teachers*,\(^{52}\) the New York Court of Appeals outlined an expansive view of the range of "permissive" subjects. Local school boards must be "presumed to possess the broad powers needed" to reach their own collective bargaining accommodations with teachers.

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be rebutted only by demonstrating the existence of a "specific statutory provision which circumscribes the exercise of such power." The result is that Private Sector model courts are willing to uphold a wide variety of contractual provisions as subject to grievance arbitration.

This stance reflects two basic policy judgments made by Private Sector model courts: (1) grievance arbitration is the preferred method of settling contractual disputes, and (2) actual settlements of labor disputes at the bargaining table should be encouraged by the courts.

The question of whether a contractual provision is within the "permissive" or "prohibited" area usually arises in the context of a challenge by a school board to the arbitration of a particular grievance. In the private sector, management usually seeks to avoid arbitration of a grievance by claiming that it is not covered by the contractual grievance provision. In sharp contrast, public sector management often seeks an injunction against arbitration of a grievance that is admittedly covered both by the contract and by the grievance arbitration provision to which management has already agreed.

Private Sector model courts follow the lead of the United States Supreme Court in the Steelworkers Trilogy and favor grievance arbitration for the resolution of contractual disputes. Some courts cite the Trilogy directly and apply the principles specifically to the contractual provisions under dispute. Others refer generally to the "trend of judicial and legislative action" supporting grievance arbitration as an "inexpensive and reasonably amicable method of conflict resolution." The basic position taken by these courts is that the reasons for grievance arbitration in the private sector apply with equal force to the public sector.

Other courts stress the particular value of grievance arbitration in the public sector context. In the private sector, grievance arbitration is recognized as an alternative to the use of economic weapons for the resolution of disputes over the terms of the contract. Grievance arbitration may thus serve as an important means of preventing strikes. Public policy arguments

56. Note 54 supra.
suggest that it is even more important that strikes be avoided in the public sector, and to that extent, it is even more important that grievance arbitration in the public sector be supported by the courts. Apart from the issue of strikes, courts have seen grievance arbitration in the public sector as a means of ensuring fair treatment for public employees. Without this impartial method of resolving individual grievances, the school board may act as "prosecutor and judge." The detrimental effect on public employee morale may be harmful to the public interest.

Another basis for a broad judicial conception of "permissive" subjects is the notion that school boards should be encouraged, even if they are not required, to resolve a wide range of labor-management disputes at the bargaining table. The Washington Supreme Court quoted with approval the observation of one commentator that, "[w]here school boards to understand that bargaining does not require capitulation but is calculated to bring about harmony and build morale, they would seldom reject a proposed subject on the ground that it is not within the area of mandatory bargaining." Collective bargaining is seen as a process in which each party "balances what is desired against the known costs of disagreement." The costs to management of excluding items of vital concern to teachers may be "loss of competent employees and the fostering of a general low morale." On labor's side, the cost may be "loss of community support if unreasonable demands are made."

The application of these principles to specific contract proposals depends upon the assessment by particular boards and teacher associations of what the desires and priorities of their local constituents are. As the New York court noted in Huntington, the "ability of a Board of Education to meet the changing needs of employer-employee relations within its district" must be supported.

Private Sector model courts thus look beyond the immediate procedural posture of a challenge to grievance arbitration and examine the effect of their decisions upon the collective bargaining process itself. They are willing to leave to local school boards the decision of how best to reach accommodation with their teachers. If such local decisions are to foster

60. Board of Educ. v. Philadelphia Fed'n of Teachers Local 3, 464 Pa. 92, 346 A.2d 35, 38 (1975). Strikes are legal in Pennsylvania in certain circumstances, supra note 5. The practical implications may be the same, however, in jurisdictions that do not legalize the right to strike. See note 26 supra.


63. Id.

64. Id.

morale and provide peaceful resolution of disputes, the agreements reached in the collective bargaining process must be enforced. Private collective bargaining experience has demonstrated that grievance arbitration is a particularly appropriate method for neutral resolution of labor contract disputes. The argument is that the courts should, therefore, follow the lead of the United States Supreme Court in encouraging the submission of such disputes to arbitration and in upholding the decisions of grievance arbitrators once they are made.

C. Prohibited Subjects

Private Sector model courts have limited the scope of "prohibited" subjects to those which are "contrary to law." They have explicitly rejected a number of other grounds for excluding subjects from collective bargaining, including (1) the absence of explicit statutory authority for schools to act in a specific area, (2) the existence of statutory managerial duties or of expressly reserved management prerogatives in the state statutes, or (3) the existence of alternative statutory systems of dispute resolution.

In Huntington, the school board contended that it was without power to agree to compensation for personal damages sustained by employees at work, reimbursement for tuition expense, or increased salary in contemplation of retirement, because no state law specifically authorized the board to take such actions. The court, without challenging the basic position that local boards as creatures of the state legislature derive their powers from state statutes, simply viewed the collective bargaining statute itself as an enabling act. By imposing the duty to negotiate, the statute impliedly conferred upon local boards the powers "reasonably necessary" to discharge their obligation to reach agreement.66

The second and more common school board contention is the mirror image of the first. If the state legislature has granted or reserved power in a given area to local school boards, those boards are then precluded from limiting their own power through the collective bargaining process by making binding contractual commitments.67

Pennsylvania Labor Relations Board v. State College Area School District68 typifies the Private Sector model approach to this argument. The school board raised the reserved power argument in the context of a broad "management rights clause" contained in the Public Employee Relations Act.69 The lower court had interpreted the clause to exclude from collective

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66. Id.

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions or programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.
bargaining twenty-one items, including preparation time, teaching assignments, extracurricular duties, association meeting rights, access to personnel files, calendar, and class size.\textsuperscript{70} The Pennsylvania Supreme Court noted that the lower court presumption of the "dominance of a legislative intention to preserve the traditional concept of inherent managerial prerogatives" was at odds with the basic philosophy of the collective bargaining statute. The major purpose of the statute was to prevent strikes by providing a method for the peaceful resolution of disputes. It was "absurd to suggest that the legislature deliberately intended to meet this pressing need by providing an illusory right of collective bargaining."\textsuperscript{71}

The court rejected the statutory power argument on similar grounds. The state legislature had granted to local school boards all powers relevant to the running and managing of school districts. These included the power to make decisions in all areas of employer-employee relations, including the level of employees' salaries. To exclude this range of board powers from collective bargaining agreements would be to "emasculate" the collective bargaining statute.\textsuperscript{72}

Collective bargaining, in the court's view, did not mean that the school board surrendered its prerogatives or duties to manage the school district. It simply meant that such management would now be carried on and such decisions would be made within the context of collective bargaining. "The mere fact that the General Assembly granted the prerogative to the employer does not exclude the possibility that the decision to exercise that prerogative was influenced by the collective bargaining process."\textsuperscript{73} Nor was there any derogation of the "public interest" by including such items in collective bargaining agreements, the public interest is served by the peaceful resolution of disputes.\textsuperscript{74}

Private Sector model courts also uphold contractual provision for grievance arbitration even when statutes provide for alternative methods of review of school board decisions. A common example is in the area of "tenure," which is generally a term indicating that school board discretion to dismiss a teacher is limited to certain statutory grounds and that the board's decisions are reviewable by some outside authority. The question usually arises in the context of a challenge to the arbitrability of a contractual provision that teachers shall be dismissed only for "just cause."

In Huntington, the New York court held that grievance arbitration was an "appropriate alternative" to the other procedural remedies available to a tenured teacher. A dismissed teacher would, however, be required to elect


\textsuperscript{71} 337 A.2d at 266.

\textsuperscript{72} Id. at 267.

\textsuperscript{73} Id. at 269.

\textsuperscript{74} Id. at 266.
whether to challenge the school board decision through arbitration or through the statutory process of appeal to the courts and to the State Commissioner of Education.\textsuperscript{75} The Michigan Supreme Court also rejected the argument that the statutory procedural protections for tenured teachers were intended to provide an exclusive remedy.\textsuperscript{76} Similarly the Pennsylvania Supreme Court rejected the contention that the legislative intent of the statutes providing for tenure was to preserve school board authority to dismiss non-tenured teachers or to dismiss tenured teachers within the limitations of the tenure statutes.\textsuperscript{77}

Thus, Private Sector model courts are adverse to finding any general preemptive intent in other statutes regulating school boards. However, these statutes may prohibit contractual agreements that are contrary to their terms.

In general, Private Sector model courts view specific statutory limitations on the discretion of school boards as the basic source of limitations on the discretion of local boards to agree to specific contractual provisions. According to the Pennsylvania Supreme Court, for example, the public employer is precluded from agreeing to a specific proposal only when “other applicable statutory provisions explicitly and definitely prohibit the public employer” from doing so.\textsuperscript{78} An example suggested by the court would be a contractual provision for a salary scale lower than the state statutory minimum.\textsuperscript{79} According to the New York Court of Appeals in \textit{Huntington}, the school board has “the burden of demonstrating the existence of a specific statutory provision which circumscribes the exercise of such power.”\textsuperscript{80}

The history of this doctrine in New York illustrates that Private Sector model courts may not be content to adhere to quite so restricted a view of their own discretionary powers to evaluate contractual agreements or arbitration awards, however. In \textit{Susquehanna Valley Central School District v. Teachers Association},\textsuperscript{81} the Court of Appeals “clarified” the \textit{Huntington} formulation. Local boards and teachers associations might be limited in their freedom to contract by “plain and clear,” not simply “express,” prohibitions in “statute or decisional law.”\textsuperscript{82} Furthermore, “public policy, whether derived from, and whether explicit or implicit in statute or decision-

\begin{thebibliography}{9}
\bibitem{} 30 N.Y.2d at 132, 331 N.Y.S.2d at 25, 282 N.E.2d at 115.
\bibitem{} Kaleva-Norman-Dickson School Dist. No. 6 v. Teachers Ass’n, 393 Mich. 583, 227 N.W.2d 500 (1975).
\bibitem{} 337 A.2d at 269.
\bibitem{} 30 N.Y.2d at 23-24, 331 N.Y.S.2d at 130, 282 N.E.2d at 114.
\end{thebibliography}
al law, or neither, may also restrict the freedom to arbitrate."83

Lower courts in New York immediately took the opportunity offered by such language to refuse to enforce contractual provisions on "public policy" grounds. In *Levittown Board of Education v. Levittown United Teachers*84 the court held that "public policy" included the right of school boards to determine the "means of economic survival." Thus the school board decision to save money by reducing staff in violation of the job security provision of the collective bargaining agreement was not arbitrable. The court noted that the residents of the district paid the highest tax rates in the county and that some of the staff were without regular classroom assignments. Of course, the difficulties involved in raising taxes might be used to invalidate almost any contractual provision involving cost to the district. This "economic necessity" argument was eventually rejected by the Court of Appeals in a similar staff reduction case, *Board of Education of Yonkers v. Federation of Teachers*.85 Although the court acknowledged a condition of "financial disaster" in the district, the lower court's stay of arbitration on "public policy" grounds was overturned. Rather than abrogating the contract, the court said, the arbitrator should take the financial position of the district into account when determining the remedy for the breach.

Other lower courts used the "public policy" exception to preclude arbitration of contractual provisions that interfered with the ability of school boards to maintain "excellence in the public school system."86 This approach to the interpretation of "public policy" was sharply curtailed by the Court of Appeals in *New York City School Boards Association v. Board of Education*.87 This case involved the relative powers of the central New York city school board and the decentralized "community" school boards under its jurisdiction. The plaintiff sought to enjoin the central board from implementing its contractual agreement with the city teacher federation to reduce the number of hours of instruction in the city schools. The local boards, supported by the State Commissioner of Education, argued that the agreement was invalid on "public policy" grounds because it was contrary to sound educational policy. The Court of Appeals soundly rejected the argument, noting that the courts were not the place to determine the best educational policy.

Kansas is another jurisdiction which has applied the "public policy" limitation to refuse enforcement of contractual agreements. The Kansas Supreme Court upheld the rejection of a petition for a writ of mandate to

83. *Id.*
enforce a board agreement which reinstated striking teachers whose contracts had been terminated.\textsuperscript{88} Although the board's subsequent repudiation of the agreement left the teachers without recourse, any other result, the court said, would be contrary to the public policy against strikes by public employees.

The basic position of the Public Sector model courts is that, as in the private sector, contractual agreements and grievance arbitration awards based upon them should be upheld unless they are contrary to law or public policy. However, courts in these jurisdictions may be influenced by policy arguments against specific contractual commitments or against collective bargaining in the public sector generally. To that extent, they may be tempted to expand the "public policy" exception well beyond its private sector applications.

D. Objections to the Private Sector Model

The first objection to the attempt by these courts to apply private sector concepts and principles to the public sector is that such applications are simply not very helpful. The National Labor Relations Board and the courts have had considerable difficulty in attempting to apply the \textit{Fibreboard} distinctions to the private sector.\textsuperscript{89} Their application by courts to the school situation has been even less consistent. There is, after all, no tradition of private sector experience or analysis of "class size" as a subject of bargaining. This lack of predictability may encourage the waste of time and energy in disputes over the proper categorization of particular proposals.

The "impact" doctrine, for example, may be clear enough in the private sector, but it is particularly difficult to apply in the public sector. In private labor relations contexts, the issue of whether an item is a "mandatory" subject of bargaining usually arises in the course of determining whether strikers are protected as participants in an "unfair labor practice strike."\textsuperscript{90} Strikers are typically protesting an action already taken by the employer, and the question is whether the employer had the right to act as it did without first bargaining to impasse. In the public sector, on the other hand, the striking employee typically has no legal protections, whether or not the employer has committed an unfair labor practice.\textsuperscript{91} The question of whether a subject is "mandatory" usually arises not in the context of

employer action but of employer refusal to act. A school board may refuse to discuss a teacher proposal. The association, lacking the right to strike, instead seeks redress from the labor relations board or from the courts. Thus, the dispute in the public sector situation may well precede school board action or "policy" determination. In this context, an association proposal to make board adoption of one policy more expensive than its alternative would have an obvious impact upon the policy decision itself. Nevertheless, to preclude the item from discussion would be to limit severely the public sector employees' right to make the basic "wage and effort bargain" with their employers, a right which is at the heart of collective bargaining. The private sector decisions provide no solution to this dilemma.

A second objection is that the assumption that public sector employees should have the same rights as private sector employees ignores essential differences between public and private employment. Many commentators, following the lead of Harry Wellington and Ralph Winter, contend that there are no effective market restraints on the price of labor in the public sector, particularly in a field such as public education where the government enjoys a virtual monopoly (and, of course, can impose taxes even upon non-consumers).\(^2\) Furthermore, they contend, collective bargaining in the public sector involves social, political, and ideological consequences for groups other than public employees. On the other hand, in private industry collective bargaining "merely" influences the allocation of resources.\(^3\) Finally, these commentators argue that public sector unions are in a more powerful position than their private sector counterparts, particularly with regard to "non-monetary" items.\(^4\) For all of these reasons, they urge that the scope of public sector collective bargaining must be more strictly limited than that of private sector collective bargaining.\(^5\)

A third objection to the Private Sector model is related to the second, but reaches the opposite conclusion. The significant differences between public and private employment are said to advise broader collective bargaining in the public sector, particularly in the "mandatory" area. One argument is that the absence of the right to strike, which may well be the most significant difference between public and private employment, renders useless the line between "permissive" and "mandatory" subjects. Since strikes will not be discouraged in the public sector by relegating items to the "permissive" category, all such items should be mandatory.\(^6\)

\(^{92}\) See, e.g., Wellington & Winter, Limits, supra note 26, at 1121-22.


\(^{94}\) See especially, Wellington & Winter, Structuring, supra note 93, at 861-70.

\(^{95}\) See Kilberg, supra note 89, at 186-89, and Edwards, supra note 9.
On the other hand, it may be that as a practical matter a broad range of permissive subjects will encourage public employee strikes. The courts' application of private sector principles to public employment may well result in the exclusion of many items of vital concern to teachers from the "mandatory" areas. Any union leadership must demonstrate that it can effectively represent its members in the matters of highest concern to them. When the school board refuses to discuss an item that the teacher representatives know is of highest concern, the teacher leadership has two practical options. It may seek redress through unfair labor practice proceedings, or it may organize some "concerted activities" to persuade the school board to change its mind, despite the legal restrictions. From this perspective, it seems obvious that to the extent that the courts have precluded the first course they will have encouraged the second.

II
PUBLIC MANAGEMENT MODEL

These courts are primarily concerned with protecting the integrity of the political process by preventing delegation of discretionary managerial decisions to persons other than elected officials or their agents. The public management responsibilities of local school boards must be protected from the limitations believed to be implicit in collective bargaining. Unlike private managers, the ultimate responsibility of public managers is to the citizenry as a whole. Any compromise or sharing of that responsibility with a private group, such as employees, diminishes the power of the citizenry and therefore undermines the democratic process. The integrity of the political system is best preserved by observing the lines of delegated authority which extend from the people through the Constitution to the legislature, then to local school boards, to school administrators, and finally, to teachers. The scope of bargaining provisions of collective bargaining statutes must be narrowly construed in order to protect essential management prerogatives from possible infringement. Subjects that fall within the sphere of management prerogatives must be classified as prohibited and not merely as permissive subjects of bargaining. Prior statutes granting or restricting

97. This is particularly true in the context of the rivalry for teacher allegiance between the American Federation of Teachers and the National Education Association. See Wildman, Collective Action by Public School Teachers, in Woodward & Peterson, supra note 2, at 301-14.

98. This point of view is forcefully expressed by Robert Hampton, Chairman of the federal Civil Service Commission:
Public policy demands that the performance of . . . governmental functions not be hampered by any particular group in the interests of its members. The public interest must prevail over the private interest. Under our economic system a private firm belongs to its stockholders; the federal government belongs to all the people. Of course, some private firms perform noncompetitive or essential functions. But there is a basic difference: the government's functions emanate from the power and resources of all the people and therefore must be responsive to the will and needs of the people. In Federal Labor-Management Relations: A Program in Evolution, A Symposium: Labor Relations in the Public Sector, 21 Cath. U. L. Rev. 493, 496 (1972).
school board power in a given area preempt the subject from collective bargaining consideration unless a clear legislative intent to the contrary can be shown. Alternative systems of dispute resolution within the traditional structure are given priority over contractually established grievance procedures which look outside the system, that is, to arbitration, for final resolution.

A. New Jersey: Prototype Cases

The jurisdiction that best illustrates the Public Management approach is New Jersey. In the companion cases of *Dunellen Board of Education v. Dunellen Education Association*99 and *Board of Education v. Englewood Teachers Association*,100 the supreme court dealt with the scope of mandatory subjects under the New Jersey Employer-Employee Relations Act. The act stated simply that "grievances" and "terms and conditions of employment" were bargainable.101 In both cases, the employers sought restraining orders to prevent the teachers from taking certain issues to arbitration under their respective collective bargaining agreements.

In *Dunellen* the issue was the abolition of the position of Social Studies Chairman, specified under the "Extra Duty Assignments" compensation schedule of the collective bargaining agreement. In overruling the Chancery Division's dismissal of the complaint, the court followed the basic reasoning of the Public Management position. The court first stressed that the source of the school board's authority must be traced from the Constitution to the legislature and then to the local board. The Constitution mandated that the legislature must maintain and support a "thorough and efficient" school system. This management responsibility had been delegated by the legislature to the local boards, thus charging them with "public responsibilities which they could not lawfully 'abdicate or bargain away.'"102 Furthermore, specific legislation had granted local boards the "traditional management power to employ, promote, transfer and dismiss."103 Such statutory duties, assumed to cover the chairmanship issue, could not be subject to collective bargaining limitations. Finally, New Jersey law provided an alternative system of dispute resolution through the State Commissioner of Education, who was empowered to determine all controversies arising under school laws. Since the collective bargaining law provided that no other statutes were to be modified by its provisions,104 the court reasoned that the State Commissioner's responsibilities for supervising the management of the educational system had to be exclusive.

100. 64 N.J. 1, 311 A.2d 729 (1973).
102. 311 A.2d at 740.
103. Id.
For these reasons, the provisions of the collective bargaining statute had to be strictly construed. The scope of bargaining had to be limited in order to prevent the legislature from running afoul of principles of delegated authority. "Surely the Legislature... did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies..."\(^{105}\) The teachers, the court concluded, cannot be permitted to "take over the educational policies entrusted by the statutes to the Board."\(^{106}\)

In *Englewood*, the court examined the other side of the coin. At issue were two school board actions. In the first, the board had lengthened the hours of four special teachers to conform with the hours specified generally for teachers under the collective bargaining agreement. This action allegedly violated a general clause preserving past benefits. In the second action, the board had refused the tuition compensation and salary schedule placement requested by a separate grievant. Again overruling the Chancery Division, the court upheld the arbitrability of the issues in question. "Surely working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act. Those matters along with physical arrangements and facilities and customary fringe benefits would appear to be the items most evidently in the legislative mind."\(^{107}\) These items "directly" affected the financial and personal welfare of the individual teachers involved, "without affecting any major educational policies."\(^{108}\) Even though school laws dealt directly with compensation and hours, those laws did not preempt collective bargaining agreements which did not conflict with their minimum provisions. The Commissioner of Education need not retain exclusive jurisdiction, since his expertise "would not significantly further the interpretive process as to the intended meaning of the parties' agreement."\(^{109}\)

**B. Scope of Mandatory Subjects: Duty to Bargain**

Courts adopting the Public Management approach, like the New Jersey court, do not begin by asking which subjects must be bargainable in order to give effect to the collective bargaining statutes. Instead, they ask which subjects must *not* be bargainable in order to preserve the public managerial responsibilities of local boards.

\(^{105}\) 311 A.2d at 741. The court nominally uses the illegal delegation approach as a method of statutory construction. This is likely to be tested in the near future, as the legislature has repealed tit. 34, § 13A-8.1 (1974 N.J. Laws ch. 123), and explicitly provided that the role of the State Commissioner of Education is not exclusive. N.J. REV. STAT. tit. 34, § 13A-5.3 (1974). See Red Bank Bd. of Educ. v. Warrington, 138 N.J. Super. 564, 351 A.2d 778 (N.J. Super. App. Div. 1976), taking a Private Sector model approach on the basis of these changes, and expanding the scope of bargaining.

\(^{106}\) 311 A.2d at 744.

\(^{107}\) 311 A.2d at 731-32.

\(^{108}\) 311 A.2d at 732.

\(^{109}\) 311 A.2d at 733.
Sometimes the court has statutory guidance. In *State College Educa-
tion Association v. Pennsylvania Labor Relations Board*, the Pennsyl-
vania Commonwealth Court relied upon a statutory management rights sec-
tion, which defined "matters of inherent managerial policy" to include "such areas of discretion or policy as the functions and programs of the
public employer, standards of services, its overall budget, utilization of
technology, the organizational structure and selection and direction of per-
sonnel." The court used this section to prohibit bargaining on twenty-one
specific subjects, including preparation time, separate desks for teachers,
time for Association meetings, calendar, class size, timely notice of assign-
ments, and teacher access to their own personnel files.

At other times, the statute may be silent. The Nebraska Supreme Court,
for example, concluded that the phrase "conditions of employment" im-
plied an exclusion of basic managerial functions. The court then defined
such functions to include "the right to hire; to maintain order and efficien-
cy; to schedule work; to control transfers and assignments; to determine
what extracurricular activities may be supported or sponsored; and to deter-
mine the curriculum, class size, and types of specialists to be employed."

Having decided which matters must be excluded, the courts then ask
what the legislature intended when it mandated bargaining about wages,
hours, and working conditions. These subjects, the Public Management
model courts say, must be limited to those items "directly and materially
affecting 'conditions of employment'" or "directly affecting the
teacher's welfare." The Nebraska Supreme Court cites with approval the
Kansas statutory list of working conditions: hours of work, vacation allow-
cance, sick and injury leave, holidays, and wearing apparel. The Pennsyl-
vania Commonwealth Court lists physical conditions of the work surround-
ings, vacations, sick pay, and the quantity and quality of work.

None of these items, however, is necessarily bargainable. In order to
be within the mandatory bargaining area, a specific item or proposal must
also not be "affected by policy considerations." Thus, although the
Pennsylvania Commonwealth Court considered physical work surroundings
to be an aspect of working conditions, the association proposal of separate
desks for each teacher was not bargainable because it affected the overall

113. School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752,
759 (1972).
115. 188 Neb. 772, 199 N.W.2d at 759.
118. *Id.* 306 A.2d at 413.
budget, and the budget was a management prerogative. Similarly, although
vacations and quantity of work were bargainable working conditions, a
calendar proposal was not bargainable because it affected the "general
functions and programs" of the public employer.119

The result is that, in order to be classified as a mandatory subject of
negotiation, an item such as class size, for example, must clear two hurdles.
First, its determination must not be in itself an inherent managerial preroga-
tive which the legislature did not intend to include in the category of
"wages, hours and working conditions." If class size, for example, passes
this test, as "directly and materially affecting" the quantity of work re-
quired of a teacher, then it must still be shown that bargaining about class
size will not inhibit any of the managerial functions entrusted to the district,
in order to clear the second hurdle and be bargainable.

The general spirit in which these questions are approached is perhaps
best expressed by the Pennsylvania Commonwealth Court: "The legislature
intended to afford public employees a limited right of collective bargaining
with public employers, subject, however, to the paramount rights of the
public at large."120 Collective bargaining statutes have the effect, in these
jurisdictions, of carving out a small niche in the traditional relationships
between public school managers and employees.

C. Scope of Prohibited Subjects: Arbitrability

The basic approach of Public Management model courts to the scope of
prohibited subjects was outlined in Dunellen. The lines of delegated author-
ity preclude local boards of education from bargaining about "educational
policy, management prerogatives or statutory duties."121 There is no room
for "permissive" subjects. If a subject does not fall within the "manda-
tory" category, it is prohibited and non-arbitrable.

The theory of illegal delegation of authority to which these courts refer
has most commonly been used in the context of legislative delegation of its
rule-making power to the executive branch,122 administrative agencies,123 or
private groups.124 Little discussion is found in these cases, however, of
either of the two basic principles that have evolved to limit the application of
the illegal delegation doctrine, legislative standards for the guidance of the
non-legislative authority and adequate safeguards against arbitrary action by
the non-legislative authority.125 These courts do not look for guidelines or
safeguards, but focus instead upon the hierarchy of delegated authority running from the state legislature to the local boards.

School boards are creatures of state legislatures and have been granted certain powers. These powers involve duties and responsibilities which are necessary to the board’s basic function of providing for the education of the children in their districts. Collective bargaining is seen as essentially incompatible with this legislative scheme, either because it represents an illegal sub-delegation of authority to teacher unions or to arbitrators, or because any contractual arrangement limiting the boards’ discretionary powers is seen as a derogation of their corresponding duties. An Illinois appellate court, for example, stated the issue in terms of whether a school board could legally “impose upon itself conditions precedent” to the exercise of its discretionary powers to terminate a nontenured teacher.

It is because these powers and duties are delegated to local boards by state statutes that such statutes are seen as preempting collective bargaining on a wide range of issues. Therefore, unlike Private Sector model courts, these courts need not find any statutory limitation on the powers of local boards in order to limit their ability to contract. On the contrary, it is the board’s responsibility to act without outside limitation that prohibits the making of the contract.

Sometimes the board’s delegated powers are found in specific enabling statutes covering the area of the grievance. In Board of Education v. Rockaway Education Association, for example, the court held that the school board was entitled to an injunction preventing arbitration of a grievance involving a superintendent who directed a teacher not to conduct an in-class debate on abortion. The contract specified that “whenever appropriate for the maturation level of the group, controversial issues may be studied in an unprejudiced and dispassionate manner.” The court held that this clause


129. Wesclin Educ. Ass’n v. Board of Educ., 30 Ill. App. 3d 67, 331 N.E.2d 335, 340 (1975). Strictly speaking, Illinois courts are not interpreting collective bargaining statutes here; outside of the urban areas, collective bargaining is based upon the courts’ ruling in cases such as Classroom Teachers Ass’n v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973). It may well be questioned, however, whether the collective bargaining statutes have any great effect upon Public Management courts once the legality of collective bargaining agreements themselves has been established. See School Comm. v. Raymond, 343 N.E.2d 145 (Mass. 1976)(court’s ruling on scope of bargaining based upon illegal delegation of authority not affected by whether new collective bargaining law was in effect).

interfered with the board's statutory duty to provide "courses of study suited to the ages and attainments of all pupils." In another case, the Illinois Supreme Court found that statutory language which entitled certificated employees to "contractual continued service" status after two years, except on written notice of dismissal with supporting reasons, imposed a discretionary, nondelegable duty on the board to appoint and terminate teachers without contractual limitations.

Such explicit statutory language is not necessary, however. An Illinois court found exclusive board control of faculty promotions "fairly implied" in the act empowering boards of trustees to "employ such personnel as may be needed . . . ." And in perhaps the most revealing use of statutory preemption, the Massachusetts court found that the issue of the abolition of the position of music supervisor was preempted by the statutory declaration that school committees "shall have general charge of all the public schools." All management prerogatives were thus "statutorily" preempted from contractual limitations.

Although these courts often quote the language of School District of Seward Educational Association v. School District that boards must be precluded from bargaining about "educational policy," "management prerogative," or "statutory duties," the only one of these three phrases which is meaningful in determining the actual scope of restricted subjects among these courts is "management prerogatives."

"Statutory duties" is a term of little independent significance. As revealed by the Massachusetts court and implied by the liberal application of more specific enabling statutes in the other jurisdictions, the determination of scope questions is not based on the explicit language of the statutes themselves. Nor are all enabling statutes given the same preemptive weight. Statutes giving local boards authority to determine compensation, for example, are regarded as limiting only when there is a direct conflict with the provisions of the contract.

The term "educational policies" also has little significance except as applied to the traditional view of managerial prerogatives. In Dunellen the abolition of the department chairmanship was related to the "policy" of increasing "educational productivity." In another case the New Jersey
Supreme Court characterized determination of the college calendar as a "major educational policy." Upon examination, "educational policy" is synonymous with those managerial functions which the court deems essential to carrying on the business of education.

The "managerial prerogatives" protected by these courts from collective bargaining derive their content, instead, from private sector conceptions. The general parallel between public and private management positions is illustrated by one description of management's attitude in the federal civil service. "It is management's job (or right) to manage; the 'owners' of the enterprise, whether they be stockholders or taxpayers, will reap higher dividends if management is given a free hand, unencumbered by any 'outside' interference." Shortly after the Taft-Hartley Act was enacted, a list of items was claimed to be "absolute management prerogatives" by private sector management. This list bears a striking resemblance to the Public Management courts' conceptions of prohibited subjects of bargaining:

1. The types of products to be manufactured,
2. Location of plants and their number as well as location of work within the plant,
3. Methods, processes and means of production,
4. Organization of internal production or distribution units,
5. Size of the work force and assignment of work,
6. Work and quality standards,
7. Promotion of rank and file to supervisory and managerial positions,
8. Discipline of work force, including discharge,
9. Use and control of plant property,
10. Scheduling of operations and shifts,
11. Health, safety and property protection measures where employer must meet legal requirements,
12. Selection of employees for hire,
13. Price determination and other aspects of relationship to customers.

Of course, Public Management courts often express the notion that private and public sector employment relations are essentially different. What is meant is that the outcome of the management claim in the public sector must be different from its outcome in the private sector. None of the items listed above would be prohibited subjects of bargaining in the private sector today. In fact, most have been held to be mandatory, including methods of work, assignments, work standards, promotion, discipline and discharge, scheduling, safety rules, and selection of employees. But such

138. Burlington County College Faculty Ass'n v. Board of Trustees, 64 N.J. 10, 301 A.2d 733 (1973).
141. GORMAN, LABOR LAW, supra note 90, at 496-507; DEV. LAB. LAW, supra note 7, at 403-07.
determinations under the National Labor Relations Act are rejected in Public Management jurisdictions as "inapplicable" to public employment. 142

D. Objections to the Public Management Model

The first basic objection to the Public Management approach is that the doctrine of illegal delegation of authority is theoretically unsatisfactory as a basis for the interpretation of collective bargaining statutes. The illegal delegation doctrine stems from the notion that legislative power should be exercised by elected legislative representatives. It is difficult to see how this limitation applies directly to the collective bargaining process.

Teachers, after all, are not given the authority under collective bargaining statutes to make laws; rather, they are given a particular kind of access to the legislative decision-making body. The basic objection has been to the degree of influence which teachers, as an interest group, may thus be permitted to exercise on the political process. 143 This is quite different, however, from legislative bodies actually turning over rule-making functions to agencies whose decisions will have the force of law. In collective bargaining, the legislative body (the school board) retains its right to make the rules for the school system. 144

Nor do grievance arbitrators exercise legislative power when they interpret collective bargaining agreements made between teachers and school boards. Their function is quasi-judicial. It is no more an exercise of legislative power than is a court's determination of the proper limits of government's power under applicable statutes.

This factual distinction accounts for the curious reluctance of the courts to invoke the traditional limitations of the illegal delegation doctrine, that is, legislative standards and safeguards against discretionary abuse. These limitations are applicable to agencies that have actually been given decision-making power, not simply access to decision-makers or quasi-judicial authority.

At the heart of the courts' concern is not the proper location of legislative authority, but the degree to which governmental power can or should be limited by private individuals or groups in a democratic system. In

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143. See Wellington & Winter, Limits, supra note 26, at 1123-26; Summers, Public Employee Bargaining: A Political Perspective, 83 YALE L.J. 1156 (1974) [hereinafter cited as Summers, Political Perspective].
144. Of course, this may not be the case when compulsory interest arbitration applies, but that has little application to the scope of bargaining decisions being made in these cases. Of the jurisdictions cited as applying the Public Management model, only Nebraska has a mandatory interest arbitration statute applying to teachers. NEB. REV. STAT. § 48-810 (1974) (Court of Industrial Relations). See note 6 supra.

When the interest arbitration has been the issue, the traditional illegal delegation of authority doctrines have been applied with considerable sophistication. See, esp., Dearborn FireFighters Union v. Dearborn, 394 Mich. 229, 231 N.W.2d 226, 252-68 (1975) (Williams, concurring).
short, these courts are concerned with the traditions of sovereignty and sovereign immunity. The proper analogy is the suit against the government by private individuals. It is in the context of such suits that the courts have examined the extent to which the interests of a private individual or group can be permitted to weigh against the interests of the government as the representative of the whole people. According to the traditional concept of sovereignty, it is incongruous to place the representative of the whole people in a position of “equality before the law” with a mere private citizen. Similarly, the position of the public employer before a “neutral” arbitrator seems to be an anomaly.

There are two basic problems with the direct application of this doctrine to public sector collective bargaining. One is that the doctrine itself has been eroded by years of public criticism. President Lincoln declared, “It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.” In the context of public sector collective bargaining, the Taylor Commission lent its prestige to the position that “Sovereignty has been used to justify unilateral, inequitable decisions by governmental administrators.” Or, as another commentator observed, “Public employers, operating behind the mask of sovereignty, succeeded in escaping the obligations imposed upon their private sector counterparts.” As the public perception of the equities involved has changed, the viability of sovereignty as a barrier to collective bargaining has been undermined.

The second and more theoretical problem with the application of the sovereignty doctrine to teacher collective bargaining after the enactment of collective bargaining statutes is that the sovereign may always limit its own “immunity.” “To deny state governments this right would be to deny their sovereignty.” Just as the Federal Tort Claims Act removed the barrier to private tort suits against the federal government, so the state legislature may remove the sovereignty barrier against “contract suits,” or their grievance arbitration equivalents, arising out of collective bargaining.

Nevertheless, some concepts developed by the courts in the context of sovereign immunity may be helpful in the public sector context. Just as it is unthinkable that it be a “tort to govern,” so perhaps it must not be a “breach.” The trend in sovereign immunity is toward “judicial abstention” in areas of basic policy decisions. The government cannot be “liable for
fault of the Secretary of State in getting too close to the brink of war."  

Similarly, perhaps courts and arbitrators should not hold school boards in breach when to do so would involve the judicial tribunals themselves in educational policy decisions. Surely the line resulting from such an examination would be very different from one that places every traditional management function beyond the reach of contractual liability.

A second basic set of objections to the Public Management model is more practical than theoretical. By excluding the whole gamut of traditional management prerogatives from the scope of bargaining, the courts may significantly interfere with the basic efficiency of the governmental operation which they are purporting to protect.

The first consideration is that if so many items of vital concern to employees are excluded, collective bargaining will not have the intended effect of resolving disputes satisfactorily. The employees may be frustrated at having no opportunity to be heard. As one commentator has observed, "The collective bargaining process is in part a therapeutic process, and it should permit the parties to address fully all problems which affect the bargaining relationship." Perhaps more importantly, "The success of any bargaining procedure requires that those who are affected believe that it is an equitable method for resolving their disputes." The effect on employee morale of a legal standard which permits, and even encourages, an employer to challenge a contract after the bargain has been made and the grievance has arisen can easily be imagined.

Contrary to the assumption of some commentators that public employees are concerned primarily with the bargainable monetary issues, it may be that the excluded nonmonetary items are actually of greatest concern to teachers. "Recognition of professional status" and "freedom from intolerable, bureaucratic rule-making (including selective enforcement of such rules)" have been listed as the major factors in teacher support of collective bargaining, along with "community acceptance of teacher pay scales commensurate with the value of the service rendered in the community." Teachers "typically" include in collective bargaining contracts items such as school calendar, length of the school day, length and frequency of faculty meetings, relief from overcrowded conditions, promotions, reassignments, and transfers. Most, if not all, of these items would be excluded from bargaining in Public Management jurisdictions.

Similarly, a recent survey of Los Angeles teachers conducted for the

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152. Davis, supra note 125, at § 25.03.
153. Edwards, supra note 9, at 916.
teachers union by an independent research firm found administration of the
district second only to class size as a major problem facing teachers. The
teachers felt that the policies and practices most in need of change were
district transfer policies and teachers' exclusion from the development of
administrative regulations and evaluation procedures. More than ninety
percent of the teachers felt that collective bargaining (which was about to go
into effect) would improve teaching conditions primarily by allowing
teachers to be heard in decision-making. 157

The experience of the federal sector with the exclusion of traditional
management prerogatives from the scope of bargaining is illuminating. 158 A
focus of employee dissatisfaction has been the civil service system, in which
rules are "unilaterally initiated and administered by the government em-
ployer." 159 The limited scope of bargaining was described as "one of the
major obstacles to developing balanced and fruitful labor relations" in the
federal service. 160 Public managers took the opportunity, presented by the
restrictive scope provisions of the Executive Orders which established
collective bargaining, to "reduce the new program to a reasonably accurate
facsimile of the status quo ante." 161 The new Federal Labor Relations
Council appears to presage a major change placing the burden of proof upon
public management to show precisely how union bargaining proposals
would interfere with their management responsibilities. 162 In the meantime,
a great deal of time and energy has been expended with little increase in the
efficiency of governmental operations.

Another practical objection to the exclusion of these items from the
scope of collective bargaining is that excluding employees from decision-
making process may violate principles of sound management. As noted by
Professor Feller, the acceptance of collective bargaining in private industry
may in large part be attributed to the belief of private sector management
that there are distinct advantages for the corporation in the rationalization of

157. Poll conducted in the fall of 1976 by Corey Research, reported in United Teachers,
158. Compare: Exec. Order No. 10,988, §§ 6(b) and 7(2), 3 C.F.R. 521 (1959-63 compila-
tion); Exec. Order No. 11,491, 5 U.S.C. § 703, §§ 11(a) and 12(b) (1970), as amended, Exec.
Kassalow, Perspective on the Up surge of Public Employee Unionism, in WOODWORTH &
PETERSON, supra note 2, at 20, 26.
160. Mathews, Federal Labor Relations: A Program in Transition, in A Symposium:
Labor Relations in the Public Sector, 21 CATH. UNIV. L. REV. 512, 537 (1972). See also,
Kassalow, supra note 159.
PETERSON, supra note 2, at 141, 145. See also, Blaine, Hagburg & Zeller, Discipline and
Discharge in the United States Postal Service: Adverse Action and Appeal, WOODWORTH &
PETERSON, supra note 2, at 88, 96.
162. Dept. of the Army Corps of Engineers, FLRC No. 71A-46 (1972), reprinted in R.
SMITH, H. EDWARDS & T. CLARK, LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND
the system of governance in employer-employee relations and in the basic level of acceptance and cooperation by the employees as a result of their participation. Current literature on management processes generally emphasizes "cooperation, consultation, communication, involvement and consent." These elements are important to the level of job satisfaction, and therefore to the level of productivity of subordinate employees. Collective bargaining is the formalization of that process. Certainly there is evidence to suggest that without pressure public school administrators, like their federal counterparts, will do little to relinquish their former unilateral control. As an advocate of the Public Management approach has conceded:

There is probably no book on educational administration written in the last twenty-five years which does not advocate a type of consultative participation plan. Unfortunately, there have been very few boards or administrators who have taken this so seriously as to establish a mechanism by which it is done broadly or with any regularity . . . .

Finally, there is an essentially political objection to the dominant role played by the courts which adopt the Public Management approach. Almost all local school boards are elected representatives of the people. It is one thing for courts to determine that collective bargaining statutes do not require local boards to bargain about items which arguably fall within the sphere of management prerogatives. It is quite another thing for the court to tell boards that they may not enter into agreements about those subjects, no matter what the elected representatives' own policy judgments may be. If sovereignty, and indeed the basic principles of democracy, are to be respected, it hardly seems appropriate for the courts to limit the authority of elected officials to act in what those officials perceive to be the best interests of the community. Collective bargaining never requires a board to reach agreements on items to which it or its constituents are opposed in principle. The courts' prohibitions, on the other hand, are absolute.

The basic justification advanced by the commentators for court intervention is, in essence, that certain items must be excluded from collective bargaining because local boards of education, if left to their own devices, will not act in the public interest. The rationale is that there is no effective

166. Moscow, Coll. Barg. Pub. Empl., supra note 166, at 127. Eighty-five percent of local school boards are elected: the remaining fifteen percent are appointed by local elected officials.
counter to a strike by public employees. Boards will necessarily cave in to irresistible public pressure to end the curtailment of services, without considering the detrimental long-range consequences of such a settlement. Therefore, the only way to prevent teachers from having almost total power to determine the outcome of certain issues is to exclude those issues from collective bargaining altogether.  

An important assumption in this argument is that the basic concern of the public at large is labor peace, rather than efficiency or reduced costs. It is possible, on the other hand, to assume instead that the "public" is composed of two basic groups, users and taxpayers, which share a common interest in obtaining more services for less money. The crucial factor in the decision-making process is which of these assumptions is held by the politicians involved. The "taxpayers' revolt" characteristic of the seventies is often painfully apparent at the local school board level, where taxpayers have the power to reject requests for tax increases. Thus, the prevailing view seems increasingly likely to be that the public prefers economic efficiency to labor peace.

Even if the prime consideration of voters (or political decision-makers) is to prevent disruption of services, a decision by teachers to strike does not necessarily have that result. There are, in fact, effective counters to a teacher strike. School districts in California, for example, have been able to staff schools with large numbers of substitute teachers and, on a short-term basis, with administrators from surrounding districts.

Nor do teachers' strikes have the economic impact of private sector strikes. Staffing a school with substitutes often represents a substantial savings to a district. On the other hand, contrary to the effect of strikes in


169. C. Summers, Political Perspective, supra note 142, at 1159.

170. For the experiences of a public official who dramatically and successfully gambled on the Summers view, and believes in broad latitude for public employee bargaining, despite his political battles with the city's unions, see Uhlman, Seattle: in Two Mayors and Municipal Employee Unions, Public Employee Unions: A Study of the Crisis in Public Sector Labor Relations 77-84 (A. Chickering ed. 1976) [hereinafter cited as Public Employee Unions].

Wellington & Winter have not been persuaded by events of the last five years. Updated version of The Limits of Collective Bargaining in Public Employment, Public Employee Unions 51, 75 (rev. ed. 1976).


172. Substitutes in the Cupertino Union School District strike were paid $60 per day, while
most other public agencies, a teacher strike may cause a loss of funds to the employer. Where school districts depend at least in part upon revenues from the state calculated on the basis of average daily student attendance, there may be a decrease in revenue. This effect, however, is dependent primarily upon the decisions of users, not of teachers. The effectiveness of a teacher strike is thus likely to depend upon the degree of public support that can be generated among users of the service. If the public continues to use the service, whether from perceived necessity or lack of sympathy for the strike, there will be no loss of revenue and no pressure on the school board to settle.

In fact, one important intended effect of a strike is to increase the political involvement of the users of the service as a counter to the pressure of taxpayers, generally for lower costs, even at the expense of quality of service. This tactic can be successful only if teachers can convince the users that the issue is equity or the quality of education and that the outcome of the strike will not simply be higher costs or reduced services. The Chairman of the New York Governor's Committee on Public Employee Relations has noted that "a sharp distinction is drawn by the public between strikes as an expression of civil protest against patently unjust treatment and strikes as a regular way of life, that is, as a recognized institutional form for establishing employment terms." These are all distinctions seldom made by the commentators and are certainly not reflected in the Public Management perspective.

The group which may stand to lose the most from increased public involvement generated by a strike is the public school administrators. Little attention has been paid in the literature to analyzing the political influence of these public managers. It has been suggested, for example, that teachers have more influence with school boards than do other interest groups because of their cohesiveness and resource base, their "special strategic proximity" to the board, their status as "experts" about education, and the

the mean staff salary lost by striking teachers was $80-90 per day; the difference represents a savings to the district of at least $192,000. Note 171 supra, at 41.


174. In the El Rancho Unified School District attendance ran at only 60% of normal and resulted in a substantial loss of revenue to the district. 31 CPER 42 (Dec. 1976). In the Sunnyvale Elementary School District, on the other hand, the student attendance ranged from 80 to 85% over the two weeks. Note 171 supra, at 41.


177. An exception is C. Summers, Political Perspective, supra note 142, at 1192-97, especially with regard to budget procedures. See M. UROFSKY, WHY TEACHERS STRIKE 18-22 (1970) for a critical examination of the role played by the central district office in preventing adequate communication between board, community and teachers prior to the 1968 Ocean Hill controversy and teacher strike in New York City.
dependence of the board upon them for implementation of board policies. The commentator also adds, as a source of their influence, the teachers’ ability to strike.\footnote{178} All of these factors, except the ability to strike, surely would contribute to an even greater influence of administrators on the political process during the normal course of events. Indeed, “employee demands [may] expose the fact that these administrators are all too frequently the actual policy-makers, not the various governing boards and elected officials.”\footnote{179} This type of interest-group analysis does not occur to many supporters of the Public Management position. Rather, their basic perspective is that administrators are not an “interest group” because their interest is the same as the public interest: “When management loses, the public loses.”\footnote{180}

It is from this perspective that teacher strikes may well be seen as dangerous to the “public interest.” However, once a distinction is made between the public interest and management interests, it seems clear that the greater public debate and involvement likely to be generated by a strike (and which may well be its primary effect) may result in decisions more consistent with the interests of the community than those generated by the “normal American political processes”\footnote{181} extolled by the commentators. Indeed, those “normal processes” may represent simply the coalition of taxpayers and school administrators which has traditionally dominated the politics of the public schools.

An alternative argument advanced for the danger of committing such vital collective bargaining decisions to elected board members is that even in the absence of strike pressures they may “give away the store” because they are inexperienced or inept or generally sympathetic (not sufficiently antagonistic) to the position of teachers.\footnote{182}

The first portion of this argument is based on the notion that board members are naive amateurs facing seasoned teacher union professionals. Even if this were ever the case, it seems an increasingly unlikely scenario. School board and administrative organizations are now providing workshops, information networks, and consultation services for board mem-

\begin{itemize}
\item \footnote{178} R. Summers, \textit{Public Benefit Conferral}, supra note 167, at 12-13.
\item \footnote{179} Kay, \textit{The Need for Limitation Upon the Scope of Negotiations in the Public Sector, II}, 2 J. L. & Educ. 155, 156 (1973): “Employee demands expose the fact that these administrators are all too frequently the actual policy-makers, not the various governing boards and public officials.”
\item \footnote{180} Indeed, two former public management representatives have suggested that in order to promote the “public interest,” elected officials should be excluded from the process altogether. Siegal & Kainen, \textit{Political Forces in Public Sector Collective Bargaining}, 21 Cath. Univ. L. Rev. 581, 587 (1972). This is often the source of the complaint about “end run bargaining,” which involves direct contact between teachers and their elected employers rather than simply communication through the management hierarchy.
\item \footnote{181} Wellington & Winter, \textit{Limits}, supra note 26, at 1126.
\item \footnote{182} Metzler, \textit{supra} note 165, at 146-48 (1973). See generally, Siegal & Kainen, \textit{supra} note 180.
\end{itemize}
bers. Many boards are not directly involved in negotiations at all. When their own professional managers are not used, the boards may hire (at taxpayer expense) negotiations experts to represent them at the table. Furthermore, board members with backgrounds in private industry are likely to be considerably less naive about collective bargaining tactics than are teachers, who often conduct their own negotiations.

As for sympathetic board attitudes, observations of mediators and arbitrators indicate that board members are likely to take more intransigent positions than those taken by private industrial managers. "Board militancy" is an increasing phenomenon in the seventies. On the other hand, there may be boards who do not equate the interests of the community with the interests of administrators in maintaining hierarchical patterns of authority. Such boards would be inclined, from the perspective of the administrators, to "give away the store." But this does not seem to be a policy judgment to which the courts should give absolute legal authority.

In short, much of the case for the Public Management position rests not on the threat to democracy represented by collective bargaining, but on the threat to the power of administrators.

III
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POLITICAL PROCESS MODEL

These courts view school boards as serving a dual role. First, as employers, boards are viewed as properly subject to the same collective bargaining restraints as employers in the private sector. Second, as political decision-makers, they are responsible for resolving the conflicting interests of various groups in the community, and in this role they must be free from any constraints upon their ability to make policy judgments. The courts distinguish decisions related to employee benefits and to those management functions concerning the direction, supervision, and employment of workers, on the one hand, from decisions related to basic educational policy, on the other. The line between educational policy and terms of employment (or managerial functions) is based upon the courts' perception of the degree of involvement that various groups in the community, other than teachers, should have in the decision. The courts' primary concern is that manage-

183. In California, for example, the California School Boards Association provides training and assistance in table negotiations. Public managers have formed a consortium of 92 districts in the Los Angeles area. For fees ranging from $100 to $2500, the School Employers Association provides services ranging from information to representation before the Educational Employment Relations Board. Its executive committee is composed of eight superintendents, and it has a consultant panel of negotiations experts. 31 CPFR 46, supra note 171.

184. According to a list compiled by the California Teachers Association Regional Resource Center (Hayward, Jan. 9, 1977), 18 professional consulting firms and individuals have been hired by at least 67 school districts in Northern California alone for the purpose of representing the districts in negotiations.

185. MOSKOW, COLL. BARG. PUBL. EMPL., supra note 166, at 159.

186. DuPont & Tobin, supra note 155, at 717.
ment and labor should not use the collective bargaining process to exclude other interested and affected groups from participation in the political decision-making process.

A. Mandatory Subjects: Duty to Bargain

There are two decisions which typify the use of the Political Process model. In City of Biddeford v. Biddeford Teachers Association,\(^\text{187}\) the Supreme Judicial Court of Maine\(^\text{188}\) dealt with the interpretation of the scope of bargaining provisions\(^\text{189}\) of its municipal employee collective bargaining statute in the context of a board of education challenge to the decisions a statutory interest arbitration panel. In City of Beloit v. Wisconsin Employment Relations Commission,\(^\text{190}\) the Wisconsin Supreme Court dealt with a challenge to a set of declaratory rulings by the state administrative board interpreting the newly revised scope of bargaining provisions\(^\text{191}\) of its longstanding public employee collective bargaining statute.

Despite different procedural postures, the decisions exhibit common methods of interpretation of the scope of bargaining provisions of the two statutes. Both courts proceed from the position that the school board "is an employer under the statute and it is also a public body of elected officials with powers and duties for the operation of the school system in the public interest."\(^\text{192}\) Collective bargaining statutes can therefore be reconciled with the statutory responsibilities of local boards by distinguishing their functions as employers from their functions as determiners of public policy, the aspect of management that is unique to public employers. To determine public policy, "more than the bilateral input of the public employer and the employees' bargaining agent is required for deciding the appropriate public policy."\(^\text{193}\) When "judgments transcending teacher interests" and "bearing too substantially upon too many and important non-teacher interests" are involved, the political role of the school board in receiving input from and reconciling the interests of a broad variety of interest groups and individuals must be protected.\(^\text{194}\)

In determining which items or proposals are subject to the duty to bargain, these courts use two different standards, depending upon whether the subject is perceived as impinging upon the boards' discretion in the area of educational policy or merely upon its managerial authority as employer.

\(^{188}\) It should be noted that references to the "court" are to the opinion of Judge Wernick, 304 A.2d 387, 402 (1973), concurring in part and dissenting in part. In fact his opinion represents the prevailing view of an equally divided court (on the issue of the constitutionality of the interest arbitration provision of the statute) and was the only opinion that dealt with the scope of bargaining issues.
\(^{190}\) 73 Wis.2d 76, 242 N.W.2d 231 (1976).
\(^{191}\) Wis. STAT. § 111.70(1)(d) (1971).
\(^{192}\) City of Beloit v. WERC, 73 Wis.2d 76, 79; 242 N.W.2d 231, 234 (1976).
\(^{193}\) Id. 73 Wis.2d at 79, 242 N.W.2d at 234.
\(^{194}\) City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 420 (1973).
With regard to managerial authority, the Maine court explicitly rejected what it termed the "extreme 'exclusive management prerogatives' interpretation" urged by the school board.195 The result of such a position, it argued, would be that "all practical substance [would] be scooped out of the concept of teacher working conditions."196 Rather, when traditional hierarchical relationships of employers and employees are involved, the question is whether an item or proposal is related to wages, hours, or working conditions. Once teachers have shown that there is a relationship to working conditions, a "prima facie case of eligibility for collective bargaining is established," which is not overridden by a showing that managerial functions of "organization, supervision, direction and control of personnel"197 are involved.

Therefore, in Biddeford the required hours or days of teacher attendance when school is not in session198 and in Beloit the required teacher attendance at in-service training sessions199 were both held mandatorily bargainable, even though the management "prerogative" to direct the work force was infringed upon. Moreover, in Beloit proposals related to evaluation procedures, teacher personnel files, lay-offs in order of seniority, and "just cause" standard for dismissal were upheld as mandatory.200 Although each item admittedly restricted management's supervisory control of the work force, each one was related to job security. Since job security has been established in the private sector as an element of "working conditions," this determined the classification as mandatory.

Some items related to managerial functions were excluded from the mandatory category by the Wisconsin court, but only because they were seen as totally unrelated to working conditions. For example, a proposal that administrators be required to provide assistance to teachers receiving poor evaluations was excluded from mandatory bargaining, not because the management function outweighed the job security element, but simply because, in the court's perception, the item related solely to "management techniques."201 Similarly, proposals related to student discipline were mandatorily bargainable only insofar as they related to teachers' safety, which is another established private sector element of working conditions.202

The Maine court, on the other hand, appears to have taken a more expansive view of "working conditions." The court classified the hiring of special teachers to teach particular subjects or to perform specific remedial

195. Id. at 419.
196. Id.
197. Id. in Beloit the court refers to these functions simply as "management and direction." 73 Wis.2d 76, 82; 242 N.W.2d 231, 237 (1976).
199. 73 Wis.2d 76, 83; 242 N.W.2d 231, 240 (1976).
200. Id. at 236-39.
201. Id. at 242.
202. Id. at 239.
or counseling tasks as involving "working conditions" because of the potential effect of the proposals in lessening the number of tasks required of classroom elementary teachers. The hiring and use of teacher aides for non-teaching duties was also seen as directly related to the working conditions of teachers who would otherwise be expected to perform such tasks. The decision that these proposals were within the "mandatory" area is most notable, however, for its lack of concern with the degree to which management functions of "organization, supervision, direction and distribution of personnel," are involved.

The standard when "working conditions" and "educational policy" are involved is a different matter however. In *Biddeford*, the court asserted that the prima facie case of eligibility for collective bargaining might be "overridden by educational policy considerations." In fact, as applied by both courts, the result of categorizing an item as an "educational policy" decision is to exclude it from mandatory collective bargaining, no matter how substantial its effect upon wages, hours, or working conditions.

Thus, in *Biddeford* the court excluded class size from mandatory collective bargaining as an item of "educational policy," even though the court perceived the issue as "plainly and seriously" affecting teacher working conditions. Similarly, the Maine court excluded the school calendar from mandatory negotiations, although the days of teacher attendance beyond the school year were considered mandatory. Clearly, the effect upon teacher "hours and working conditions" of each item is the same, but the calendar was held to involve an "educational policy" decision, while the days of teacher attendance was not.

The Wisconsin court achieved the same result by adopting the "impact" doctrine. Basic educational policy decisions are excluded from mandatory collective bargaining, while the effects of such unilateral policy decisions upon wages, hours, and working conditions remain mandatory subjects of bargaining. In *Beloit*, the establishment of class sizes, remedial reading programs, and summer school programs were thus excluded from mandatory bargaining as educational policy.

The basic question for the courts concerning the scope of mandatory bargaining thus becomes which decisions of school boards or management are to be considered matters of "educational policy." It is in this context that the distinctive approach of the Political Process model courts deserves close analysis.

One articulated test of "educational policy" is whether an item sub-

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204. Id. at 422.
205. Id. at 419-20.
206. Id. at 420.
207. Id. at 420, 421.
stantially affects "too many and important non-teacher interests." This formulation, however, is insufficient to explain the courts’ application of the "educational policy" principle to specific situations. In *Biddeford*, for example, the court rejected the argument that the high cost of an item and the resultant impact upon the tax rate should serve to place it in the category of an "educational policy" decision.\(^ {210}\) The impact of such decisions upon "non-teacher interests" (i.e., those of the taxpayers or advocates of other uses for the educational tax dollars) was insufficient to categorize the item as educational policy.

Alternatively, these board decisions were characterized as involving "fundamental" value choices.\(^ {211}\) But the Maine court also rejected the argument that the decision to spend funds for teacher aides, for example, necessarily involved educational policy by virtue of its potential effects upon the availability of funds for "other items of higher educational priority."\(^ {212}\) Of course, such arguments could also be used to preclude salaries themselves from mandatory bargaining, and neither court’s conception of "educational policy" is so broad.

Another characterization of "educational policy" advanced by both courts is that it encompasses decisions affecting the "quality of education."\(^ {213}\) The courts’ rationales and decisions regarding specific items reveal, however, that the effect on quality is not the determining factor. Some items were characterized by both courts as involving "educational policy" without any discussion of their impact upon educational quality.\(^ {214}\) On the other hand, both courts concluded that certain items, such as the evaluation of teachers or the hiring of specialized teachers, did not involve educational policy, despite the relationship of such issues to educational quality.

The basis actually used by the courts for categorizing an item as "educational policy" is articulated by the Wisconsin court: A decision is a matter of educational policy when "[m]ore than the bilateral input of the public employer and the employees’ bargaining agent is required for deciding the appropriate public policy."\(^ {215}\) This input is required, in the view of these courts, when the interests and views of other affected groups may either not be known or not be advanced by teacher or board representatives.

The question of whether the tax rate should be raised to accommodate higher salaries (or hire teacher aides) may be a difficult one to decide, but the court can easily assume that the issues and rationales will be well known.

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210. *Id.* at 422-23 (hiring teacher aides, specialist teachers).
211. *Id.* at 414.
212. *Id.* at 422.
213. *Id.* at 420-21 (school day); City of Beloit v. WERC, 242 N.W.2d 231, 240-41 (1976) (class size).
214. City of Beloit v. WERC, 242 N.W.2d at 241-42 (summer school, remedial reading); City of Biddeford v. Biddeford Teachers Ass’n, 304 A.2d at 421 (calendar).
to both sides at the bargaining table. Other decisions, however, may involve
alternatives, rationales, or interests not known to or advanced by either side.
Therefore, the "multilateral input of employer, employees, citizen groups
and individual citizens [must be] an integral part of the decision-reaching
process."

Teachers are entitled to a voice in such decisions, but only "along with other
groups and individuals similarly concerned." The collective bargaining
process may be too powerful and exclusive a lever.

It was from this perspective that the Biddeford court excluded the
school calendar from the scope of mandatory items. The rationale was not
that fundamental value judgments or educational quality were involved, but
rather that the "plans and interests" of parents, non-teaching school person-
nel, and other members of the community affected by student vacations
(presumably businesses with student customers or employees, for example)
were involved and needed to be considered in the decision-making proc-
ess.

Similarly, decisions that involve "educational philosophies and
theories and the manner of their implementation" presumably would
benefit from the input of spokesmen for a wide variety of views. These are
"educational policy" decisions not simply because the quality of education
is involved, but because the court sees the potential effects upon the quality
of education of alternative approaches being proposed as debatable.

In Biddeford, for instance, the court saw the issue of the length of the
teachers' work day as potentially involving decisions regarding "the extent
to which [the quality of education] may be improved or weakened by use of
various types of substitutes, technological or otherwise, for the living
presence and active participation of teachers." This is a highly debatable
subject, one upon which teachers, administrators, parents (and students) are
likely to have a wide variety of views and suggestions. Another issue which
both courts saw as involving similar considerations of educational theory
was the issue of class size. However, where the courts perceived the
potential effects of a proposal upon educational quality as not a debatable
issue, the item was not excluded from mandatory bargaining. An example is
the case of specialist teachers, where the court saw the effects as clearly
positive but identified the question as merely whether the money should be
raised to achieve them.

A basic issue which these courts saw as requiring multilateral input is
the determination of what should be taught. The court in Beloit excluded the

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216. Id.
217. Id.
218. 304 A.2d at 421.
219. Id. at 420.
220. Id. at 421.
221. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d at 420 (1973); City of Beloit
v. WERC, 242 N.W.2d at 240-41 (1976).
222. 304 A.2d 422-23.
establishment of a remedial reading program from mandatory bargaining because it involved the issue of "whether the district should commit itself to certain educational goals." In *Biddeford* the court took care to note that the proposal for special teachers of certain subjects did not involve the question of whether those subjects should be taught, but simply who would teach them. Therefore, the subject remained in the mandatory category.

In sum, the primary limitation upon the duty to bargain in the Political Process model is the courts' pragmatic assessment of the process of political decision-making at the local board level. Those issues which the courts think require the input of a variety of individuals and groups are excluded, while issues related to "merely" managerial functions, or upon which there is basic agreement as to the alternatives involved, are subject to the duty to bargain.

**B. Educational Policy: Permissive or Prohibited?**

These two courts appear to reach opposite conclusions on the question of whether items involving educational policy should be permissive or prohibited subjects of bargaining. The Wisconsin court affirmed the Wisconsin Employment Relations Commission's ruling that decisions establishing class size, remedial reading programs, and summer school were "permissive" subjects of bargaining, even though each was an educational policy decision. The Maine court, on the other hand, described class size as lying "within 'educational policies'—excluded from collective bargaining and binding arbitration."

In both jurisdictions, however, the question will not be finally resolved until the issue arises in the context of grievance arbitration, rather than in the context of bargaining (Wisconsin) or, at the opposite end of the spectrum, interest arbitration (Maine). Only then will we know whether each court's basic assumption is that the opportunity for multilateral input is significantly curtailed by collective bargaining itself or by the process of interest arbitration.

It may be that the results will be the opposite of those suggested by the courts' language quoted above. The Wisconsin court, for example, elsewhere quoted with approval Clyde Summer's contention that "the bargaining table is the wrong forum and the collective agreement is the wrong instrument" for deciding matters of curriculum content. The court said that where the input of various groups is required, "bargaining sessions are not to replace public meetings of public bodies in the determination of the appropriate policy."

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223. 242 N.W.2d at 241.
224. 304 A.2d 422-23.
228. City of Beloit v. WERC, 242 N.W.2d at 234-35 (1976).
In contrast, the Maine court in *Biddeford* stressed the importance, in the context of interest arbitration, of having educational policy matters decided "by persons directly responsible to the people." In a subsequent case, the court has suggested that it may not exclude educational policy matters from grievance arbitration consideration. Unlike the Wisconsin court, the Maine court may be content to let the political processes ensure access of citizens and interest groups to the school board.

**C. Objections to the Political Process Model**

In the pragmatic terms suggested by the courts' own approach, there are three basic objections to the courts' application of this model.

The first is that the determination of which subjects "require" multilateral input may itself require more expertise in local politics or in educational philosophy than is possessed either by the courts or by a state public employee relations board. In New York, for example, the issue of transfers or layoffs in terms of seniority was the major focus of community concern in the Ocean Hill controversy which precipitated the 1968 teacher strike. The courts in Maine and Wisconsin, however, considered those items as involving simply "managerial" functions. In some districts the issue of maximum class size may simply involve the question of expenditure of funds for additional teachers, with little thought given to alternatives to the traditional self-contained classroom model. In other districts the issue of appropriate methods of student discipline (whether or not teacher safety is involved) may be a highly volatile issue requiring resolution of a wide variety of points of view. In short, it may be a risky business to attempt to determine which items may become "hot" political issues. Such decision-making seems better suited to the function of the elected official than to the function of the judge.

A second objection to the model concerns the assumption that collective bargaining or interest arbitration necessarily excludes interested non-teacher groups from input into the political decision-making process.

One argument is that the collective bargaining process peculiarly excludes groups other than teacher and board representatives from the process of decision-making. In reality, the problem of exclusion of citizens from this process is built into the system of representative democracy. The essential

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229. 304 A.2d at 414.
231. M. UROFSKY, WHY TEACHERS STRIKE: TEACHERS' RIGHTS AND COMMUNITY CONTROL (1970) (history and analysis of Ocean Hill, based upon interviews with major participants) [hereinafter cited as M. UROFSKY, WHY TEACHERS STRIKE].
232. There is evidence that school boards tend to be particularly "undemocratic" in the sense discussed here. L. ZIEGLER, M. JENNINGS, & G. PEAK, GOVERNING AMERICAN SCHOOLS: POLITICAL INTERACTION IN LOCAL SCHOOL DISTRICTS (1974), noted in R. Summers, *Public Benefit Conferral, supra* note 167, at 8 n.11.
factor is the opportunity to be heard by the decision-makers before the decisions are actually made. This problem is not solved by assuming that "public meetings" held prior to the making of decisions will necessarily result in giving interest groups an opportunity to influence the actual decision-making process. Board members may simply wait until after the meeting to announce decisions that they have already made. Whether or not "public meetings" or "collective bargaining discussions" have occurred, the actual process of political decision-making is likely to be unaffected.

Elected officials base their decisions on a variety of factors, including the rational evaluation of data presented to them, their perceptions of the political power of respective interest groups, and bargains or mutual concessions made with interest groups or with colleagues from whom they expect support.

The concept of decision-making based upon evaluation of interest group strength and depth of conviction is not unique to collective bargaining. Such considerations will be involved whether boards deal with teachers, administrators, parent groups, or students. Nor is the "trade-off" unique to collective bargaining. The commentators or the courts may prefer a different, more "rational" basis for political decisions, but limiting the scope of collective bargaining is likely to do little to implement that preference.

Nor does the process of collective bargaining necessarily involve only teachers and the board. The New York school board, for example, has developed a process for involving administrators and parent or community groups in the preparation of its positions in teacher collective bargaining. Furthermore, there are many instances of student participation in college-level faculty negotiations, ranging from input to the governing body before final agreements are made, to actual participation in negotiations.

The opportunity for input into the decision-making process of an interest arbitration panel, as opposed to collective bargaining, may involve different considerations. Arbitrators drawn from the field of private sector grievance arbitration may, by tradition, be little inclined to expect or encourage input from anyone other than the "parties" involved. On the other hand, the board representatives, as parties, may be expected to represent the community interests. If boards do not in fact represent community interests, perhaps arbitrators need either to develop more expanded concepts of their function and role or to practice "judicial abstention." The resolution of these issues however, need not affect the determination of the scope of bargaining for other purposes. Many state legislatures have distin-

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233. C. Summers, Political Perspectives, supra note 142, at 1197.
guished subjects appropriate for various forms of "neutral" impasse resolution from subjects appropriate for agreement between boards and teachers.\textsuperscript{237}

A third objection is that the exclusion of educational policy decisions from mandatory negotiations may result in the practical exclusion of teachers from any meaningful participation in such decisions.\textsuperscript{238} In \textit{Oak Creek Education Association v. Wisconsin Employment Relations Commission},\textsuperscript{239} for example, a court upheld a commission ruling that a school board could refuse to discuss proposals for teacher participation in district curriculum committees, as well as proposals for rates of compensation for such work. The court agreed with the commission that the "guts" of the proposal was not compensation, but participation by the teachers in the process of curriculum development. Applying the pragmatic approach of the Political Process model, the court argued that although the final curriculum decisions would in theory be made by the board, nevertheless, "'selection of the means by which one obtains input to be used in making decisions is part and parcel of the power to make decisions.'"\textsuperscript{240} The court did not insist that curriculum decisions be made in "'public meetings'; it acknowledged that such decisions typically "'are for the most part the product of the work of curriculum committees.'"\textsuperscript{241} The objection was to the teachers' insistence that they be able to serve on such committees!

A survey of negotiated collective bargaining agreements that deal with educational policy in this sense has indicated that the major impact of negotiations has been to provide opportunities for teachers to participate on such committees, rather than to determine items such as courses of study, textbook selection, or methodology.\textsuperscript{242}

The basic conflict may not be between teachers and citizen groups but between teachers and administrators for access to the decision-making body. Educational policy is the area where, "'[b]ecause school-board members often lack the necessary training and knowledge, they increasingly rely on the superintendent and his administrative staff.'"\textsuperscript{243} Collective bargaining itself, or the participation which teachers are able to gain in district committees through collective bargaining, may therefore be a means of increasing,

\begin{itemize}
\item \textsuperscript{237} E.g., Rhode Island, R. I. GEN. LAWS ANN. § 28-9.3-12 (advisory only on all matters involving expenditure of money); New York, New York City Collective Bargaining Law, N.Y. ADMIN. CODE § 1173-7.OC(3)(c) (McKinney 1954) (excluding salary); and Maine itself, ME. REV. STAT. ANN. tit. 26, § 965(4) (1976) (advisory only as to salaries, pensions and insurance).
\item \textsuperscript{238} T. STINNETT, TURMOIL IN TEACHING 328-53 (1966), reprinted in WOODWORTH & PETERSON, supra note 2, at 363, 366.
\item \textsuperscript{239} 223 N.W.2d 328 (1975).
\item \textsuperscript{240} Id. at 330.
\item \textsuperscript{241} Id.
\end{itemize}
rather than restricting, the variety of views which contribute to the decision-making process.

IV

PROFESSIONAL EMPLOYMENT MODEL

These courts focus upon the special attributes of professional employees, and in particular upon their commitment to and responsibility for the quality of the service they provide. The result is that these courts arrive at an expanded concept of "wages, hours and working conditions" as these terms are used in the context of collective bargaining between teachers and school boards. Proposals are mandatorily bargained if they are "significantly related" to wages, hours, or working conditions and are not relegated to the "permissive" or "prohibited" categories simply because they intrude upon either managerial prerogatives or educational policy concerns. In fact, educational policy decisions may have particular relevance to the working conditions of teachers. It is assumed by the courts that the primary legislative intent is peaceful resolution of employment disputes between teachers and school boards, and that this is best accomplished by making all such matters subject to the duty to bargain.

A. Scope of Mandatory Subjects: Duty to Bargain

The decision most directly applying the Professional Employment model is Clark County School District v. Local Government Employee-Management Relations Board. In two consolidated cases, the Nevada Supreme Court upheld state board (EMRB) rulings which subjected a wide range of proposals to the duty to bargain.

In one of the two consolidated cases, the Clark County School District had refused to negotiate a teachers' association proposal that provision be made for "daily preparation time" for teachers. Although the court did not discuss the specifics of the proposal, such provisions usually involve relief from classroom duties for a specified period of time to enable the teacher to prepare lessons and materials or to correct student assignments. Otherwise such work must be accomplished during the time when the teacher is also responsible for supervising the work of students in the classroom or, more typically, outside of school hours on the teacher's "own time." At the secondary school level, such "preparation time" may be implemented by limiting the number of class periods for which a teacher is responsible during the day. At the elementary school level, implementa-

244. 90 Nev. 442, 530 P.2d 114 (1974). See also Fargo Educ. Ass'n v. Paulsen, 239 N.W.2d 842 (1976), in which the court specifically indicated a willingness to follow the reasoning of the Nevada Court.
245. The court merely referred generally to testimony before the EMRB regarding the "nature, needs and mechanics of classroom preparation and the value of classroom limitations." 90 Nev. at 444, 530 P.2d at 116.
247. Id., art. IV, § A(1)(b).
tion may involve alternative methods of student supervision or provision for specialized teachers to take over for the general classroom teacher during part of the day. Obviously many issues related to "managerial prerogatives" or "educational policy" may be involved in such decisions.

The court, however, agreed with the EMRB that the proposal was subject to mandatory negotiation. The court saw a direct relation between preparation time and both wages and hours: "Denial of preparation time extends a teacher's work day and affects wages as such time is uncompensated."248 Furthermore, preparation time was related to working conditions because it "affects a teacher's effectiveness and the achievement of students."249

The court explicitly recognized that the issue of preparation time involved questions of "scheduling and administration" that fell within the area of management "prerogatives". Nevertheless, the perceived connection with wages, hours, and working conditions was held to override such considerations. To hold otherwise, the court concluded, would be to defeat the major purpose of the collective bargaining legislation.250

In a second case, involving the Washoe County School District, the supreme court overruled a trial court determination that none of the items held negotiable by the EMRB was subject to mandatory bargaining under the collective bargaining statute. Proposals about maximum class size, professional improvement, student discipline, the school calendar, evaluation of teacher performance, the study of differentiated staffing, teacher load (including preparation time, number of different subject responsibilities, and time for parent conferences and curriculum development), and instructional supplies were all held to be "significantly related to wages, hours and working conditions."251 The court's analysis demonstrated its concept of wages, hours, and working conditions in the context of professional employee-employer relations.

The evaluation of teacher performance was held to affect working conditions because of its effect upon "transfer, retention, promotion and the compensation scale."252 These are traditional subjects of bargaining in private industry. Similarly, the school calendar was negotiable because of its effect upon the "amount of work the teacher is expected to perform for a fixed compensation."253 This concept is entirely consistent with the concept of the "wage and effort bargain" which is the heart of the private collective bargaining process.254

248. 90 Nev. at 444, 530 P.2d at 116.
249. Id.
250. Id.
251. 90 Nev. at 446-7, 530 P.2d at 118-19.
252. 90 Nev. at 446, 530 P.2d at 118.
253. Id.
254. See West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972), for its application by a Private Sector model court.
In determining that "teacher load" was negotiable, however, the court went beyond this formulation. At issue were a variety of proposals including preparation time, the number of different courses or subjects for which a teacher would be responsible, time for curriculum development, and compensation for substitute teaching by full-time teachers. The court held that these items were negotiable not only because they affected compensation and the amount of work done, but also because they involved "the kind of work done,"—part of a teacher's working conditions. Maximum class sizes were negotiable issues not only because of their effect upon the amount of work and time required in preparation and correction of student work, but also because class size affects "control and discipline problems" and "teaching and communication techniques."

The proposal concerning instructional supplies involved periodic discussions between the association and the district regarding the selection and use of textbooks and teaching equipment, as well as the creation of teacher reference libraries. The court adopted the reasoning of the EMRB that the proposal was negotiable because the "type, quality and availability of instructional supplies affects the ability of a teacher to discharge his work properly," and "sometimes" the number of hours required of a teacher. Proposals related to "professional improvement," involving in-service training and partial payment by the district of tuition for summer school courses taken by teachers, were negotiable not only because of the relationship between training and promotion ("career opportunities") but also because of the potential effect of training on the teacher's "ability to more effectively produce meritorious results in the classroom."

Perhaps most revealing is the court's treatment of the proposal regarding differentiated staffing. The association had proposed that a committee be set up to study the concept, that provision be made for consultants' fees, and that the district agree to negotiate the impact upon wages, hours, and working conditions of any plan subsequently adopted. The court did not focus upon the somewhat limited nature of the proposal, which merely called for participation in the study and for subsequent "impact" negotia-

255. This usually involves having regular teachers give up their preparation periods in order to fill in for absent teachers.
256. 90 Nev. at 447, 530 P.2d at 119.
257. 90 Nev. at 446, 530 P.2d at 118.
258. 90 Nev. at 447, 530 P.2d at 119.
259. The term usually applied to what the court described as "in-house" workshops, conferences and after-hours courses.
260. 90 Nev. at 446, 530 P.2d at 118.
261. The term generally refers to a variety of staffing plans that involve alternatives to the one teacher: one classroom concept. The teaching and supervisory functions may be specialized, for example, so that "master teachers" have primary responsibility for development of curriculum and materials, as well as for supervision of instruction in a given area, while instructional teachers may have primary responsibility for diagnosing and prescribing materials and methods for individual students, as well as for supervision of student-teachers or teacher aides who may assist in implementing the learning programs.
tions. Instead the court based its decision on the view that any differentiated staffing plan would itself be negotiable because of its potential effect upon the relationship of teachers to their "peers". 262

The court thus advanced considerably beyond a "wage and effort bargain" approach, at least as such an approach is usually applied in private industry. Its application to items such as the school calendar, or even to class size, for example, may be understood in a traditional wage and effort context, but its application by the court to items such as professional training, student discipline problems, or instructional supplies requires an additional analytic step. This extra step is based upon consideration of the special nature of the professional employee.

Unlike most organized employees in the private sector, the teacher is a professional employee who is responsible for the quality of his or her results. This is reflected in the movement for "accountability" in teacher evaluation, in which assessment of the teacher's job competency is based upon the level of his or her students' achievement. 263 This conception of professional responsibility is not simply imposed by the employer but is internalized by the professionals themselves. "Teachers by reason of their education, psychology and traditions have an interest in the quality of educational programs." 264

The professional's job is not defined, by the employer or by the teacher, in terms of required hours or required output within those hours. Rather, it is defined by the result that he or she is expected to accomplish: the highest possible levels of student achievement in the areas for which the teacher is responsible. It is in this context that a broader conception of the "wage and effort bargain" is appropriately applied to teacher collective bargaining. Anything which makes the required result more difficult to accomplish—whether overcrowded classrooms, disruptive students, inadequate training, or lack of instructional supplies—increases the "effort" required of the teacher as professional employee.

It is also from this perspective that the relationship between factors affecting the teacher's ability to "more effectively produce meritorious results" and other traditional collective bargaining concerns should be viewed. To the extent that evaluations of the teacher's performance are based on these results, his or her job security is directly involved. To the

262. "Any plan of differentiated staffing which categorizes teachers on the basis of competency, experience, responsibility and other factors, affects wages, hours and working conditions of individual teachers relative to their peers." 90 Nev. at 446, 530 P.2d at 118.


264. Wollett, supra note 243, at 1030.
extent that high levels of student achievement are what the teacher as a professional expects of himself or herself, anything which affects that result also has a direct effect upon job satisfaction.265

Thus items related to the "methods and means of production" or to the "nature and quality of the product" are highly relevant to employee concerns in the particular context of professional employment in public education. Debates about "educational theories and philosophies" may directly involve the teachers' workload, job security, and job satisfaction.

Other aspects of the court's rationale can be traced to the traditions of professional employment itself, apart from any attempt to draw analogies to the private sector. Such traditions266 have their roots in the practices of the self-employed professional who defines his or her own tasks and sets his or her own work schedules. His or her relationship to fellow professionals is collegial.267 The evaluation of his or her performance, and even rates of pay, are based primarily upon standards set and enforced by the "self-governing community of practitioners."268

Problems arise when this tradition is applied to the salaried professional in any institutional setting, whether it is a hospital, corporation, government agency, or school system. "Employers are likely to insist on controlling compensation, the scheduling of work, and the assignment of duties and may even want to reorganize the performance of the entire range of professional tasks so thoroughly as to deprofessionalize the occupation."269

It is in the context of higher education that the principles of professional autonomy have been most successfully preserved within the institutional setting. The faculty as a "community of scholars" has traditionally retained a large degree of control over the organizational structure, the content of curriculum, the scheduling of work, and the evaluation of performance, as well as over opportunities for professional advancement.270

With this tradition in mind, it is to be expected that teachers would demand and legitimately be accorded a substantial voice in "the kind of work done," "teaching and communication techniques," access to "career opportunities," and their relationships with their colleagues. Matters related to the nature and quality of the services provided by the institution, even the "basic scope of the enterprise," are the very issues which the practitioners, by nature of their status and training, are uniquely qualified to decide.

265. See City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973), where the court referred to the "frustrations" of elementary teachers responsible for adequately covering many different subject areas as an element of "working conditions."

266. See generally Garbarino, Professional Negotiations in Education, in WOODWORTH & PETERSON, supra note 2, at 329, 332-37.

267. The adjective as derived from the general meaning of "college" as "an organized society of persons performing certain common functions and sharing certain rights and privileges." OXFORD UNIVERSAL DICTIONARY (1955 ed.).

268. Garbarino, supra note 266.

269. Id. at 334.

270. See Naples & Bress, supra note 3, at 238-41.
This approach may at first seem a long way from the traditional notion of collective bargaining, but on closer consideration it may not be far removed. The purpose of collective bargaining in either private or public employment is, after all, the peaceful resolution of disputes between employers and employees arising out of the employment context. To the extent that the professional traditions and attitudes of teachers are at odds with the attitudes of administrators as to the proper role and status of teachers, such disputes will certainly arise. Collective bargaining would therefore be fulfilling its basic function by providing a means for resolution of those disputes.

Collective bargaining in this context may perform one additional function. One commentator has suggested that the inclusion in collective bargaining of "the full range of professional problems" presents an "unparalleled opportunity to make public employee union-management relationships something new and unique in American labor history." Since both management and labor share the basic goal of improving the quality of education, he argues, the possibility exists for using the collective bargaining process to engage in a mutual effort to address the "crisis state of American education."  

B. Scope of Prohibited Subjects

While the Nevada court broadly interpreted the provision for mandatory bargaining of wages, hours, and working conditions, it took a correspondingly narrow view of the statute's provision for reserved management rights. According to the statute, the employer was entitled to exercise such rights "without negotiation or reference to any agreement resulting from negotiation." Apparently, the legislative intent was that management prerogatives preclude an item not only from mandatory bargaining but from grievance arbitration enforcement as well.

The Nevada legislature was not content with a general reservation of such powers. The statute provided a specific list, including the right of the employer to "direct its employees," "hire, promote, classify, transfer, assign, retain, suspend, demote, discharge or take disciplinary action against any employee," "maintain the efficiency of its governmental operations," and "determine the methods, means and personnel by which its operations are to be conducted." The court found that none of these rights were affected by the series of proposals that it found subject to mandatory bargaining.

271. See generally notes 44, 45, 65-66 supra.
272. See Wollett, supra note 243.
273. Kassalow, Perspective on the Upsurge of Public Employee Unionism, in WOODWORTH & PETERSON, supra note 2, at 20, 29.
274. Id. at 30, where Kassalow suggests the same potential for addressing the problems of public institutions such as hospitals.
276. Id.
Instituting daily preparation periods, for example, would not interfere with the right of management to "direct" the work force. The policy that teachers should do the preparation work had already been adopted by management itself, and the employer "retains the right to make certain that the teacher prepares adequately and competently." As a general principle, the court declared that the employer's right to "direct" employees would not be contravened so long as teachers remained "obligated to perform their duties within the policy framework established by the district."

Nor was the employer's right to promote, assign, discharge, or discipline employees contravened by negotiation of such items as evaluation procedures. Since the statute itself protected the right of employers to hold teachers accountable for "infractions or nonperformance of their duties," the essential attribute of the supervisory responsibility of the school employer was retained.

The employer's right to "maintain the efficiency of its governmental operations," the court said, was not "at cross purposes" with any of the association proposals, including such items as class size or differentiated staffing. On the contrary, the long-range efficiency of the school system would be best served when "management and labor are in accord on the vital factors of wages, hours and conditions of employment."

Perhaps most importantly, the court did not see the process of collective bargaining as interfering with the right of the public employer to carry out any of its statutory responsibilities. The court was simply upholding the right of the association to insist upon discussion of the proposals in the context of collective bargaining. "Discussion alone does not guarantee their adoption." Participation in collective bargaining did not imply any abdication of the board's right or responsibility to make its own policy decisions. Such decisions might well be reflected in its bargaining positions or collective bargaining agreements.

C. Objections to the Professional Employment Model

Historical, theoretical, and political objections to the Professional Employment model have been developed in describing the other three approaches.

The Private Sector model offers objections on historical grounds. Since the history and the experience of private sector collective bargaining have not demonstrated that issues relevant to the "quality of the product" or other essentially professional concerns can be satisfactorily resolved through

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277. 90 Nev. at 445, 530 P.2d at 117.
278. Id. 90 Nev. at 447, 530 P.2d at 119.
279. Id.
280. Id.
281. Id.
collective bargaining, these matters should not be incorporated into public sector collective bargaining, particularly on a mandatory basis.\textsuperscript{282} Historically, the statute itself may be the product of a political compromise between the interests of public sector management and labor. Such a compromise may be more accurately reflected in the Private Sector Model's "balancing" approach to the scope of bargaining issues.\textsuperscript{283}

The theoretical objections are reflected primarily in the Public Management approach. Bargaining about issues related to professional concerns will go to the core of managerial functions and will interfere with the responsibility of elected officials to maintain control of the enterprise entrusted to them. Any derogation of this authority contradicts the principles of delegated authority in a representative democracy. The private interests of teachers, whether "professionals" or not, should not be permitted to interfere with the public interest. Management should be free to make policy decisions regarding the services that they offer and the manner in which the quality of education is best served. Those decisions should be based solely on the public interest and must be reached without collective bargaining restrictions.

The basic criticism of the Professional Employment model from the perspective of the Political Process approach is that it overlooks the interests of other groups vitally affected by decisions related to professional concerns. These concerns, as they affect the quality of the services offered and the nature of the services themselves, present policy issues that should be resolved through processes that are open to many concerned citizens. Collective bargaining, either by excluding input from other groups or by giving teachers too great an influence on policy making, is too closed a

\textsuperscript{282} Relevant here may be the experience of engineers in attempting to resolve professional concerns through private sector collective bargaining. See Kuhn, \textit{Success and Failure in Organizing Professional Engineers}, in \textit{WOODWORTH \& PETERSON, supra} note 2, at 439-46. For discussion of the types of items considered amenable to resolution by collective bargaining in the private sector see Rabin, \textit{FIBERBOARD and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain}, 71 \textit{COLUM. L. REV.} 803 (1971).

\textsuperscript{283} This argument has particular force in Nevada, where the legislature subsequently amended the scope of bargaining sections to provide a specific list of mandatory items, significantly excluding a number of items such as class size. \textit{NEV. REV. STAT.} § 288.150(2) (1974) (1975 Nev. Sess. Laws, ch. 539, effective May 18, 1975). See Clark, \textit{The Scope of the Duty to Bargain in Public Employment}, \textit{LAB. REL. LAW PUB. SECTOR, supra} note 13, at 81, 91-92.

The same objection could be made to other interpretations that do not reflect the precise balance which the parties to the "political negotiation" had in mind. See W. Taylor, Counsel, California State Employees Ass'n, in \textit{Proceedings—The Meyers-Millas-Brown and Winton Acts: Major Legal Issues in Public Employee Relations} (Inst. Indus. Rel., Univ. Calif., Berkeley, S.F., Jan. 21, 1971) 46, 48-51, for a participant's description of such a "negotiations" process.

Whether or not such a policy position accurately reflects the "intent" of the legislature in realistic terms, the import of this line of reasoning is that the balance should be struck by the court rather than by the parties to collective bargaining negotiations at the local level. This seems at odds with much of the Private Sector model theory.
system for making these judgments. Educational policy should not be left solely to professional educators.

CONCLUSION AND RECOMMENDATIONS

As should be clear from the analyses presented above, it is unlikely that any one of the four approaches described will be mandated by the language of any particular teacher collective bargaining statute. The scope of bargaining provision of California's Rodda Act,284 for example, contains language supporting each of the four approaches.

Proponents of a Private Sector model approach could argue that the terms "wages, hours of employment, and other terms and conditions of employment" imply that the National Labor Relations Act provides the basic statutory model and guidance.285 They could suggest that the basic purpose of the Rodda Act, to ensure the "right of employees to be represented," requires that public employees be provided with rights analogous to those enjoyed by private sector employees.286 And they could contend that permissive subjects are authorized by the statutory provision for written contracts covering "any" agreements.287

Those urging adoption of a Public Management approach could assert that the provision which states that all matters not specifically enumerated in the scope of bargaining section are "reserved to the public employer and may not be a subject of meeting and negotiating" mandates that all nonmandatory subjects must be prohibited.288 Listed among the purposes of the act is the provision that it shall not "supersede other provisions of the Education Code."289 The listing of terms and conditions of employment and

   The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.


the phrase "limited to" could imply that mandatory subjects must be given a narrow construction.290

The Political Process view finds support in the separate listing of educational policy items (educational objectives, content of curriculum, and selection of textbooks) as appropriate for consultation but not for mandatory meeting and negotiating.291 Proponents of the Political Process model might also cite the clear legislative intent to prevent the exclusion of others from the collective bargaining which is reflected in the "sunshine" provisions of the law.292

Supporting the Professional Employment model is the statutory language of the "purpose" section, affording teachers the right to be represented in their "professional and employment relations" and to have a "voice in the formulation of educational policy."293 The "right to consult" on matters of educational policy could be viewed as meaningless without the sanction attending mandatory bargaining; the language should denote at least permissive bargaining if the "right" is not to be illusory.294

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291. CAL. GOV'T CODE § 3543.2 (West Cum. Supp. 1977). This may reflect the views of those commentators who urge that teachers should have some voice in educational policy decisions. It could then be argued that the term "consult" implies permissive negotiations or some process other than negotiations (the alternatives discussed in text accompanying notes 225-230 supra).


294. Since the term "consult" used in the scope of representation section (CAL. GOV'T CODE § 3543.2 (West Cum. Supp. 1977)) is not defined in the Act, the courts will have considerable leeway in determining its implications in light of the models they adopt.

Those urging the view that it connotes some process other than collective bargaining may point to the use of the term in New York City. See Klaus, The Evolution of a Collective Bargaining Relationship: New York City's Changing Seven-Year History, 67 MICH. L. REV. 1033, 1045-48 (1969). In the preamble to the second bargaining contract, the board and the teachers union agreed to meet once a month during the school year on matters of educational policy and program development. Out of the meetings came joint union-management committees, including one which established the More Effective Schools (MES) program.

The Minnesota teacher collective bargaining statute appears to have this type of process in mind. MINN. STAT. §§ 179.63(18), 179.65(3), 179.66(3) (West Cum. Supp. 1977). Educational policy is subject not to the "meet and negotiate" requirement but to a separate "meet and confer" requirement. The latter is described as involving periodic meetings, at least every four months, to "discuss and exchange ideas."

This view would not, of course, preclude the notion that the same matters would be appropriate "permissive" subjects of bargaining. The Pennsylvania Supreme Court characterized the subjects within the scope of its "meet and discuss" requirement as permissive, though not subject to the "bargaining" requirement. PA. STAT. ANN. tit. 43, §§ 1101.301(17), 1101.702 (Purdon Cum. Supp. 1977). Pennsylvania Lab. Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975).

A separate issue is whether something more is required in the negotiations process itself. Does the "right to consult" establish a new "permissive plus" category? In Indiana the items within the scope of the duty to "discuss," as opposed to the duty to "bargain," are permissive
Any of the four models adopted could thus be used to determine how restrictively or expansively the mandatory items listed in the Rodda Act should be interpreted and to analyze the consequences of finding that a subject is not mandatory. Since it is theoretically possible, on the basis of the statutory language, to justify using any one of the four analyses, the courts' choice is likely to rest upon policy considerations. The courts may be placed, however unwillingly, in the position of having to decide which approach best serves the interests of the public and educational system. From this perspective, there are additional grounds which supply a basis for concluding that the application of one model is more appropriate than the application of the other three.

Much of the argument for limiting the scope of bargaining in the setting of public education is directed toward the exclusion of "educational policy." The exclusion is justified on one of three grounds, either that it is not related to wages, hours, and working conditions, that it goes to the core of the management function, or that such basic decisions should be made by the community at large. Considered in light of the fundamental debate taking place within society, and within the institution of public education, however, it is neither possible nor desirable to exclude such policy decisions from the bargaining table.

The fundamental division among those concerned with public education today may be characterized as that between those subscribing to the Traditional Approach and the Alternative Approach.295

and may become subject to binding contractual agreement. Ind. Code Ann. tit. 20, art. 7.5, §§1-3, 1-4, 1-5 (Burns 1975). In addition, however, the Education Employment Relations Board has established that it is an unfair labor practice to refuse to discuss such an item at the bargaining table. The difference between the duty to discuss and the duty to bargain is that agreements subject to the former need not be reduced to writing or included in the contract and that the use of statutory impasse procedures is not required. Doering, Bargaining and Discussion—Is It a Happy Marriage? 50 Ind. L. J. 284 (1975).

Similarly, it may be argued that the term distinguishes the duty to bargain about an item at contract negotiation time from the duty to avoid unilateral action on an item not covered by the contract during the term of the contract itself. See Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973). The duty would then have some, but not all, of the attributes of the duty to bargain in the private sector.

295. The Traditional Approach is reflected in most of the standard literature on education. See, e.g., J. Conant, The American High School Today (1959). It is reflected in the writings of most commentators, including Wellington and Winter, Summers, and Moskow.


Those adhering to what may be termed the "Traditional Approach" assume that the basic function of public education is to transmit a body of knowledge to students. The role of the community is to decide what body of knowledge is required of an educated member of society. This assumption is reflected in legislation that mandates required curriculum and textbooks, permitting local variations by lay boards of education. Local boards are also primarily responsible for the general supervision of management, much like corporate boards of directors.

The role of management under the Traditional Approach is to see that the determined body of knowledge is transmitted in the most efficient manner. Management's educational role is to evaluate the staff and to provide for its improvement on the basis of the manager's superior knowledge of accepted educational techniques. In addition, there is a strictly managerial role; management is responsible for running an "efficient plant," seeing to it that maximum service (information transmittal) is delivered at the lowest possible cost.

The role of the teacher in this system is to use effectively the generally accepted methods for transmission of information to students. Teachers are expected to make use of management critiques and training opportunities. They are expected to develop lectures and illustrative examples supplementing the given textbook material and to provide feedback to students by correcting assignments and examinations.

The "Alternative Approach," on the other hand, assumes that the function of schools is to train students to deal with the various types of information and situations that may arise. Emphasis is on the development of individual student skills, covering a much broader range of skills than those associated with the Traditional Approach. The initial role of the community is to determine whether the Alternative Approach is a viable one. This may involve some difficult value judgments. Proponents of reform argue that students will be better prepared to function in society, but a local or even a state decision may be at odds with educational requirements of testing services which use traditional approaches and focus more intensely on a comparatively limited range of skills (reading, memory, computation). However, once the decision to adopt the Alternative Approach is made, then the role of the community is to determine with which general

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296. There are various "movements" in educational reform reflected in the writings above. The description below represents what I believe to be their common features and implications, particularly as experienced in the educational setting, for changes in the traditional assumptions about education.

types of information or situations students should be prepared to deal, in other words, to determine educational "goals." 298

The decision about educational goals has important implications for the role of management. As there may be few "generally accepted techniques" for teaching a variety of skills, the focus of evaluation shifts from techniques to evaluation of "results," i.e., behavioral changes in students. 299 These behavioral changes are related to the goals established by the community. In addition, management has the responsibility of providing opportunities for teachers to develop and share new techniques. Thus, many traditional "managerial" functions now become "educational" functions as new techniques require facilitation through new staffing patterns, different physical plants, and changes in traditional rules regarding student discipline and freedom of action during the school day. 300

The teacher, as well as management, has a new role. In the classroom, the most startling departure from the traditional perspective is that textbooks and instructional materials, the former "givens," become the means to a new end, the teaching of skills. 301 As traditional materials may not present the necessary variety of types of information, teachers must find or, more often, develop their own. 302 As traditional classroom settings may not provide the necessary variety of situations, teachers must develop alternative sources of experiences. Teachers also must individualize the materials and the methods of instruction, adapting them to a wide range of student skills and the various means by which students learn. 303

Teachers also have new roles that reach beyond the classroom. They have new levels of what might be characterized as managerial responsibility. Teachers must now evaluate techniques of instruction and materials on the basis of their experiences in the classroom and must share these experiences with other teachers. Their responsibility for self- and peer-evaluation takes on new significance. Basic curriculum planning requires contribution from teachers experienced in the classroom and knowledgeable in specific subject areas, in order to translate the goals set by the community into skill and subject-matter formats. 304

298. See, e.g., Education for the People, supra note 295, at 141-44.
299. See note 263 supra. This is the legislatively mandated basis for teacher evaluation in California. CAL. EDUC. CODE §§ 13485-13489 (1972) (Stull Bill).
302. Goddard, Annehurst School For Tomorrow, 13 THEORY INTO PRAC. 71-74 (1974), suggests that because of the nature of individualized instruction, teacher-developed material will always be required to supplement "commercial" materials.
303. Id.
304. See Wollett, supra note 243.
When community, management, and teachers are all agreed that the Alternative Approach should be adopted, there are several implications for collective bargaining. The adoption of the Alternative Approach necessarily involves changes in the terms and conditions of employment for teachers. More work is required of the instructional staff, and the work that is related to diagnosis and implementation of programs for individual student needs can only be done by the classroom teacher. Decisions must be made as to when the work is to be done and at what level of compensation. These are subjects well within the traditional scope of collective bargaining.

This additional work might be done by the teacher during the regular classroom hours, resulting in competition between students and preparatory work for the teacher's time and attention. The work may also be done after class hours. If the time is compensated at the teacher's regular salary level, this alternative will be unattractive because it will be more costly than any alternative except the "preparation time" substitution. It may be less attractive to teachers than the preparation time substitution alternative because of the extra length of the work day. This time may also, of course, be uncompensated. As the alternative that involves no increase in cost to the district and no reduction in individual student contact, it will naturally be the most "efficient" and attractive to management's point of view. This last alternative, however, will inevitably lead to teacher frustration and may engender hostility to the new approach. Thus, even if community, management, and teachers are all agreed that the Alternative Approach should be adopted, teachers will bring these issues to the bargaining table for the most traditional of reasons, to avoid exaction of their labor without adequate compensation.\(^{305}\)

A second reason that adoption of the Alternative Approach will engender issues for resolution at the bargaining table, even when a consensus exists that the new methods are desirable, is that the Alternative Approach requires new relationships between management and other members of the certificated staff. Because of their new roles and their responsibilities for developing and implementing methods of instruction, teachers need and demand a major voice in decisions which were traditionally the prerogative of management (with general community "veto" power). These decisions may concern buildings and facilities, staff organization and hiring practices, budgets, or curriculum (in the traditional sense of subjects, textbooks, and instructional supplies). Management can no longer claim superior competence to make these decisions on the basis of "managerial" expertise. Precisely because these issues have become "educational policy" decisions, they can no longer remain exclusive management prerogatives. Reluctance of management to give up its previous prerogatives will result in

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teacher motivation to use collective bargaining to gain a voice in decisions necessary to implement the programs they themselves have designed.

But what are the implications of inclusion of "educational policy" in collective bargaining if, as seems more likely, no consensus exists among board, management, and teachers as to whether to adopt the Alternative Approach? Many of those urging limitation of the scope of collective bargaining by excluding "educational policy" have argued that the exclusion is necessary to prevent unwilling teachers from successfully resisting board and management attempts to implement reform.\(^\text{306}\) Others have argued that teachers should not be able to use collective bargaining to implement changes.\(^\text{307}\) Educational policy, the argument runs, should not be included in collective bargaining, because to do so would usurp the basic role of the community in making the ultimate decisions about which approach to adopt. It seems apparent, however, that because of the involvement of traditional issues of wages, hours, and working conditions in these decisions these issues cannot be isolated from collective bargaining. Indeed they should not be.

Even more importantly, while the broad-scope collective bargaining of the Professional Employment approach is neutral as to which basic approach should be adopted, narrow-scope collective bargaining favors the Traditional Approach over the Alternative Approach and therefore in itself represents an "educational policy" decision. A district (board or management) seeking to impose the Alternative Approach upon unwilling teachers is limited by traditional collective bargaining, while a district seeking to impose the Traditional Approach on unwilling teachers is unlimited.

Since imposition of the Alternative Approach involves more work for teachers and often a change in the work environment, teachers can resist the district’s efforts at the bargaining table by using traditional collective bargaining issues: compensation for work done, job security, and so forth. This form of resistance often leads to board and court efforts to dilute teacher influence by distinguishing the "policy" decisions from their "impacts". It may also be the motive for court concern with the real purpose—"guts"—of a proposal. The courts may be attempting to allow latitude for educational reform, while at the same time allowing for bargaining over compensation, time, and other obvious elements of working conditions. As suggested above, this effort is futile when the future decision or continuation of a past decision to implement a particular basic policy may be made too expensive by collective bargaining to be feasible.\(^\text{308}\)

On the other hand, since the Traditional Approach does not require

\(^{306}\) Metzler, supra note 165, at 153 "The board and administration must retain sufficient flexibility to utilize new or experimental ideas and programs . . . ."

\(^{307}\) Wellington & Winter, Structuring Collective Bargaining in Public Employment, supra note 93, at 860.

\(^{308}\) See discussion at notes 24-25 supra.
extra planning or preparation time nor increased student contact, teachers who would rather employ the Alternative Approach have no collective bargaining leverage for change under a narrow-scope approach. Any additional work done by them to implement the new methods is presumed to be "voluntary" and therefore to be undeserving of compensation in traditional collective bargaining terms. Attempts to obtain the necessary flexibility in traditional curriculum or materials will be thwarted by "educational policy" limitations. Similarly, attempts to obtain the necessary structural, organizational, or budgetary support for implementation of the new methods will be met by "traditional management prerogative" arguments. These, of course, will be reinforced by the hierarchical traditions and past practices of most districts.

In contrast, the Professional Employment model's broad-scope collective bargaining on issues including "educational policy," does not favor either approach. A district seeking to impose the Alternative Approach on unwilling teachers is limited by collective bargaining, but a district seeking to impose the Traditional Approach is also limited.

When it is the district that seeks the Alternative Approach, teachers may have an "easier" time resisting it. They will not need to spend time discussing scope issues or disguising their concerns in time and money terms but will be able to address the issues directly. The result is likely to be the same and will depend, whether the scope of bargaining is broad or narrow, on the depth and unity of teacher resistance, community support for new programs or higher taxes, and similar considerations.

On the other hand, when it is the teachers who seek the new approach, they will be able to address the issues directly in collective bargaining. They will have a basis for challenging management decisions regarding organization, budget, facilities, or bases for evaluation. They will, in other words, have an opportunity to gain freedom from traditional strictures (academic, disciplinary; organizational, or physical) which may be limiting their implementation of new methods. They will also gain access to the board and to the community to seek support needed from outside the school itself for the full implementation of the new methods.\footnote{From this perspective, the "impact" doctrine as applied in New York and elsewhere is the worst of both worlds. Teachers can bargain about the "impact" of any proposed changes by the board or management, but they are precluded from proposing items of educational reform themselves. The result is, therefore, least promising for any change from traditional practices.}

Thus it seems clear that whichever educational philosophy ultimately prevails, collective bargaining should not be precluded as a method of resolving disputes involving educational policy issues. Broad-scope bargaining does not foreclose any educational options.

If a consensus as to an educational approach does exist among board, management, and teachers, then both the successful experience of the
private sector and the unsuccessful experience of the public sector without collective bargaining suggest that the major issues are those clearly susceptible to collective bargaining resolution: money and time, and teacher-management relations. However, when no consensus exists, a major objection to the inclusion of educational policy in collective bargaining is that bilateral negotiations may not provide enough opportunity for community input. Aside from any theoretical considerations, community support, both economic and moral, is vital to the successful implementation of any educational policy, traditional or alternative. The basic political posture of school boards, however, makes it unlikely that they would exclude community input on basic policy items or agree to changes which the board perceived as unacceptable to the community. Moreover, the alternative to collective bargaining resolution is traditional decision-making, which all too often means management decision-making. Management, after all, has no need to go to the community if its word is law in its own universe.

A second objection to using the collective bargaining process to settle such issues is that minority views on the professional staff may go unheard. But just as community support is essential for the successful implementation of basic policy, so is the support of the staff. Teacher association leadership, like the school board, occupies an essentially political position. Like the school board, it cannot afford to take strong stands on positions for which it has little support or on which its constituents are deeply divided. Once again, the real alternative may be management decision-making. And if there is an alternative method that actually assures teacher input into decision-making, it is unlikely that basic issues will be raised in collective bargaining.

Excluding matters of dispute from the bargaining table does not insure a better alternative method of resolution. Furthermore, it may make resolution of those issues which can be raised (such as salaries) far more difficult to resolve because the real issues, the real sources of teacher discontent and frustration, cannot be dealt with. Thus it seems clear that the Professional Employment Model, which mandates a broad interpretation of the scope of bargaining provisions of the Rodda Act, would be the most promising of the four possible approaches. As the only one of the four models to include educational policy as an item subject to collective bargaining, this model alone deals effectively with dispute resolution in the context of the current debate about the fundamental nature of public education. Exclusion of either management prerogatives or educational policy from collective bargaining is neither possible nor desirable.