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Can American Labor Law Accommodate Collective Bargaining By Professional Employees?

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During the past two decades, the rate of unionization among professional employees has substantially increased while the overall proportion of workers in unions has dramatically declined. Some professional employees—such as performing artists, journalists, engineers, and nurses—have relatively long traditions of unionization. Other professional employees—such as teachers, college professors, lawyers, and doctors—have joined unions more recently. Despite enormous differences in the proportion of union membership in various professions, some analysts view professional employees as a primary hope for the future of the American labor movement.¹

1. See, e.g., R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 244-45 (1984). For data on the extent of unionization among professional employees, see S. BRINT & M. DODD, *PROFESSIONAL WORKERS AND UNIONIZATION: A DATA HANDBOOK* (1984) (published by Department of Professional Employees, AFL-CIO); Aronson, *Unionism Among Professional Employees in the Private Sector*, 38 INDUS. & LAB. REL. REV. 352 (1985).

Unions representing professional employees increasingly stress that they seek legal protection for traditional professional values. These values include participation in developing organizational policy, significant responsibility for personnel decisions about fellow professionals, the establishment of professional standards, and the commitment of organizational resources to professional goals. Doctors and nurses attempt to influence the nature of health care in hospitals, musicians want to serve on the audition committees of symphony orchestras, professors seek guarantees of academic freedom in universities, and legal aid attorneys negotiate for adequate space to counsel their clients in privacy.² Yet many professional employees, including many who have joined unions, share the concern of employers, managers, and members of the general public that collective bargaining may be incompatible with these values. The danger that unionization governed by principles of American labor law will impair collegial participation in organizational decision-making may be the most frequently expressed concern.³

Anxieties about tensions between labor law doctrines and professional values are well founded. American labor law developed in response to industrial sector collective bargaining and reflects basic assumptions that deviate from professional values. The National Labor Relations Act

Although scholars generally agree that "profession" is a meaningful category, the difficulty in distinguishing professions from other occupations has prompted debate over the professional status of various employees. In another article, I discuss this scholarly literature and construe professions broadly to provide a range of illustrations. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L. REV. (forthcoming Dec. 1989) (manuscript at 1, n.1; on file with author). Because my illustrations almost always include references to well-established professions, a reader's disagreement with particular attributions of professional status should not be a major barrier to evaluating the general points they illustrate. See *infra* notes 28-30 and accompanying text (citing definitions of professional in scholarly literature and in NLRA).

2. See *infra* note 110 and accompanying text (discussing collective bargaining as means to professional values). See generally Rabban, *The Treatment of Professional Issues in Collective Bargaining Agreements* (1989) (unpublished manuscript on file with author) (examining extent of correlation between labor contracts and professional values in broad range of professions and organizations).

3. When the governing Council of the American Association of University Professors (AAUP) voted to "pursue collective bargaining as a major additional way of realizing the Association's goals in higher education," three dissenters wrote a statement asserting the "manifest unwisdom" of this action. *Council Position on Collective Bargaining*, 58 A.A.U.P. BULL. 46, 57 (1972). The dissent's forceful peroration illustrates concerns by professional employees about the potential costs of collective bargaining:

[W]hen the industrial model begins seriously to thrust out the academic model, when traditional organs of faculty government begin to disappear, when freedoms are eroded, when principles become bargaining counters, even one-time enthusiasts for collective bargaining may find it helpful to have someone to turn to to support them in an effort to save the only values that make the material sacrifices of an academic profession worthwhile.

Id. at 61.

Professor Mintzberg argues that unionization inevitably destroys professional values and encourages professional organizations to behave more like hierarchical industrial ones, thereby accelerating rather than arresting the pathologies the professional employees sought to combat by organizing. Unions, he claims, can damage collegiality, professional autonomy, and individual responsibility. Mintzberg, *A Note on the Unionization of Professionals from the Perspective of Organization Theory*, 5 INDUS. REL. L.J. 623, 630-34 (1983); see also Rabban, *The Emerging Professional Model of Collective Bargaining* (1989) (unpublished manuscript on file with author) (presenting different views about compatibility of collective bargaining with traditional professional values).

(NLRA)⁴ is the basic federal law governing collective bargaining. Although the Act applies only to employees in the private sector,⁵ subsequent state and federal legislation covering public employees⁶ incorporates many doctrines from the NLRA model. The application of several key doctrines to professional employees in both the private and public sectors creates significant impediments to the realization of professional goals in collective bargaining.

Assumptions derived from the industrial sector limit the eligibility of professional employees to bargain under the NLRA.⁷ Yet the coverage of

4. 29 U.S.C. §§ 151-188 (1982 & Supp. V 1987).

5. 29 U.S.C. § 152(2) (1982) (excluding United States and "any State or political subdivision thereof" from definition of "employer" and thus from NLRA coverage).

6. State legislatures began enacting statutes in the late 1950's and 1960's enabling collective bargaining by state, county, and municipal employees. Over thirty states have passed such legislation, and additional states have extended statutory bargaining rights to limited categories of public employees. *See Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1676-79 (1984) [hereinafter *Developments*]. Federal employees obtained some collective bargaining rights through an Executive Order signed in 1962, Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963), *reprinted in* 5 U.S.C. § 631 (1964), *revoked by* Exec. Order No. 11,491, 3 C.F.R. 191 (1969), *reprinted in* 5 U.S.C. § 7101 (1982), and are now covered by the more comprehensive collective bargaining provisions of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 (1982 & Supp. I 1987).

7. *See generally* Rabban, *supra* note 1. The exclusion of managers and supervisors from the coverage of the NLRA reflects the hierarchical and adversarial relationships attributed to the industrial sector. Allowing managerial employees to bargain, legislators feared, would create intolerable conflicts of interest between their job responsibilities and their solidarity with other unionized employees. An important Supreme Court decision, *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), held that faculty members are managers as a result of their crucial role in formulating educational policy. The majority emphasized that professional employees, although explicitly covered by the NLRA, may be ineligible to bargain under its provisions if they also have supervisory or managerial responsibilities. Subsequent decisions by the NLRB have applied *Yeshiva* to cases where faculty obtained such influence only after negotiating a collective bargaining agreement. *See, e.g.,* College of Osteopathic Medicine and Surgery, 265 N.L.R.B. 295 (1982). The *Yeshiva* holding, which has been extended to physicians and dentists employed by a health maintenance organization, *see FHP, Inc.*, 274 N.L.R.B. 1141 (1985), could jeopardize the coverage under federal labor law of any professional employees who achieve meaningful participation in organizational decision-making.

In Rabban, *supra*, I propose that the scholarly distinction between bureaucratic and professional responsibilities, developed independently by sociologists of the professions and organizational theorists, should become the legal distinction between professionals excluded as managers or supervisors and professionals eligible to bargain under the NLRA. This proposed distinction would define fewer professionals as managers than the holding in *Yeshiva*. Yet even a broad application of that holding is unlikely to remove all, or even most, professional employees from the coverage of the NLRA. As the majority in *Yeshiva* emphasized, its holding should not be interpreted to "sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." 444 U.S. at 690. Often in response to challenges based on *Yeshiva*, the NLRB and the circuit courts have reaffirmed their prior holdings that various professional employees are covered by the NLRA. *See, e.g.,* Noranda Aluminum, Inc. v. NLRB, 751 F.2d 268 (8th Cir. 1984) (occupational health nurses); Passaic Daily News v. NLRB, 736 F.2d 1543 (D.C. Cir. 1984) (newspaper bureau chief); Meredith Corp. v. NLRB, 679 F.2d 1332, 1342 (10th Cir. 1982) (news director of TV station); NLRB v. Actors' Equity Ass'n, 644 F.2d 939 (2d Cir. 1981) (actor); Walla Walla Union-Bulletin, Inc. v. NLRB, 631 F.2d 609, 614 (9th Cir. 1980) (sports editor); Greenbrier Valley Hosp., 265 N.L.R.B. 1056 (1982) (head nurse).

Many of the state statutes that govern public sector collective bargaining specifically include professional employees. *E.g.,* CAL. GOV'T. CODE § 3507.3 (West 1980); ILL. ANN. STAT. ch. 48, § 1603(m) (Smith-Hurd 1986); OHIO REV. CODE ANN. § 4117.01(I) (Anderson 1988); WIS. STAT. ANN. § 111.70 (I) (West 1988). Some of these statutes refer explicitly to faculty. *See, e.g.,* ILL. ANN. STAT. Chap. 48, § 1702(k) (Smith-Hurd 1986); OHIO REV. CODE ANN. § 4117.01(F)(3) (Anderson 1988) (department heads excluded as supervisors, but no other faculty members defined as supervisors solely because they "participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy"); *id.* at § 4417.01(K) (faculty members not managers based on "involvement in

most professional employees under American labor law directs attention to legal doctrines that may affect the impact of collective bargaining on professional employment. This Article focuses on the scope of bargaining, exclusive representation, and company domination, doctrines developed under the NLRA and incorporated into legislation covering public employees. The Article suggests related modifications of these doctrines in an attempt to promote a system of labor law in both the private and public sectors that is more conducive to professional values.

The distinction between mandatory and permissive subjects of bargaining translates into law the traditionally limited role of workers in the development of organizational policy. It limits mandatory negotiations largely to the "bread and butter" issues that have dominated collective bargaining in the industrial sector. This distinction allows an employer to refuse even to discuss significant policy issues that are enormously important to many professional employees and frequently prompt them to organize unions. An employer can take unilateral action with respect to any matter that is not a mandatory subject.

The legal principles of exclusive representation and company domination are similarly rooted in the experience of industrial unions. They derive from the reaction against employer repression of independent labor unions during the years immediately preceding the passage of the NLRA in 1935. Designed as complementary and reinforcing principles, exclusive representation and company domination are intended to strengthen union power against employer attempts to "divide and conquer" employees. They require employers to bargain about mandatory subjects only with the exclusive union representative. They also prohibit employers from dealings regarding these subjects with either individual employees or non-union employee committees. By limiting contacts between employers and employees outside the union rubric, these principles threaten collegial decision-making by professional employees.

This Article proposes two major innovations designed to eliminate the unhealthy influence of legal doctrines designed for industrial workers on collective bargaining by professional employees. I suggest, at least in the context of professional employment in both the private and public sectors, the abolition of the distinction between mandatory and permissive subjects of bargaining and the simultaneous loosening of the principles of exclusive representation and company domination. My proposal would require the employer and the exclusive union representative to bargain (but not to

the formulation or implementation of academic or institution policy"). In excluding managerial employees from its coverage, the California Higher Education Employer-Employee Relations Act makes clear that department chairs as well as other faculty are not managers. CAL. GOV'T CODE § 3562(l) (West 1980).

State labor boards in Alaska and Kansas have rejected attempts to exclude faculty as managers based on the reasoning of *Yeshiva*. See Franke, *Two Trends in Academic Collective Bargaining: A Faculty Representative's Perspective*, 13 J.L. & EDUC. 651, 657 (1984).

agree) about any subject either raises and to sign a written contract incorporating any agreement reached. This contract would apply to all employees in the unit, whether or not they are members of the union. At the same time, my proposal would allow the employer, while negotiating or administering a collective bargaining agreement with the union, greater latitude in discussing any subject with individual employees or committees of employees. Unions would gain a greater scope of bargaining for the price of a weakened, but still meaningful, exclusivity and independence.

My proposal reflects a quandary. Current law allows virtually all informal and formal interactions between employers and employees on matters outside the scope of mandatory bargaining. Yet the principles of exclusive representation and company domination severely limit discussions about mandatory subjects of bargaining with any person or group other than the union. Expanding the scope of bargaining without also loosening the principles of exclusive representation and company domination would require employers to negotiate with unions over policy issues of professional concern that are now permissive, but would limit or eliminate independent contacts between employers and employees about those issues unless the union itself allows them.

Many people concerned about maintaining professional values after unionization thus favor the current narrow range of mandatory subjects.⁸ Under such a system, they correctly observe, union representation cannot preempt most of the valuable discussions about professional issues that take place in committees or through personal contacts between administrators and professional employees. This approach, as its advocates occasionally concede, contains numerous practical difficulties, including the intractable problems inherent in distinguishing mandatory from permissive subjects.⁹ More fundamentally, the distinction weakens the role of a union in dealing with employers about the very professional issues that may have led to its selection. Many professional employees vote for union representation because they perceive alternative mechanisms for exercising professional influence, to the extent that they exist at all, as ineffective or insufficiently comprehensive.¹⁰ And even if bodies of professional employ-

8. See *infra* notes 106, 146-47.

9. See *infra* notes 64-71, 74 (cases reaching conflicting holdings on whether subject is mandatory or permissive); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1195 (1974); Carnegie Council on Policy Studies in Public Higher Education, *Faculty Collective Bargaining in Public Higher Education—Three Key Issues*, in FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION 13-15 (1977) [hereinafter Carnegie Council, *Three Key Issues*].

10. See Rabbat, *supra* note 3. The descriptions of the operation of faculty senates and other faculty committees in NLRB decisions dealing with the coverage of professors under the NLRA frequently support these perceptions. Several cases have found that the administration rather than the faculty had effective control over university decision-making even when the faculty had significant nominal responsibilities. Administrators did not refer key issues to the faculty, acted unilaterally on matters concurrently under faculty consideration, and overruled faculty recommendations. See, e.g., *Loretto Heights College v. NLRB*, 742 F.2d 1245, 1253-55 (10th Cir. 1984); *Cooper Union*, 273 N.L.R.B. 1768, 1770-73, 1775-76 (1985), *enforced*, 783 F.2d 29 (2d Cir. 1986), *cert. denied*, 479

ees are relatively successful, they operate only at the sufferance of the employer unless their existence is guaranteed by enforceable collective bargaining agreements.¹¹

Advocates of traditional collective bargaining might object to my proposal from the opposite perspective. Loosening the principles of exclusive representation and company domination, they might argue, may unnecessarily weaken unions through the false assumption that unions cannot address professional values as effectively as professional bodies beyond union control. Democratically elected unions, they might add, must reflect the views of their members. If the employees in a union are truly committed to professional values, the union itself will find ways to achieve them through collective bargaining provisions or through union committees. A union-controlled faculty senate, forum of lawyers, or council of nurses is as likely to support professional values as similar bodies selected by the entire professional work force, particularly if the bargaining unit consists solely of professional employees eligible to serve on these committees. And traditional unionists might cite the company domination of employee committees prior to the NLRA as a warning that allowing such committees outside the union rubric invites employers to undermine the strength of the exclusive union representative.

Union officers, who claim that their simultaneous service on independent faculty committees has not created conflicts of interest, may lend support to the position that these committees would function equally well under union control, an arrangement that has not generated significant studies or reports. Yet even these union officers concede that many participants and observers view the union and faculty committees as having sig-

U.S. 815 (1986); *Lewis Univ.*, 265 N.L.R.B. 1239, 1246 n.19, 1249-50 (1982), *enforcement denied*, 765 F.2d 616 (7th Cir. 1985); *Fundacion Educativa Ana G. Mendez*, 265 N.L.R.B. 72, 75 (1982); *Florida Memorial College*, 263 N.L.R.B. 1248, 1249-50, 1252-53 (1982), *enforced*, 820 F.2d 1182, 1184-85 (11th Cir. 1987). One NLRB decision characterized faculty participation as simply "a sophisticated version of the familiar suggestion box." *Florida Memorial College*, 263 N.L.R.B. at 1254. And one judge observed that when considering curriculum changes the administration exercised influence and acted against faculty desires in proportion to the significance of an issue. *Lewis Univ.*, 765 F.2d at 630 (Swygert, J., dissenting). Even a case identifying faculty as managers found that the faculty council "chiefly talks." *Trustees of Boston Univ.*, 281 N.L.R.B. 798, 811 (1986) (quoting Administrative Law Judge opinion, quoting Professor William Vance), *aff'd*, 835 F.2d 399 (1st Cir. 1987).

11. One proposal for collective bargaining in higher education would limit the scope of bargaining to monetary issues but would allow a union to "bargain about the establishment of an academic senate of faculty members to provide oversight of academic matters, or about general policies and procedures." Carnegie Council, *Three Key Issues*, *supra* note 9, at 14; *see infra* notes 106, 108 (discussing position of Carnegie Council).

Dolores Sloviter, a Federal circuit judge and former law professor, has warned faculty members against placing legal reliance on "some vague understanding which the university inevitably denies." Even the formal policies of universities, she points out, "are replete with gaps," and "courts cannot superimpose a contractual requirement upon parties who have not deigned to bargain for it." She attributes lack of faculty interest in contractual rights to their self-image "as professionals who have, at least until recently, disdained the hard-nosed collective bargaining common on behalf of blue-collar workers." Sloviter, *Faculty in Federal Court: Decreasing Receptivity?*, 68 *ACADEME* 19, 22-23 (1982).

nificantly different "personalities."¹² Many perceive collective bargaining as inevitably adversarial and political, qualities that preclude the collegial and deliberative roles essential for committees to function effectively as conduits of professional expertise and judgment. Under this view, committees "captured" by unions are, by definition, unable to act independently and professionally.¹³ Union officers may be able to preserve their professional roles on independent committees, but not on committees controlled by the union. Even if this common view lacks a sufficient empirical foundation, its prevalence among professional employees, as well among their employers and the general public, suggests that labor law should allow the preservation of committees free from union control.

If, moreover, one accepts the general proposition that professional employees should bring their expertise and judgment to bear on organizational policy, the employer should have the option of establishing committees and individual contacts with professional employees despite union objections. The value of professional expertise does not depend on union membership. Professional employees who have potentially great contributions to make to the organizations for which they work may refuse to join unions for personal or ideological reasons. However unfounded their objections to unionization may be, they should not be precluded from effective expression of their professional views, and their employers should not be deprived of the benefit of those views. Membership of faculty on university senates and tenure committees, of physicians on committees that review medical practices in health maintenance organizations, and of lawyers in forums dealing with staffing patterns and budgets in legal services programs should be based on professional qualifications rather than union loyalty.

My proposed doctrinal innovations are not so dramatic as they may seem. Restricting obligatory bargaining and protected strikes to subjects defined as mandatory by the NLRB and the courts is a construct of NLRB and judicial decisions, not a creation of congressional legislation. Eminent commentators opposed the development of this distinction from its inception, advocating instead that the parties should bargain about any subject either raises.¹⁴ The restrictions on contacts between employees and employers outside the union rubric, in contrast, are emphatically stated in the legislative history of the NLRA and firmly reiterated in subsequent

12. Glenn, *The Faculty Senate and the AAUP at Southern Connecticut State University*, 73 ACADEME 16, 17-18 (1987). See generally McDonald, *Governance on Trial*, 73 ACADEME 20 (1987); Schaefer, *The Senate and the Union in the California State University System*, 73 ACADEME 12, 15 (1987); Yellowitz, *Academic Governance and Collective Bargaining in the City University of New York*, 73 ACADEME 8 (1987).

13. See, e.g., Kadish, *The Theory of the Profession and Its Predicament*, 58 A.A.U.P. BULL. 120 (1972); Mintzberg, *supra* note 3, at 631-33. See generally Rabban, *supra* note 3.

14. See *infra* notes 38-42 and accompanying text.

Supreme Court decisions.¹⁵ Yet recent innovative NLRB and circuit court decisions, often involving professional employees, have rejected union claims that the establishment of various employee committees constitutes company domination.¹⁶ These decisions, though unconvincing doctrinally, indicate an increasing recognition of the limitations of traditional analysis. Neither the NLRB nor the courts have attempted similar innovations in interpreting exclusive representation, but the legislative history of the NLRA reveals that key figures favored a construction of this principle quite similar to the one proposed in this Article.¹⁷ In the public sector, moreover, the First Amendment and state statutes requiring open meetings have limited exclusive representation in ways that approach the doctrine I propose applying to professional employees in private as well as public employment.¹⁸

The sources of these legal rules suggest different methods of modifying them. Either judicial or legislative action could legitimately alter current rules governing the scope of bargaining because the NLRB and the courts created these rules in the first place. Similar reasoning applies to many laws covering public employees, although some state statutes identify specific nonmandatory subjects¹⁹ and therefore must be amended to adopt my proposal. The changes this Article recommends in the doctrines of exclusive representation and company domination, in contrast, are inconsistent with the clear meaning of the NLRA and much analogous legislation governing the public sector. Even innovative theories allowing courts an expanded role in renovating statutes would not justify judicial implementation of the modifications I recommend.²⁰ New legislation would be necessary.

15. See *infra* Sections II and III.

16. See *infra* text accompanying notes 274-302.

17. See *infra* text accompanying notes 214-20.

18. See *infra* text accompanying notes 204-210.

19. See, e.g., ME. REV. STAT. ANN. tit. 26, § 965(1)(c) (1988) (excluding "educational policies" from scope of bargaining); OHIO REV. CODE ANN. § 4117.08 (Anderson Supp. 1988) (excluding standards of services, mission of employer, personnel decisions, and various other subjects from scope of bargaining). After the Nevada Supreme Court affirmed the state labor board's relatively broad identification of the scope of bargaining in public education, *Clark County School Dist. v. Local Gov't Employee-Management Relations Bd.*, 90 Nev. 442, 530 P.2d 114 (1974), the Nevada legislature amended its statute to limit mandatory bargaining to specified matters and to remove from the scope of bargaining subjects such as "[a]ppropriate staffing levels and work performance standards," the "quality and quantity" of public services, and "[t]he means and methods of offering these services." NEV. REV. STAT. § 288.150 (1986).

20. Dean Calabresi offers perhaps the most comprehensive, subtle, and persuasive of these innovative theories. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Legislative inertia, a bad "fit" between the statute and the general "legal landscape," and changes in the "legal topography" induced by subsequent legislation, constitutional developments, and substantial scholarly criticism are among Calabresi's creative justifications for judicial power to renovate legislation. *Id.* at 120-31. While acknowledging that in dramatic circumstances one of these factors may itself justify judicial intervention, Calabresi observes that "[i]t usually takes a series of constitutional decisions, ideological changes, technological innovations, or intellectual revolutions to make an old rule anachronistic." *Id.* at 131.

In my opinion, none of Calabresi's justifications for judicial renovation of statutes applies to the

Changes in the law, of course, cannot force either unions or employers to agree to provisions that support professional values. For example, broadening the scope of mandatory bargaining does not require unions to seek such provisions or employers to accept them. Yet these modifications can influence, even if they cannot determine, the results of collective bargaining. Most professional employees in unions apparently respect and seek to obtain legal guarantees for professional values.²¹ Based on the record of collective bargaining by professional employees thus far, it is unlikely that many unions, relying on my proposed expansion of mandatory subjects, would demand the replacement of traditional collegial mechanisms with inflexible rules that are insensitive to professional concerns.²² I think it more likely that many employers, relying on the existing legal construct of permissive subjects, will refuse to include professionals in determining issues of policy.²³ And my suggested loosening of the existing principles of exclusive representation and company domination would allow the employer, even over union objections, to deal with professional employees either individually or through advisory bodies. These related changes would foster collective bargaining by professionals that is more compatible with their values, traditions, and aspirations than the process encouraged by current interpretation of the NLRA and derivative legislation covering public employees.

Even those who accept the plausibility of my proposal might raise legit-

NLRA provisions on exclusive representation and company domination. In passing the Taft-Hartley Amendments to the original Wagner Act, Congress reconsidered and reaffirmed these legal doctrines, even while explicitly addressing the professional employment context in new provisions defining the appropriate bargaining unit. See *infra* text accompanying notes 29, 31 & 120 (bargaining unit of professional employees), 170-75 (exclusive representation) & 240-45 (company domination). Subsequent legislation extending the NLRA to employees of nonprofit hospitals, including professional employees such as doctors and nurses, assumed the continuation of these doctrines. See Pub. L. No. 93-360, 88 Stat. 395 (1974) (codified as amended at 29 U.S.C. § 152 (1982) (health care amendments)). In addition, a major effort at labor law reform, which did not address these doctrines, failed in 1978. H.R. 8410, 95th Cong., 1st Sess., 123 CONG. REC. 23,712-14 (1977), and S. 2467, 95th Cong., 2d Sess. (1978) (failed labor reform legislation that passed House but not Senate).

More generally, I do not believe that any independent legislative or constitutional developments have changed the legal "landscape" or "topography" in ways that challenge the continued viability of exclusive representation or company domination. There have been scholarly and legal debates about the application of the principle of company domination to various employee committees. See sources cited *infra* note 274. These debates, however, reveal sharp disagreements, not the "sufficient accretion of scholarly criticism" that for Calabresi might undermine the intellectual foundations of statutory provisions and, together with other factors, justify judicial intervention. G. CALABRESI, *supra*, at 131.

The growth of collective bargaining by professional employees and the tension between professional goals and legal doctrines do suggest renovation of statutory provisions dealing with exclusive representation and company domination. But without justifications for judicial intervention, statutory amendments such as those I offer later in this article are necessary. See *infra* notes 118, 213, 305 (proposed amendments).

21. See CARNEGIE COMMISSION ON HIGHER EDUCATION, GOVERNANCE OF HIGHER EDUCATION: SIX PRIORITY PROBLEMS 39-51 (1973); *infra* note 110 and accompanying text.

22. See Rabban, *supra* note 2 (revealing protection of professional values in collective bargaining agreements); *infra* text accompanying notes 111-17 (providing examples).

23. See *infra* text accompanying notes 59-85 (cases revealing largely successful employer efforts to limit professional participation in policy-making by defining topics as permissive). See generally Rabban, *supra* note 2.

imate questions about the range of employees these modified doctrines should cover. Some might suggest that they should be extended to the entire workforce. Indeed, several recent studies, particularly a highly publicized series of Department of Labor reports, worry that the current interpretations of the legal doctrines I address jeopardize recent and highly praised attempts to encourage worker participation in the industrial sector.²⁴ Others, by contrast, might cite the vast differences among various employees described as professionals to maintain that my proposal should apply only to limited categories of professional employees. The role of professors in determining the educational policies of universities, they might assert, is appropriately greater than the roles of scientists in determining the research policies of their corporate employers or of nurses in determining the health care policies of hospitals.

Nonetheless, the application of my proposed doctrinal changes to professional employees is a more convincing and pragmatic position than either of these extreme alternatives. At least in recent American labor history, industrial unions, often reflecting the views of their members, have not sought the kind of influence in organizational decision-making that is so vital to most employees in all professions.²⁵ Contemporary innovations, frequently grouped under the label "quality of work life" (QWL), deal primarily with greater employee flexibility and involvement in matters related to their immediate working conditions. Although met with suspicion by many within the union movement, they do not represent a major transformation of the traditional role of workers.²⁶ QWL programs may re-

24. The first report was BUREAU OF LABOR-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, PUB. NO. 104, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION (June 1986). See also sources cited *infra* note 34.

25. See D. BRODY, WORKERS IN INDUSTRIAL AMERICA 173-214 (1980); H. HARRIS, THE RIGHT TO MANAGE 70-74 (1982); R. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985 at 156-57 (1986).

T. KOCHAN, H. KATZ & R. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 179 (1986), succinctly captures the traditional union position:

[O]ne of the basic principles of the New Deal collective bargaining model was that "management manages and workers and their unions grieve or negotiate the impacts of management decisions through collective bargaining." The reluctance of labor leaders to engage management in joint consultations or to seek shared decision-making power reflects the longstanding business unionism traditions of the labor movement, the practical fear of being coopted into supporting unpleasant choices, and the political risks associated with getting too closely identified with management and losing touch with rank-and-file interests.

Id.

Derek Bok and John Dunlop express the conventional wisdom in concluding that "the American worker has given very little evidence that he cares at all about participating in the running of the business that gives him his livelihood." D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 345 (1970). According to more recent survey data, "workers express a relatively low level of interest in gaining a say over broad areas of managerial decision-making such as investment, plant location, and managerial salaries." T. KOCHAN, H. KATZ, & R. MCKERSIE, *supra*, at 211-13. Yet these authors also point out that workers "may upgrade the priorities attached to expectations for participation if they gain favorable experience with it." *Id.* at 207.

26. T. KOCHAN, H. KATZ & R. MCKERSIE, *supra* note 25, at 146-205, provides a good overview of Quality of Work Life (QWL) programs. The authors conclude that most of these programs are relatively modest in scope and do not extend to "the strategic level of decision-making." *Id.* at

quire some changes in traditional doctrines,²⁷ but not to the extent that I propose in the professional employment context.

Both scholars and the general public, moreover, recognize a distinctive category of professional employment even while disagreeing about its precise contours. The relative strengths and weaknesses of professional employees depend on factors such as differences in expertise among professions, the purposes of the employing organization, the demand for professional services, and the historical development of particular professions. Yet the common characteristic of expertise based on intellectual training overshadows variations among professions and traditionally has led employers and the general public to accept greater autonomy from

175-77, 203-05. The authors' examples of atypically broad employee involvement, which "include major changes in work rules and work organization," *id.* at 176, are still quite limited compared to the goals and expectations of professional employees. At the end of a case study intended to illustrate worker participation in "strategic business decisions," the authors appropriately contrast the actual role of employees in making "suggestions regarding the layout or use of new machinery" after receiving "advance warning from the plant's industrial engineers regarding upcoming changes in technologies" with the unrealized possibility that workers might "have a direct say in the actual design of that technology or in other critical financial or production issues." *Id.* at 199.

The first interim report by the Department of Labor underlines the limited scope of what it calls "participative management or quality of work life" programs. BUREAU OF LABOR-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, PUB. NO. 113, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, at 3 (Feb. 1987). In proclaiming the success of these programs, the report cites "fewer job classifications," the ability of "any assembly worker" to "stop the line because of a perceived quality or safety problem," and the "heavy reliance on team efforts." *Id.* at 5. These innovations do not approach employee participation in major issues of corporate policy.

Union leaders, while indicating their receptivity to QWL programs, worry that employers may use them to gain concessions from unions without giving workers genuine influence, job security, or other benefits. *See, e.g., Bieber Urges Caution in Responding to Workers Participation Schemes*, 3 LAB. REL. WEEK 187 (Feb. 22, 1989) (UAW President warns QWL programs may be "trap" for workers); *Worklife Plans Given Mixed Reviews*, AFL-CIO News, Jan. 28, 1984, at 6, col. 2 (President of AFL-CIO Industrial Union Department warns QWL programs may be "anti-union tool"). Concern that even wary union leaders are cooperating too readily in participatory programs has provoked challenges from union dissidents. *See, e.g., The Payoff from Teamwork*, BUS. WK., July 10, 1989, at 56, 58, 61; *U.A.W.'s Challenge from Within*, N.Y. Times, June 18, 1989, § 3, at 5, col. 1.

A recent example of a more significant form of employee participation is described in *Boeing, Unions Use Cooperative Approach for Designing New Sheet Metal Facility*, 3 LAB. REL. WEEK 206 (March 1, 1989). According to this article, Boeing and two unions are cooperating through joint labor-management committees in planning and designing a new sheet metal facility. Boeing's corporate manager for labor relations cited the increasing skill and career orientation of its employees as a reason for this "risky" experiment in labor-management cooperation. *Id.* Proliferation of such programs might challenge existing doctrines of labor law in ways that collective bargaining by professional employees already do.

27. Various forms of communication about topics that could be construed as "conditions of employment" between employers and committees of employees in non-union settings may violate the prohibition against company domination. The same arrangements in union settings may violate exclusive representation as well as company domination. *See* T. KOCHAN, H. KATZ & R. MCKERSIE, *supra* note 25, at 234-35. Compare Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499, 542, 547 (employee committees violate § 8(a)(2) of NLRA if implemented unilaterally by employer but may be permissible if union participates in their creation and development) with Sockell, *The Legacy of Employee-Participation Plans in Unionized Firms*, 37 INDUS. & LAB. REL. REV. 541, 554 (1984) (suggesting that any employee committee dealing with subjects of collective bargaining violates NLRA). For discussion of Kohler and Sockell articles, see *infra* note 303.

supervision and more participation in organizational decision-making for professional employees than for other workers.²⁸

Limiting my proposed doctrinal changes to professional employment would allow a test of their wisdom in the most plausible and promising context. The NLRA and derivative legislation governing public employment already identify professional employees as a distinctive category and allow them to bargain in separate units.²⁹ Despite the inevitable ambiguities at the borders of most categories, the distinction between professionals and "rank-and-file" workers has not proved difficult to apply.³⁰ Significantly, Congress justified the special treatment of professionals in the NLRA by recognizing that they seek professional as well as economic goals through unionization.³¹ The additional modifications I suggest for professionals in both the private and public sectors comport with this recognition and avoid the cumbersome and unnecessary burden of developing and applying special rules for each profession.

If these new laws for professional employees are successfully implemented, their general extension might then be considered. Perhaps all work can approximate the ideals of professional work. As Alvin Gouldner optimistically wrote, the concern of the "new class" of professional employees "to control its work environment . . . embodies any future hope of working class self-management and pre-figures the release from alienated labor."³² To the extent that workers and their leaders seek to regain and expand the autonomy and influence they lost during the era of scien-

28. Scholars across the ideological spectrum recognize expertise based on intellectual training as a distinguishing characteristic of professionals. Talcott Parsons provides a classic definition of the key criterion of professional status: "formal technical training accompanied by some institutionalized mode of validating both the adequacy of the training and the competence of trained individuals." Parsons, *Professions*, in 12 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 536 (D. Sills ed. 1968); see also E. FREIDSON, *PROFESSIONAL POWERS* 20-38 (1986) (discussing how to identify professions). Radical attacks on traditional interpretations of professions also acknowledge this distinctive characteristic. See, e.g., M. LARSON, *THE RISE OF PROFESSIONALISM* 31-32 (1977) (knowledge accessible through prolonged training basis of professional expertise). Rabban, *supra* note 1, provides an overview of the scholarly literature on professionalism and discusses the similarities and differences among various professions.

29. See 29 U.S.C. § 152(12)(a)(iv) (1982) (NLRA definition of professional employee citing advanced knowledge based on "specialized intellectual instruction"); *id.* at § 159(b)(1) (separate unit for professional employees unless majority of them votes for inclusion in broader unit with other employees).

30. Perhaps the relative ease in identifying professional employees can be traced to the legislative history of the original statutory provision covering them. This history emphasized that the drafters had been "careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and nurses." S. REP. NO. 105, 80th Cong., 1st Sess. 19 (1947), *reprinted in* 1 *NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947*, at 407, 425 (1948) [hereinafter *LEG. HIST. LMRA*]; see also H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 36 (1947), *reprinted in* 1 *LEG. HIST. LMRA, supra*, at 505, 540 (definition of professional employee "covers such persons as legal, engineering, scientific and medical personnel").

31. S. REP. NO. 105, 80th Cong., 1st Sess. 11 (1947) *reprinted in* 1 *LEG. HIST. LMRA, supra* note 30, at 407, 417 (justifying availability of separate units for professional employees by citing their "great community of interest in maintaining certain professional standards").

32. A. GOULDNER, *THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS* 20 (1979).

tific management in the early twentieth century,³³ labor laws designed for professional employees might be appropriate for them as well.³⁴

I. THE DISTINCTION BETWEEN MANDATORY AND PERMISSIVE SUBJECTS OF BARGAINING

The Wagner Act passed in 1935 did not define the scope of collective bargaining. The Taft-Hartley Amendments of 1947 added a provision specifying that the duty to bargain requires the parties "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms or conditions of employment."³⁵ This obligation, however, "does not compel either party to agree to a proposal or require the making of a concession."³⁶ Although the House bill would have limited bargaining to enumerated subjects to insure that a union would have "no right to bargain with the employer about . . . how he shall manage his business,"³⁷ the provision actually adopted did not contain any explicit language about the scope of bargaining.

A number of influential commentators urged the NLRB and the courts to refrain from construing the statutory phrase "terms and conditions of employment" as a license to define the scope of bargaining for the parties. They worried that such a license would encourage members of the Board and judges to reintroduce their own values into labor-management relations, the very problem that plagued legal regulation of labor disputes before the passage of modern federal labor legislation. Archibald Cox, one of the most vigorous proponents of this view, pointed out that judges traditionally had "a narrow view of the proper objectives of labor activities."³⁸ Judges sitting in equity had frequently cited improper objectives as the basis for enjoining strikes. Congress passed the Norris-LaGuardia

33. See D. MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* 214-56 (1987).

34. It is noteworthy that several recent general studies of labor law in the industrial sector have recommended, though without elaboration, changes in the same legal doctrines that I discuss in connection with professional employment. See, e.g., C. HECKSCHER, *THE NEW UNIONISM* 8-9, 77-81, 224 (1988) (current legal framework—including exclusive representation, clear line between exempt managers and nonexempt workers, and arbitrary line between working conditions and managerial domain—freezes industrial relations and inhibits needed changes); T. KOCHAN, H. KATZ & R. MCKERSIE, *supra* note 25, at 234-36 (innovations in industrial relations "challenge" doctrines of employer domination, exclusive representation, distinctions between workers and supervisors, and distinctions among bargaining subjects); BUREAU OF LABOR-MANAGEMENT RELATIONS, *supra* note 26, at 66 (highlighting threats to cooperative labor relations posed by potentially broad definition of "manager" in *Yeshiva*, by concepts of company domination and exclusive representation, and by narrow scope of bargaining); *id.* at 25 ("removing the artificial distinction between mandatory and permissive subjects" should be explored); Sockell, *supra* note 27, at 555-56 (suggesting re-interpretation of current NLRA provision on exclusivity and investigation of possible elimination of distinction between mandatory and permissive bargaining subjects).

35. 29 U.S.C. § 158(d) (1982).

36. *Id.*

37. H.R. REP. NO. 245, 80th Cong., 1st Sess. 22-23 (1947), reprinted in 1 LEG. HIST. LMRA, *supra* note 30, at 292, 313-14.

38. Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1085 (1958).

Act and the NLRA to end the practice of "judging the legality of concerted action by its purpose."³⁹ Yet in Cox's view, a restrictive definition of the scope of bargaining would reintroduce "the same kind of objectives test as the equity judges" had used.⁴⁰ Cox therefore urged that the new statutory language in the Taft-Hartley Amendments be read to require bargaining over all proposals "not inconsistent with a federal statute or declared public policy."⁴¹ This interpretation, he added, "would seem to be in keeping with the basic philosophy of collective bargaining, for if either side feels strongly enough about a proposal to press it to an impasse, it is better to have full discussion and agreement under economic pressure than to attempt to conceal the issue by legal repression."⁴²

The Board and the courts did not take this advice. Instead, the Board construed the Taft-Hartley provision as confirming the distinction between mandatory and permissive subjects of bargaining that it had begun to develop while interpreting the original Wagner Act.⁴³ The Supreme Court endorsed the Board's approach in its landmark 1958 decision, *NLRB v. Wooster Division of Borg-Warner Corp.*⁴⁴ The Court held that the duty to bargain in good faith extends only to mandatory subjects. Either party may propose additional subjects in negotiations, but the other party need not bargain about them. Moreover, insistence on the resolution of a non-mandatory subject as a condition to an overall agreement violates the duty to bargain in good faith. According to the majority, "such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."⁴⁵ The Supreme Court subsequently made clear that the duty to bargain in good faith precludes unilateral employer action regarding mandatory subjects before negotiating to impasse with the union.⁴⁶

39. *Id.* at 1086.

40. *Id.*

41. *Id.*

42. *Id.* See generally H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 63-90 (1968) (parties, not NLRB and courts, should determine subjects of bargaining).

43. See St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TUL. L. REV. 1301, 1304-05 (1984).

44. 356 U.S. 342 (1958).

45. *Id.* at 349. In dissent, Justice Harlan protested that without the freedom to insist on a proposal, the "right to bargain becomes illusory." *Id.* at 352 (Harlan, J., dissenting in part, concurring in part). Justice Harlan accepted the distinction between mandatory and permissive subjects and agreed with the majority that the duty to bargain extends only to mandatory subjects. But Justice Harlan would not have prohibited insistence on a permissive subject during negotiations. In Justice Harlan's view, either party should be able to insist on permissive subjects, but neither party should be required to bargain about them. *Id.* at 353-54. The majority's prohibition against insistence on permissive subjects, he feared, would impede the "evolving character of collective bargaining agreements" and lead to their "premature crystallization." *Id.* at 358-59. As an unfortunate result, the collective bargaining process would be less adaptable "to the changing needs of our society and to the changing concepts of the responsibilities of labor and management." *Id.* at 359.

46. *NLRB v. Katz*, 369 U.S. 736 (1962). "Unilateral action by an employer without prior discussion with the union," the Court observed, "does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Id.* at 747.

The Supreme Court's most recent elaboration of the distinction between mandatory and permissive subjects of bargaining, *First National Maintenance Corporation v. NLRB*,⁴⁷ stressed that "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."⁴⁸ The Court identified three categories of management decisions: those that "have only an indirect and attenuated impact on the employment relationship," those that "are almost exclusively 'an aspect of the relationship' between employer and employee," and those that have "a direct impact on employment" but are based on concerns of "economic profitability . . . wholly apart from the employment relationship."⁴⁹ The first category is permissive, the second is mandatory, and the third depends on a balancing test. Recognizing "an employer's need for unencumbered decision-making," the Court announced that bargaining over issues in the third category is mandatory "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."⁵⁰ The Court added that bargaining over the effects of a management decision on employees is mandatory even when the decision itself concerns a permissive subject.⁵¹

The recent passage and interpretation of legislation governing public employees has led to limitations on the scope of mandatory bargaining that are similar to, and often greater than, those the NLRA imposes in the private sector. Statutes and decisions in the public sector have incorporated the deference to managerial prerogatives that emerged in decisions construing the NLRA. They also have recognized as an additional concern in the public sector the possibility that the legitimate interests of citizens would be jeopardized if issues of public policy are resolved through collective bargaining. For example, the curriculum of the public schools is important to parents as well as teachers, and disciplinary procedures for police misconduct concern members of the community as well as police officers.

A typical decision distinguishing mandatory from permissive subjects of bargaining in the public sector focuses on whether the impact of an issue on employment conditions outweighs its probable effect on basic policy.⁵² Other cases, without using an explicit balancing test, examine whether a

47. 452 U.S. 666 (1981).

48. *Id.* at 676.

49. *Id.* at 677 (quoting *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

50. *Id.* at 679.

51. *Id.* at 681-82.

52. *Pennsylvania Labor Relations Bd. v. State College Area School Dist.*, 461 Pa. 494, 507, 337 A.2d 262, 268 (1975).

particular issue is primarily,⁵³ predominantly,⁵⁴ or significantly related to,⁵⁵ or has a more direct impact upon,⁵⁶ policy or conditions of employment. In some public sector jurisdictions, bargaining over issues that relate primarily to policy is prohibited, and not simply permissive. These jurisdictions reason that citizens have a right to meaningful participation in the determination of such issues and that this right would be denied if a public employer voluntarily committed them to the collective bargaining process.⁵⁷ Even if the decision itself is a permissive or prohibited subject, bargaining over its impact on employees, as in the private sector, is generally mandatory.⁵⁸

A. *Defining the Scope of Bargaining in Professional Employment*

Decisions addressing the scope of bargaining reveal that labor boards and courts in both the private and public sectors have defined only a relatively narrow range of professional concerns as mandatory subjects of bargaining. Most of this litigation has occurred in cases brought by unions of public school teachers or of university professors. Cases define many issues of substantial professional interest as outside the scope of mandatory bargaining, including curriculum,⁵⁹ student-faculty ratio,⁶⁰ policies on academic freedom and professional ethics,⁶¹ and decisions to hire, promote, award tenure, and retrench.⁶² Only the narrowest working conditions seem clearly mandatory, such as salary, supplementary employment, and rules governing travel out of state.⁶³ With respect to other issues, holdings

53. *Beloit Educ. Ass'n v. Wisconsin Employment Relations Comm'n*, 73 Wis. 2d 43, 54, 242 N.W.2d 231, 236 (1976).

54. *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 64 N.J. 17, 29, 311 A.2d 737, 743 (1973).

55. *Clark County School Dist. v. Local Gov't Employee Management Relations Bd.*, 90 Nev. 442, 446-47, 530 P.2d 114, 117 (1974).

56. *National Educ. Ass'n v. Board of Educ.*, 212 Kan. 741, 753, 512 P.2d 426, 435 (1973).

57. See, e.g., *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 162-66, 393 A.2d 278, 287-89 (1978); *Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n*, 572 P.2d 416, 419 (Alaska 1977). Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1192-97 (1974), emphasizes the threat to democratic values inherent in channeling discussions of politically sensitive issues regarding public sector employment into closed bargaining sessions.

58. See, e.g., *Hillsborough Classroom Teachers Ass'n v. School Bd. of Hillsborough County*, 423 So. 2d 969, 969-70 (Fla. Dist. Ct. App. 1982); *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 51-52, 358 N.Y.S.2d 720, 723 (1974).

59. E.g., *Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243 (Del. 1982); *Kenai Peninsula Borough School Dist.*, 572 P.2d 416; *National Educ. Ass'n*, 212 Kan. 741, 512 P.2d 426; *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 64 N.J. 17, 311 A.2d 737 (1973); *School Dist. of Seward Educ. Ass'n v. School Dist.*, 188 Neb. 772, 199 N.W.2d. 752 (1972).

60. E.g., *Rutgers Council of Am. Ass'n of Univ. Professors v. New Jersey Bd. of Higher Educ.*, 126 N.J. Super. 53, 312 A.2d 677 (N.J. Super. Ct. App. Div. 1973).

61. E.g., *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kan.-Nat'l Educ. Ass'n*, 233 Kan. 801, 808, 667 P.2d 306, 312 (1983); *National Educ. Ass'n*, 212 Kan. 741, 512 P.2d 426.

62. E.g., *Charles City Educ. Ass'n v. Pub. Employment Relations Bd.*, 291 N.W.2d 663 (Iowa 1980); *Tri-County Educators' Ass'n v. Tri-County Special Educ. Coop.*, 225 Kan. 781, 594 P.2d 207 (1979); *Beloit Educ. Ass'n v. Wisconsin Employment Relations Comm'n*, 73 Wis. 2d 43, 242 N.W.2d 231 (1976); *School Dist. of Seward Educ. Ass'n*, 188 Neb. 772, 199 N.W.2d 752.

63. See, e.g., *Kansas Bd. of Regents*, 233 Kan. 801, 826-28, 667 P.2d 306, 324-25. See generally

vary among jurisdictions. Mandatory subjects of bargaining in one state may be permissive or even prohibited in another. Examples include class size,⁶⁴ workload,⁶⁵ student discipline,⁶⁶ calendar,⁶⁷ in-service training,⁶⁸ standards and procedures for teacher evaluation,⁶⁹ faculty governance,⁷⁰ and guidelines for promotion, tenure, and retrenchment.⁷¹

Commonwealth v. Commonwealth of Pa., Pa. Labor Relations Bd., 82 Pa. Commw. 330, 474 A.2d 1213 (1984); Metropolitan Technical Community College Educ. Ass'n v. Metropolitan Technical Community College Area, 203 Neb. 832, 281 N.W.2d 201 (1979); *Beloit Educ. Ass'n*, 73 Wis. 2d 43, 242 N.W.2d 231.

64. *Compare* Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416, 423 (Alaska 1977) (nonnegotiable) and *Beloit Educ. Ass'n*, 73 Wis. 2d 43, 63-64, 242 N.W.2d 231, 240-41 (permissive) and *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 49-51, 358 N.Y.S.2d 720, 722-23 (1974) (nonnegotiable) and *National Educ. Ass'n of Shawnee Mission*, 212 Kan. 741, 749, 512 P.2d 426, 435 (nonnegotiable) with *Boston Teachers Union v. School Comm.*, 370 Mass. 455, 462-63, 350 N.E.2d 707, 714 (1976) (mandatory) and *Clark County School Dist. v. Local Gov't Employee-Management Relations Bd.*, 90 Nev. 442, 447-49, 530 P.2d 114, 118-19 (1974) (mandatory) and *West Hartford Educ. Ass'n v. DeCourcy*, 162 Conn. 566, 586, 295 A.2d 526, 537 (1972) (mandatory).

65. *Compare* Kenai Peninsula Borough School Dist., 572 P.2d 416, 422-23 (nonnegotiable) with *Boston Teachers Union*, 370 Mass. 455, 462-63, 350 N.E.2d 707, 714 (mandatory) and *Clark County School Dist.*, 90 Nev. 442, 448-49, 530 P.2d 114, 118-19 (negotiable) and *West Hartford Educ. Ass'n*, 162 Conn. 566, 586, 295 A.2d 526, 537 (mandatory).

66. *See* *Beloit Educ. Ass'n*, 73 Wis. 2d 43, 60-61, 242 N.W.2d 231, 239 (student misbehavior a mandatory subject only when it threatens physical safety). *Compare* *Colonial School Bd. v. Colonial Affiliate NCCEA/DSEA/NEA*, 449 A.2d 243 (Del. 1982) (proposed committee to develop procedures in student disciplinary matters illegal) with *Clark County School Dist.*, 90 Nev. 442, 448-49, 530 P.2d 114, 118-19 (treatment of students causing disciplinary problems mandatory).

67. *Compare* Burlington County Faculty Ass'n v. Burlington County College, 64 N.J. 10, 13, 311 A.2d 733, 735 (1973) (not mandatory) and *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 403 (Me. 1973) (nonnegotiable) with *Westwood Community Schools*, 1972 MERC Lab. Op. 313 (Mich. Employment Relations Comm'n), reprinted in H. EDWARDS, R. CLARK & C. CRAVER, *LABOR RELATIONS IN THE PUBLIC SECTOR*, 312, 314-15 (3d ed. 1985) (mandatory) and *City of Madison v. Wisconsin Employment Relations Bd.*, 37 Wis. 2d 483, 492, 155 N.W.2d 78, 82, 81-84 (1967) (mandatory).

68. *Compare* *Beloit Educ. Ass'n*, 73 Wis. 2d 43, 62-63, 242 N.W.2d 231, 240 (not mandatory) with *Charles City Educ. Ass'n v. Public Employment Relations Bd.*, 291 N.W.2d 663, 667 (Iowa 1980) (mandatory) and *Chee-Craw Teachers Ass'n v. Unified School Dist.*, 225 Kan. 561, 570, 593 P.2d 406, 413 (1979) (mandatory).

69. *See, e.g.*, *Tri-County Educ. Ass'n v. Tri-County Special Educ. Coop.*, 225 Kan. 781, 784-85, 594 P.2d 207, 210 (1979) (not mandatory); *Springfield Educ. Ass'n v. Springfield School Dist.*, 290 Or. 217, 220, 239, 621 P.2d 547, 551, 562 (1980) (bases and mechanics of evaluation permissive but fairness of procedures mandatory); *Beloit Educ. Ass'n*, 73 Wis. 2d 43, 55-56, 242 N.W.2d 231, 237 (who evaluates teachers and nature of assistance to teachers with poor evaluations not mandatory but procedures used in evaluation—such as length and frequency of evaluations, notification, and reporting results—mandatory); *Clark County School Dist.*, 90 Nev. 442, 448-49, 530 P.2d 114, 118-19 (manner of evaluating teacher performance mandatory).

70. *Compare* *In re Keene State College Educ. Ass'n*, 120 N.H. 32, 37, 411 A.2d 156, 160 (1980) (not mandatory) with *Vermont State Colleges Faculty Fed'n v. Vermont State Colleges*, 138 Vt. 451, 456-57, 418 A.2d 34, 37-38 (1980) (mandatory). The former general counsel of the NLRB and public sector labor boards in New York, New Jersey, and Michigan have all indicated that matters of governance are permissive subjects. Feller & Finkin, *Legislative Issues in Faculty Collective Bargaining*, in *FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION* 73, 134-37 (Carnegie Council on Policy Studies in Pub. Higher Education ed. 1977).

71. *See* *Council of N.J. State College Locals v. State Bd. of Higher Educ.*, 91 N.J. 18, 25-33, 449 A.2d 1244, 1248-51 (1982) (substantive criteria for retrenchment nonnegotiable but procedures for implementing decisions mandatory). *Compare* *Kansas Bd. of Regents v. Pittsburg State Univ.* Chapter of Kan.-Nat'l Educ. Ass'n, 233 Kan. 801, 823-25, 667 P.2d 306, 322-24 (1983) (criteria for promotion, tenure, and retrenchment mandatory) with *Association of N.J. State College Faculties v. Dunagan*, 64 N.J. 338, 352-56, 316 A.2d 425, 433-35 (1974) (tenure guidelines not mandatory).

The few litigated cases involving other professionals have generally reinforced the restrictive definition of mandatory subjects reflected in the education cases. A labor board in New York City determined that the level of staff and equipment in hospitals and standards of patient care are not mandatory subjects. In response to claims by a union of interns and residents that low standards risked loss of hospital accreditation, violations of principles of professional conduct, and reduced opportunities for professional advancement, the board observed that these problems go beyond the employer-employee relationship.⁷² State courts construing statutes governing public employees have divided on whether social workers' caseloads are mandatory subjects related to working conditions or permissive issues of policy,⁷³ and the NLRB has held that a publisher's imposition of a code of ethics on reporters may be permissive in some circumstances but mandatory in others.⁷⁴

Many unions representing professional employees, assuming that professional issues would be declared nonmandatory, have not even contested employer refusals to bargain about them. Unions preferred saving these issues for future negotiations over suffering expected legal defeats that might reinforce employer reluctance to discuss them at all. In several instances when employers refused to renew important provisions from prior agreements—such as union membership on the governing board of a museum, or the obligation of a symphony orchestra to select the conductor from a list submitted by the union—the unions, convinced that they would lose any litigation, acquiesced. Employer representatives tend to agree

72. *In re City of N.Y., Bd. of Collective Bargaining Decision No. B-10-81* (1981) (opinion on file with author). The Board did recognize as mandatory subjects the performance of out-of-title work, time off between shifts, and maximum hours. Yet it cautioned that possible changes in staffing to meet negotiated provisions on these mandatory subjects, as well as the definition of out-of-title work, remained managerial prerogatives outside the scope of required bargaining. *Id.* The Michigan constitution guarantees the autonomy of the University of Michigan Board of Regents in matters of educational policy. This constitutional provision led the state supreme court to limit the scope of bargaining with a union of interns and residents at the University of Michigan hospital. Because hours of training affect the quality of medical education, the court reasoned, they could not constitutionally become a mandatory subject of bargaining. *Regents of the Univ. of Mich. v. Michigan Employment Relations Comm'n*, 389 Mich. 96, 106, 204 N.W.2d 218, 224 (1973).

73. Compare *Joint Bargaining Comm. of the Pa. Social Serv. Union v. Pennsylvania Labor Relations Bd.*, 503 Pa. 236, 469 A.2d 150 (1983) (not mandatory) with *Los Angeles Court Employees Ass'n, Local No. 660 v. County of L.A.*, 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 (1973) (mandatory).

74. See *Peerless Publications, Inc.*, 283 N.L.R.B. 334, 335-37 (1987). In its initial exposure to this issue, the Board held that the code itself was a permissive subject but that its penalty provisions were mandatory. *Capital Times Co.*, 223 N.L.R.B. 651 (1976). Although the Board relied on *Capital Times* in the first *Peerless* case, 231 N.L.R.B. 244, 245 (1977), the District of Columbia Circuit rejected this distinction on review, reasoning that penalties cannot be separated "from the substantive provisions which they are designed to enforce." The court remanded the case to the Board to determine whether particular subjects covered by the code of ethics are mandatory or not. *Newspaper Guild v. NLRB*, 636 F.2d 550, 564-65 (D.C. Cir. 1980). On remand, the Board agreed with the court's reasoning and overruled *Capital Times* and its first *Peerless* decision to the extent that they held otherwise. 283 N.L.R.B. at 334-35 & n.4. The Board concluded that the code of ethics in *Peerless* should have been part of mandatory bargaining, but made clear that other codes of ethics could be permissive subjects if they relate to "the credibility of the institution and/or the quality of its product" and "do not improperly infringe on the relevant rights of the affected employees." *Id.* at 337.

with this legal view, although some emphasize their willingness—based on respect for the professional competence of their employees—to discuss and even incorporate in collective bargaining agreements reasonable union proposals on nonmandatory, professional issues.⁷⁵

Even in jurisdictions in which the statutory duty to bargain in good faith refers explicitly to “terms and conditions of professional service”⁷⁶ or matters pertaining to “the fulfillment of . . . professional duties,”⁷⁷ the scope of mandatory bargaining has not been broadened substantially. One judicial reading of such language has defined mandatory subjects as “something more than the minimal economic terms of wages and hours, but something less than the basic educational policies of the board of education.”⁷⁸ Responding to a union’s claim that the statutory reference to professional matters should encourage an expansive interpretation of mandatory bargaining, another court reiterated the general concern about assigning too many issues to the collective bargaining process. “If teachers’ unions are permitted to bargain on matters of educational policy,” the court reasoned, “it is conceivable that through successive contracts the autonomy of the school boards could be severely eroded, and the effective control of educational policy shifted from the school boards to the teachers’ unions.”⁷⁹ The court warned that this result could undermine the ability of school boards and administrators, who are responsible to the electorate, “to perform their functions in the broad public interest.”⁸⁰

Labor boards and courts occasionally encourage governing boards and administrators to consult with professional employees and their unions about the very issues these legal decision-makers have excluded from the scope of mandatory bargaining. For example, the Supreme Court of New Jersey ruled that a school board’s decision to consolidate the chairs of two departments into one position was an illegal subject of bargaining. Yet the court immediately added that its holding, while required by the statutory scheme entrusting matters of educational policy to the school board, should not be understood to preclude voluntary discussions about policy issues with teachers and their union representatives. The court observed that teachers, “as trained professionals, may have much to contribute towards the Board’s adoption of sound and suitable educational policies.”⁸¹ Similarly, the Supreme Court of Wisconsin recognized that a teachers’ union is both a collective bargaining agent and a professional association.

75. These comments derive from interviews with union and management lawyers who agreed to speak only on a confidential basis.

76. *E.g.*, *National Educ. Ass’n v. Board of Educ.* 212 Kan. 741, 741, 512 P.2d 426, 427 (1973) (quoting KAN. STAT. ANN. § 72-5413(g) (1985)).

77. *E.g.*, *Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass’n*, 572 P.2d 416, 417 (Alaska 1977) (quoting ALASKA STAT. § 14.20.550 (1987)).

78. *Nat’l Educ. Ass’n*, 212 Kan. at 741, 512 P.2d at 427.

79. *Kenai Peninsula Borough School Dist.*, 572 P.2d at 419.

80. *Id.*

81. *Dunellen Bd. of Educ. v. Dunellen Educ. Ass’n*, 64 N.J. 17, 32, 311 A.2d 737, 744 (1973).

The court stressed that the union's role as an agent, while limited by the scope of bargaining, does not preclude it from functioning as a professional association and expressing its views about educational policies. But in the capacity of a professional association, the organization cannot take advantage of the principle of exclusive representation and restrict discussion to the bargaining table. Rather, it must make its voice heard "along with other groups and individuals similarly concerned."⁸²

Several cases demonstrate vividly the adverse impact on professional values caused by applying the legal distinction between mandatory and permissive or prohibited subjects of bargaining. A judicial holding that governance is a nonmandatory subject allowed a university, after the election of a faculty union, to abolish the prior system of faculty committees without bargaining with the union.⁸³ Similar reasoning supported the refusal of employers even to discuss union requests for faculty participation on promotion review committees⁸⁴ or for joint committees of teachers and school administrators to deal with subjects such as student discipline, selection of administrators, curriculum, and in-service programs.⁸⁵

B. *Experience Under "Meet and Confer" Provisions*

As part of an effort to limit the scope of mandatory bargaining while retaining professional input into major issues of policy, some state legislation governing collective bargaining in the public sector contains "meet and confer" provisions intended to supplement the traditional negotiating process.⁸⁶ These provisions typically require the employer to "meet and confer" with representatives of employees about issues of professional concern that are not mandatory subjects of bargaining. Unlike collective bargaining negotiations, "meet and confer" sessions are not expected to lead to legally enforceable agreements. At least in theory, professional employees can give their expert advice, which may benefit the employer and the general public, without jeopardizing the employer's managerial prerogatives or citizens' interests in meaningful participation regarding matters of public concern.

Unfortunately, these well-intentioned "meet and confer" provisions do not seem to have accomplished their purposes. They are often either ineffective or indistinguishable from collective bargaining. "Meet and confer" provisions can relegate unions to the role of impotent discussant rather than the equal negotiator contemplated by true collective bargaining.

82. *Beloit Educ. Ass'n v. Wisconsin Employment Relations Comm'n*, 73 Wis. 2d 43, 52, 242 N.W.2d 231, 235 (1976).

83. *In re Keene State College Educ. Ass'n*, 120 N.H. 32, 411 A.2d 156 (1980).

84. *Rutgers v. Rutgers Council, Am. Ass'n of Univ. Professors*, N.J. Public Employment Relations Comm'n No. 76-13 at 12-14 (1976) (opinion on file with author).

85. *Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243 (Del. 1982).

86. *E.g.*, CAL. GOV'T CODE § 3543.2 (West 1980); ME. REV. STAT. ANN. tit. 26, § 965(1)(C) (1988).

Without the requirement of reaching enforceable agreements in good faith, these advisory sessions often amount to no more than "collective begging" easily ignored by the employer. Eventually, the very "meet and confer" process may atrophy. On the other hand, the theoretical differences between "meet and confer" sessions and collective bargaining negotiations often evaporate in practice. The scope of bargaining frequently expands with the duration of the relationship between the union and the employer. Issues originally addressed in "meet and confer" sessions eventually become part of collective bargaining negotiations.⁸⁷

The Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*⁸⁸ illustrates the difficulty of using "meet and confer" provisions to preserve independent professional influence within a system of collective bargaining, particularly when the exclusive union representative designates the employee representatives in the "meet and confer" sessions. The Minnesota statute construed in *Knight* made clear that "educational policies" are outside the scope of mandatory bargaining.⁸⁹ Yet the statute simultaneously required the public employer to "meet and confer with professional employees" about these educational policies and any other nonmandatory subjects,⁹⁰ reasoning that "professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies."⁹¹ Significantly, the statute also provided that the election of an exclusive representative within an appropriate bargaining unit required the employer to deal only with the union and precluded any participation by other professional employees, individually or in groups, in "meet and confer" as well as in collective bargaining sessions.⁹²

The exclusive representative elected by faculty in the Minnesota com-

87. See H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 146, 150 (1971); Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 896, 901 (1973); Edwards, *An Overview of the "Meet and Confer" States—Where Are We Going?*, 16 LAW QUADRANGLE NOTES 10, 10 (Winter 1972) ("Most critics of the 'meet and confer' model argue that it forces a union to engage in 'collective begging' in place of collective bargaining in the public sector.").

A thorough study of the evolution of the relationship between the teachers' union and the board of education in New York City found that the union effectively expanded the scope of collective bargaining from relatively narrow working conditions to broader policy issues. The union convinced the board to abolish many forms of joint consultation between teachers and the administration that antedated the union and did not formally include it, and to incorporate many of these issues within the collective bargaining process. The union soon became a major factor in school administration through both collective bargaining and regular bilateral consultation with the board of education. Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History*, 67 MICH. L. REV. 1033, 1042-52 (1969).

88. 465 U.S. 271 (1984).

89. 1971 Minn. Laws—Extra Session, ch. 33, § 3, subd. 18 (repealed by 1984 Minn. Laws, ch. 462, § 28).

90. *Id.* at § 6, subd. 3 (repealed by 1984 Minn. Laws, ch. 462, § 28).

91. *Id.* at § 13, subd. 1 (repealed by 1984 Minn. Laws, ch. 462, § 28).

92. *Id.* at § 6, subd. 7 (repealed by 1984 Minn. Laws, ch. 462, § 28).

munity college system negotiated a collective bargaining agreement that established state and local "meet and confer" committees as the sole forums for the expression of official faculty views. The agreement required abolishing the faculty senates that previously had existed at some campuses, and the union selected only its own members to serve on "meet and confer" committees.⁹³ Yet the governing board and administrators generally provided opportunities for other faculty members to supplement the official views on various issues of academic governance conveyed through these committees.⁹⁴

Faculty members in the bargaining unit who chose not to join the union claimed that the new scheme constituted a departure from generally accepted and convincingly justified professional traditions of faculty governance.⁹⁵ The Court majority conceded that these faculty members had a substantially less effective role in university governance than the participants in the "meet and confer" process.⁹⁶ Yet the majority was unmoved by dissenters' arguments derived from general principles of First Amendment interpretation⁹⁷ and from the specific First Amendment protection for academic freedom.⁹⁸ It simply concluded that these laudable traditions do not amount to a constitutional right limiting the scope of collective bargaining or "meet and confer" provisions.⁹⁹ The Court therefore upheld the statute and the labor agreement while acknowledging their adverse impact on the professional influence of professors outside the union structure. "Faculty involvement in academic governance," the Court concluded, "has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution."¹⁰⁰

C. *The Recommended Elimination of the Distinction in Professional Employment*

The distinction between mandatory and permissive subjects of bargaining should be abolished in the context of professional employment. By placing so many issues of professional concern outside the scope of mandatory bargaining, this distinction inhibits the use of collective bargaining to support and enforce professional values. As the original opponents of the distinction warned,¹⁰¹ legal restrictions on the subjects of

93. *Knight*, 465 U.S. at 275-76.

94. *Id.* at 276 n.3, 276-78.

95. *Id.* at 287-88.

96. *Id.* at 288.

97. *Id.* at 300-23 (Stevens, J., dissenting).

98. *Id.* at 295-300 (Brennan J., dissenting).

99. *Id.* at 287-88.

100. *Id.* at 288.

101. See *supra* text accompanying notes 38-42; see also Note, *Major Operational Decisions and Free Collective Bargaining: Eliminating the Mandatory/Permissive Distinction*, 102 HARV. L. REV. 1971, 1986-88 (1989) (advocating replacement of mandatory/permissive distinction with subjective good faith standard rather than with mandatory bargaining over every subject).

mandatory bargaining have allowed labor boards and courts to impose their values on the collective bargaining relationship. The view that issues of fundamental policy are managerial prerogatives underlies the distinction and derives from assumptions about the limited role of industrial employees. This view is inconsistent with the goals of professional employees, who claim persuasively that they have a legitimate and socially useful role to play in determining policies related to their professional expertise, whether or not these policies affect narrowly defined terms of employment. Indeed, most professional employees consider input into such policy issues an important condition of professional employment.¹⁰²

The Supreme Court's implication that mandatory negotiations about policy issues would make the union "an equal partner"¹⁰³ in running an organization, moreover, is simply incorrect. As the NLRA and comparable state legislation make clear, mandatory bargaining does not compel agreement. Employers are free, after good faith bargaining, unilaterally to adopt positions rejected by the union during negotiations. Mandatory bargaining does increase union power and restrict managerial flexibility by requiring employers to negotiate before they act. But mandatory bargain-

102. See, e.g., J. BLAU, ARCHITECTS AND FIRMS 24-45, 51, 53, 59 (1984) (importance to architects of "voice" in organizational decision-making and correlation between voice and commitment); P. BLAU, THE ORGANIZATION OF ACADEMIC WORK 164, 193, 277-78 (1973) (desire by faculty for influence in educational and appointment decisions); A. GOULDNER, *supra* note 32, at 20 (unlike working class, "new class" of professional employees seeks to control content and quality of work); W. KORNHAUSER, SCIENTISTS IN INDUSTRY: CONFLICT AND ACCOMMODATION 17-42, 197 (1963) (attempts by industrial scientists to achieve professional goals, including formulation of research policy); H. MINTZBERG, POWER IN AND AROUND ORGANIZATIONS 132-34 (1983) (efforts by professional employees to influence organizational policies traced to their identification of organizational mission with professional goals).

Derber, *Managing Professionals: Ideological Proletarianization and Mental Labor*, in PROFESSIONALS AS WORKERS: MENTAL LABOR IN ADVANCED CAPITALISM 167, 188 (C. Derber ed. 1982), claims that professional employees, while maintaining substantially more technical discretion than industrial workers, "are increasingly stripped of authority to select their own projects or clients and to make major budgetary and policy decisions." As a result, he maintains, some professional employees have engaged in "a kind of ideological Luddism that involves routine bending or breaking rules to aid clients and assert at least marginal control over the objectives and directions of one's work with clients." *Id.* at 179. M. LIPSKY, STREET-LEVEL BUREAUCRACY 20-21 (1980), similarly reports that doctors, overcoming efforts by the Veterans Administration hospital system to limit their discretion, managed to manipulate bureaucratic rules "to impose their views of proper treatment on the organization."

E. FREIDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE 182-83, 211 (1970), warns against too much professional influence in organizations. He advocates restricting "medical dominance" to matters "having a technical or scientific rationale" and argues that hospital administrators should protect patient choice against professional control that is not based on expertise. Freidson ends another book by expressing his opinion that:

[T]he professions' role in a free society should be limited to contributing the technical information men need to make their own decisions on the basis of their own values. When he preempts the authority to direct, even constrain men's decisions on the basis of his own values, the professional is no longer an expert but rather a member of a new privileged class disguised as expert.

E. FREIDSON, PROFESSION OF MEDICINE, A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE 382 (1970).

103. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981).

ing does not, as the term "equal partner" suggests, oblige employers to obtain union concurrence before making decisions.

Eliminating legal restrictions on the scope of mandatory bargaining would therefore require employers to negotiate about policy issues of professional concern without ceding their final authority to determine these issues themselves. It would end the practical difficulty—and the associated confusion, litigation, and conflicting results—inherent in making necessarily fine judgments about whether or not a subject is mandatory. It also supports the principle of free collective bargaining without government interference that underlies the NLRA.¹⁰⁴ The failure of "meet and confer" provisions to solve these problems provides further support for eliminating the underlying distinction between mandatory and permissive subjects in both the private and public sectors.

Expanding the scope of mandatory bargaining to cover policy issues of professional concern could be accomplished without abolishing entirely the category of nonmandatory subjects. One could argue, for example, that professors should be able to require bargaining about educational policy but not about university investment decisions. In addition, issues of professional concern to one profession could plausibly be deemed beyond the legitimate interests of other professions. The differences in background and training between doctors and nurses could justify a greater scope of mandatory bargaining over certain health care issues for doctors.¹⁰⁵ Yet differentiating policy issues of professional concern from other policy issues, especially if this distinction varies with the profession involved, perpetuates the difficult and often unpredictable task of sorting bargaining issues into categories that determine important legal rights. My proposal to require bargaining over all subjects avoids this major problem. In practice, moreover, I believe that unions of professional employees are unlikely to press for contractual provisions on matters that are well beyond conventional professional concerns.

Some fear that expanding mandatory bargaining would destroy effective mechanisms outside union control that facilitate professional influence on organizational policy.¹⁰⁶ For example, if governance were a mandatory

104. See Note, *supra* note 101.

105. For example, control over discharging a patient or referring a patient to an outside consultant might be considered appropriate subjects of bargaining for physicians, but not for nurses.

106. It is noteworthy that the Carnegie Council on Policy Studies in Higher Education rejected the proposal on the scope of bargaining by the authors of an essay it commissioned. Professors Feller and Finkin come close to advocating the abolition of the mandatory/permissive distinction so that faculty unions could bargain over issues of educational policy and governance. They stress that the bargaining unit must reflect the traditional constituency for faculty governance to make their proposal work. Feller & Finkin, *supra* note 70, at 130–31, 140–41, 164–70. Cf. *infra* note 120 (emphasizing importance of bargaining unit consisting of professional employees).

The Carnegie Council observed that it "might accept the expansive approach to bargainable issues" recommended by Feller and Finkin if it had more confidence that laws would define faculty bargaining units by traditional governance constituencies. Beyond expressing doubt that such conformity would occur, the Carnegie Council worried that any bargaining over issues of governance and educa-

subject, the union might preempt and even force the abolition of collegial bodies such as faculty senates, councils of doctors and nurses, artistic advisory committees in symphony orchestras, and other consultative bodies of professionals.¹⁰⁷ On the other hand, case law demonstrates that declaring governance a permissive subject, by allowing employers unilaterally to abolish or to refuse to implement these collegial structures, can also undermine traditional means of professional influence.¹⁰⁸

Free collective bargaining, of course, cannot force either side to agree to provisions that support professional values. But broadening the scope of collective bargaining to include what are now permissive or prohibited policy issues seems better adapted to encouraging these values than the current restrictive definition of mandatory subjects. Some professional employees and their unions reject professionalism as a bankrupt concept that has allowed employers to take advantage of their professional employees, and emulate the industrial model of collective bargaining as a tough, adversarial alternative.¹⁰⁹ Yet a larger and growing number of professional

tional policy would weaken professional or collegial rights "at the heart of the academic enterprise." The Council recommended instead that collective bargaining be limited to "items that have a monetary dimension—and that those matters that traditionally constitute the essence of 'academic freedom and autonomy' should be specifically excluded." Yet the Council would allow a union to bargain about the establishment of an academic senate. Carnegie Council, *Three Key Issues*, *supra* note 9, at 12–15.

107. The collective bargaining agreement challenged in *Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271, 275–76 (1984), replaced faculty senates with the "meet and confer" sessions controlled by the exclusive union representative. See *supra* text accompanying note 93. Another faculty union negotiated a contract that replaced the faculty senate and peer review committees with a grievance-arbitration procedure designed to allow union challenges to management decisions about issues previously addressed by these bodies. Lehmann, *The Industrial Model of Academic Collective Bargaining*, in *CAMPUS BARGAINING AT THE CROSSROADS: PROCEEDINGS, TENTH ANNUAL CONFERENCE, NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS* 48, 53 (J. Douglas ed. 1982). Unions representing a wide range of professional employees have negotiated a formal role in various policy and personnel decisions. See Rabban, *supra* note 2.

108. See, e.g., *Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243 (Del. 1982) (illegal subjects of negotiation include union proposal for instructional council to advise school superintendent and board of education on curriculum, educational goals, and other topics deemed appropriate by union); *In re Keene State College Educ. Ass'n*, 120 N.H. 32, 411 A.2d 156 (1980) (elimination of faculty committees within managerial prerogative of university).

The Carnegie Council, in an apparent attempt to be evenhanded, claimed that its suggested limitations on the scope of faculty bargaining apply to the employer as well as to the union. "The issue is not just what the union may want to bargain about but also what the 'employer,' however defined, may want to bargain about." Carnegie Council, *Three Key Issues*, *supra* note 9, at 14. Citing actual experience in higher education, the Council also worried that collective bargaining agreements reserving management rights may diminish the faculty's appropriate role "by delegating to a board of regents or other 'employer' those decisions that are or should be made at the faculty level." It urged that laws governing collective bargaining in higher education "make clear that the phrase 'management rights' is not intended to reduce faculty influence over 'collegial rights.'" *Id.*

109. See, e.g., Eastabrook, *Labor & Librarians: The Divisiveness of Professionalism*, *LIBR. J.*, Jan. 15, 1981, at 125; Kugler, *Creation of a Distinction Between Management and Faculty*, in *PROCEEDINGS, FIRST ANNUAL CONFERENCE, NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION* 67 (M. Benewitz ed. 1973) [hereinafter *PROCEEDINGS*]; Lehmann, *supra* note 107, at 54–55; Wollett, *Historical Development of Faculty Collective Bargaining and Current Extent*, in *PROCEEDINGS*, *supra*, at 28. See generally Rabban, *supra* note 3.

employees and their unions seek collective bargaining as an effective method to obtain and enforce professional values.¹¹⁰

In fact, many unions representing professional employees have successfully negotiated contractual protection for these values, even though many provisions deal with permissive subjects about which employers need not bargain. Collective bargaining agreements have guaranteed the participation of musicians in the personnel decisions of orchestras,¹¹¹ periodic forums in which legal services attorneys can address "issues of project-wide significance,"¹¹² adherence by hospitals to standards of nursing practice developed by the American Nurses' Association,¹¹³ controls by reporters on revisions of their articles,¹¹⁴ and a wide range of opportunities for teachers to benefit from professional development.¹¹⁵ Legal enforcement of collective bargaining agreements, moreover, has invalidated attempts by university administrators to abolish tenure¹¹⁶ and to decide academic issues without consulting the faculty.¹¹⁷ Under my proposal to transform all issues of professional concern into mandatory bargaining subjects,¹¹⁸ it

110. See, e.g., L. FLANAGAN, *COLLECTIVE BARGAINING AND THE NURSING PROFESSION* 18-25 (American Nurses' Association 1983); T. GUYTON, *UNIONIZATION: THE VIEWPOINT OF LIBRARIANS* 114-15 (1975); Barwis, *Contractual Newsroom Democracy*, 57 *JOURNALISM MONOGRAPHS* 1 (1978); Chamot, *Professional Employees Turn to Unions*, 54 *HARV. BUS. REV.* 119 (May-June 1976); *Council Position on Collective Bargaining*, *supra* note 3, at 46-61; Lightman, *Professionalization, Bureaucratization, and Unionization in Social Work*, 56 *SOC. SERV. REV.* 130 (1982); Schorr, *Unionization in Legal Services: Beginning the Discussion*, 14 *CLEARINGHOUSE REV.* 836, 842 (December 1980).

A participant in the faculty union at Boston University reports that he and the other professors who ended by committing ourselves to collective bargaining actually began, years earlier, to attempt reforms in the governance system of the university through traditional means, and our guide in those early efforts was the *AAUP Policy Documents and Reports* (Redbook). It was only when these early efforts failed that we opted for collective bargaining, which we regarded as a somewhat novel means to attain quite traditional ends.

Ringer, *Academic Governance and Collective Bargaining*, 66 *ACADEME* 41, 42 (1980). Professor Ringer adds more generally that "collective bargaining in the more vulnerable portions of the academic world has in fact sought the restoration and/or protection of traditional norms of collegial governance and peer review . . ." *Id.* at 43. See generally Rabban, *supra* note 3.

111. Note, *NLRB v. Yeshiva University: The Professional-Managerial Overlap*, 32 *HASTINGS L.J.* 659, 681-85 (1981).

112. Rabban, *supra* note 2, at 7-8 (discussing collective bargaining agreements in legal aid programs).

113. L. FLANAGAN, *supra* note 110, at 20.

114. Barwis, *supra* note 110, at 15, 17-18.

115. *Negotiated Paid Leave for Educational Conferences, Conference Fees Paid, and Travel Allowance Provisions*, NEA *NEGOTIATION RESEARCH DIGEST* (Nov. 1973).

116. *AAUP v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (1975).

117. *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kan.-Nat'l Educ. Ass'n*, 233 Kan. 801, 667 P.2d 306 (1983).

118. Though judicial interpretation could legitimately accomplish this goal, see *supra* text accompanying note 19, statutory amendment is probably the most direct route. Adding a proviso to the definition of good faith bargaining in § 8(d) and in analogous provisions in legislation governing the public sector could elaborate this duty in the context of professional employment: *Provided, that in any unit composed primarily of professional employees 'conditions of employment' shall include any subject either party raises.*

An unsuccessful bill that proposed Federal legislation governing collective bargaining in the public sector attempted to expand the scope of bargaining to include issues of policy. The bill would have

would be easier for unions to bargain about and obtain agreements that incorporate professional values,¹¹⁹ particularly if professional employees constitute the bargaining unit.¹²⁰

1. *The Increased Threat of Strikes*

Some people who are otherwise sympathetic to an expanded scope of mandatory bargaining for all employees nevertheless worry that it might

required bargaining over "the terms and conditions of employment and other matters of mutual concern relating thereto." *Labor-Management Relations in the Public Sector, 1973 and 1974: Hearings on H.R. 8677 and H.R. 9730 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 2 (1974) (emphasis added).

119. Some commentators suggest that the mandatory/permissive distinction can be circumvented by skillful bargaining about permissive subjects and by mandatory bargaining over the effects of a permissive decision. See J. GETMAN & B. POGREBIN, *LABOR RELATIONS* 123 (1988); Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 *INDUS. REL. L.J.* 402 (1983). But one recent empirical study concludes that more time is spent bargaining over mandatory than over permissive subjects and that mandatory status correlates with a narrower gap between initial demands and eventual settlements. Delaney, Sockell & Brockner, *Bargaining Effects of the Mandatory-Permissive Distinction*, 27 *INDUS. REL.* 21, 31, 33 (1988). See also Woodbury, *The Scope of Bargaining and Bargaining Outcomes in the Public Schools*, 38 *INDUS. & LAB. REL. REV.* 195, 208 (1985) (restrictions on bargaining over class size associated with larger student-teacher ratios and higher teachers' salaries). These studies support the anecdotal evidence by participants in labor negotiations that it is harder to reach agreements over nonmandatory subjects. See *supra* text accompanying note 75. Even if the distinction can be circumvented, moreover, ineffectiveness is a poor basis for its retention. Note, *supra* note 101, at 1985.

120. In their comprehensive study of faculty bargaining in higher education, Professors Feller and Finkin identify the composition of the bargaining unit as "the single most significant factor in adjusting faculty collective bargaining to higher education." Feller & Finkin, *supra* note 70, at 80. Because collective bargaining inevitably affects educational policy, they argue that "the polity for the selection of the bargaining agent must be essentially coextensive with the polity in the system of academic government." *Id.* at 97; see also *id.* at 140-41, 145, 160. According to Professor Feller, it is possible to "avoid unnecessary antagonism between the adversary and the collegial systems, between collective bargaining and academic self-governance, and between union and senate by establishing a collective-bargaining agency whose constituency is identical with that of the senate." Feller, *Alternative Organizational Approaches*, in *COLLECTIVE BARGAINING IN HIGHER EDUCATION* 48, 50 (M. Abell ed. 1976).

Similarly, the American Bar Association and the Federal Bar Association have maintained that lawyers should organize in their own units. In an informal opinion in 1967, the ABA Standing Committee on Professional Ethics found that lawyers "who are paid a salary and who are employed by a single client employer" would not violate the Canons of Ethics by joining a union "limited solely to other lawyer employees of the same employer." ABA Standing Comm. on Professional Ethics, Informal Op. 986 (1967). The introduction to a study by the Federal Bar Association stated that "attorneys should be separated into units of attorneys alone so that non-attorneys should not be in a position to determine courses of action for attorneys. This position is based upon the status of attorneys under their Code of Ethics as relating to the attorney-client relationship and the status of attorneys as officers of the Court." Special Committee to Study Federal Employee Professional Associations, Summary of oral report by Committee Chairman Alan H. Randall, at the Federal Bar Association National Council Meeting (May 15, 1973).

I recognize the relationship between units limited to professional employees and bargaining over professional standards, but I am reluctant to require such units as a matter of law. The current rule under the NLRA, which reflects a carefully considered congressional compromise, provides that the NLRB shall not include professional and nonprofessional employees in the same unit unless a majority of professional employees vote for a broader unit. 29 U.S.C. § 159(b)(1) (1982); see Rabban, *supra* note 1 (discussing legislative history of this provision). Given the appropriate emphasis on employee choice in selecting a union and the longstanding tradition of "mixed" units of professionals and nonprofessionals in various work settings, this rule should not be changed unless experience suggests that unions representing "mixed" units disproportionately sacrifice professional values.

give workers too much power by strengthening their ability to strike. Under the NLRA strikes over mandatory subjects are protected, whereas strikes over permissive subjects are not.¹²¹ In contrast, strikes by public employees are illegal under any circumstances in most public sector jurisdictions.¹²² Requiring bargaining with professional employees on all subjects would enable unions to use the pressure of a strike to destroy or preclude professional values in those jurisdictions that protect strikes over mandatory subjects.¹²³

General concern about the relationship between the scope of bargaining and the effectiveness of strikes has prompted consideration of ways to expand mandatory bargaining without a corresponding extension of the right to strike. For example, one commentator on the NLRA suggests the addition of a new category of "consultative subjects of bargaining" to the current categories of mandatory, permissive, and illegal subjects. Unions and employers would be required to "meet and confer" about consultative subjects, but could not use economic weapons to pressure the other side to agree to proposals about them.¹²⁴

This suggestion is unpersuasive. The principle that the threat of strikes makes meaningful collective bargaining possible is fundamental to the system established by the NLRA. This principle assumes that avoiding the mutual economic damage of a strike is a major inducement for the parties to compromise their differences at the bargaining table. Without the right to strike, the right to negotiate has little significance.¹²⁵ By uncoupling mandatory negotiations from protected strikes, the creation of a new consultative category would deviate from these basic premises of the NLRA and would raise the danger of "collective begging," which already exists

121. Professors Feller and Finkin argue convincingly that in the private sector the distinction between mandatory and permissive subjects of bargaining assumes more importance during strikes than during the process of negotiations for which it was designed. See Feller & Finkin, *supra* note 70, at 117-20.

122. See *Developments*, *supra* note 6, at 1701-04.

123. See *supra* note 107 and accompanying text (discussing possible abolition of consultative bodies of professionals if governance is mandatory subject).

Professor Kadish argues that strikes by professors over any subject may undermine five professional values: "the service ideal; the moral basis of professional claims; the commitment to shared and cooperative decision-making; the commitment to reason; and the pursuit of distinction." Kadish, *The Strike and the Professoriate*, 54 A.A.U.P. BULL. 160, 163 (1968). Yet Kadish favors strikes by professors in certain limited circumstances as, for example, where a university's "departure from academic freedom had previously been authenticated by a disinterested agency" or where "a faculty, oppressed beyond endurance by low salaries and burdensome teaching loads, is reduced to striking as a last ditch effort in self-defense and survival." *Id.* at 167.

124. Bellace, *Mandatory Consultation: The Untravelled Road in American Labor Law*, PROCEEDINGS OF THE FORTIETH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 78, 82 (B. Dennis ed. 1987).

125. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-90 (1960), contains a strong statement of this position, citing Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1409 (1958). See also Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 463-66 (1971) (possibility of strikes makes collective bargaining work).

under the "meet and confer" provisions of various state laws covering public employees.¹²⁶

Especially in the context of professional employment, moreover, the underlying concern about the danger of strikes seems overstated. The widespread commitment to professional standards, whether derived from codes of professional responsibility or otherwise internalized through training and experience, makes professional employees less likely to strike, and more likely to minimize the impact on clients when they do strike, than other workers. Their strikes, in fact, are often designed to put pressure on employers to implement, rather than to undermine, professional standards. For example, a news story about a strike by legal aid attorneys reported that "the controversy centers on one issue: the quality of legal representation given to poor people in this city."¹²⁷ The union demands included reduced case loads, better facilities for interviewing clients, additional time for legal research, and more continuity in legal representation.¹²⁸

126. See *supra* text accompanying note 87. Although she does not explicitly oppose on theoretical grounds the right to strike over a broader range of subjects, Professor Bellace apparently concludes that concerns by others about extending the right to strike have led to unfortunate restrictions on the scope of bargaining. See Bellace, *supra* note 124, at 80-82.

127. 400 *Legal Aid Lawyers Go On Strike for Better Pact*, N.Y. Times, July 3, 1973, at 1, col. 1, 24, col. 1.

128. *Id.* at 1, col. 1. A subsequent discussion of attorneys' strikes in an opinion by the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York expressed concern about potential ethical violations. Yet the opinion also recognized claims that strikes had broad professional purposes: "Legal Aid lawyers who have engaged in strike activities have contended that the purpose of the strike is to protest large caseloads and other problems in the criminal justice system and that a possible effect of their strike is to promote improvement of the legal system." N.Y. City Bar Ass'n Comm. on Professional and Judicial Ethics, Op. No. 82-75 at 7 (May 23, 1983) (unpublished opinion; on file with author).

An informal opinion by the ABA concluded that strikes by lawyers may be consistent with the ABA's Code of Professional Responsibility despite earlier opinions finding that a lawyer's mere membership in a union violates professional ethics. While acknowledging that some strike actions may harm clients in ways prohibited by various disciplinary rules, the opinion observed that "in some situations participation in a strike might be no more disruptive of the performance of legal work than taking a two week's vacation might be." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1325, at 3 (1975) ("Ethical Considerations in Strikes by Unions Representing Membership Consisting Solely of Lawyers"). One study observes that staff attorneys threatening to strike a legal services office were planning to help their clients unofficially. The attorneys cited their commitment to their professional oath and their unwillingness "to let our clients down." E. SPANGLER, *LAWYERS FOR HIRE* 154 (1986).

Nurses have expressed similar commitment to professional responsibility. Testifying about the proposed extension of the NLRA to nonprofit hospitals, a representative of the American Nurses' Association (ANA) emphasized the reluctance of nurses to strike.

Employees, especially professional employees such as registered nurses, do not resort to strikes capriciously. Professional nurses strike only when they receive a rebuff from their employers to their efforts to deal with professional concerns such as unmanageable patient care assignments, copious clerical tasks, inadequate supportive services, [and] lack of equipment and supplies which result in gross misutilization of our skills.

Hearings on S. 794 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. 111 (1973) (statement of Bonnie P. Graczyk). In rescinding its no-strike policy in 1968, the ANA advocated "concerted economic pressures which are lawful and consistent with the nurse's professional responsibilities, and with the public's welfare." L. FLANAGAN, *supra* note 110, at 15.

It is also probable that people wary of any expanded right to strike exaggerate the potential impact of strikes on employers and the public. The widespread prohibition of strikes by public employees, many of whom are professionals, has focused contemporary debate about the right to strike on the public sector. Substantial, though controverted, evidence indicates that the frequent and often ineffectively punished illegal strikes in the public sector, which make a mockery of the laws against them, have not caused major problems for employers or the public. Despite the warnings of those who oppose extending the right to strike to public employees, these illegal strikes have not generally placed greater pressure for settlements and concessions on public than on private employers.¹²⁹ Even the more significant of these strikes cannot be isolated as determinative influences on public policy. They have constituted only one of many key factors in complex relationships involving politicians, community leaders, and the general public, as well as employers and employees.¹³⁰

In those relatively rare circumstances when strikes by professional employees do threaten the public welfare, existing laws offer models for regulation. For example, the NLRA allows injunctions against strikes that "will imperil the national health or safety,"¹³¹ and some public sector jurisdictions, despite the majority practice of issuing injunctions against any illegal strike, provide injunctive relief only after proof that an illegal strike presents substantial dangers to the public.¹³² The 1974 amendments to the NLRA require "employees of a health care institution," including professionals such as nurses and doctors, to give prior notification of any intent

The president of the Union of American Physicians and Dentists has distinguished between strikes against patients and strikes against "the administrative apparatus" of "management entities." He finds it "clearly reprehensible" for a physician to "leave any patient torn, bleeding, and unattended just to further his own self-interest," and points out that in every country where physicians have struck they also have made "ample provision for emergency or even urgent care." By contrast, strikes against management are justifiable, even if they involve temporary "inconvenience" to patients by deferring routine or elective procedures. Indeed, he sees "a total consonance of interest between doctors and patients" in these circumstances because the "inconvenience would be compensated for in the long term by our winning from our paymasters improvements in the standards of patient care." Marcus, *Trade Unionism for Doctors*, 311 NEW ENG. J. MED. 1508, 1510-11 (1984).

129. See *Developments*, *supra* note 6, at 1712-15. For a classic debate, compare the views of Wellington and Winter opposing the right to strike in the public sector with the response by Burton and Krider supporting it. See Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 822-52 (1970); Wellington & Winter, *More on Strikes by Public Employees*, 79 YALE L.J. 441 (1970); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1123-27 (1969).

130. The strike by New York City school teachers in 1968 provides an excellent example. See, e.g., M. MAYER, *THE TEACHERS STRIKE*: NEW YORK, 1968 15-16, 103-22 (1969) (teachers' strike one factor among many in controversy over school decentralization; people in foundations, universities, and Mayor's office more to blame for strike than any participants); D. RAVITCH, *THE GREAT SCHOOL WARS* 312-98 (1974) (community control of schools, key issue in strike, soon lost importance as major combatants dispersed and educational funding decreased).

131. 29 U.S.C. § 178(a)(ii) (1982).

132. H. EDWARDS, R. CLARK, & C. CRAVER, *supra* note 67, at 592 n.2. Most courts, however, will issue injunctions against any illegal strikes by public employees without requiring additional proof of potential impact or the employer's good faith. *Id.*

to strike and preclude strikes for specified periods to enable attempts at mediation and conciliation.¹³³ My proposal would allow strikes over any subject by professional employees in both the private and public sectors, subject to similar limiting provisions.¹³⁴

2. *Legislating Minimum Standards*

A legal system that allows strikes over an expanded range of mandatory subjects can limit legislatively the substantive results the parties are free to reach. Statutory enforcement of minimum standards could alleviate concern that agreements between the parties might destroy professional values and interfere with public interests. For example, statutes governing private or public professional employment could demand adherence to stated standards of quality, to codes of professional ethics, and to structures of governance in organizations that employ professionals.

In fact, at least one jurisdiction has enacted such statutory provisions in collective bargaining legislation covering public higher education. California law explicitly recognizes that "joint decision-making and consultation between administration and faculty or academic employees is the long-accepted manner of governing institutions of higher learning and is essential to the performance of the educational missions of these institutions."¹³⁵ While establishing mechanisms for faculty collective bargaining, this legislation declares its intention "to both preserve and encourage . . . shared governance mechanisms or practices"¹³⁶ It also requires the parties to preserve academic freedom and peer review.¹³⁷

Federal labor law does not provide analogous protections for professional values. Yet other Federal statutes and regulations governing specific substantive programs illustrate legal standards to which collective bargain-

133. 29 U.S.C. § 158(d)(A)-(C) (1982).

134. Professors Knight and Sockell reach a similar conclusion. They advocate that the United States follow Canadian law, which allows the parties to determine the scope of bargaining and extends the right to strike to all issues. Knight & Sockell, *Public Policy and the Scope of Bargaining in Canada and the United States*, PROCEEDINGS OF THE FORTY-FIRST ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 279, 283, 285 (1988). Knight and Sockell concede that there is a higher rate of strikes in Canada than in the United States, but they stress that among the many explanations for this difference no analyst has cited the greater scope of bargaining in Canada.

135. CAL. GOV'T CODE § 3561(b) (West Supp. 1989).

136. *Id.*

137. *Id.* §§ 3561(b)-(c). California law further provides that the scope of representation shall not include "[p]rocedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate," unless the academic senate itself determines that these matters "should be within the scope of representation" or these matters are "withdrawn from the responsibility of the academic senate" *Id.* § 3562(q)(4). This provision favors preservation of traditional "collegial" issues within the faculty senate, as the Carnegie Council recommends. *See supra* note 106. But unlike the Carnegie Council approach, it provides a meaningful deterrent to possible administrative efforts to undermine the role of the faculty senate. Administrators and trustees are less likely to disregard the faculty senate when the alternative is dealing with the faculty union.

This California law seems well suited to universities with strong traditions of faculty governance, such as the University of California. It might not work in professional settings that lack these traditions.

ing agreements must conform. For example, legal services legislation restricts litigation involving school desegregation and abortion, limits lobbying by staff attorneys,¹³⁸ and requires them to "refrain from the persistent incitement of litigation and any other activity prohibited by the Canons of Ethics and Code of Professional Responsibility of the American Bar Association"¹³⁹ Medicare legislation imposes quality control and peer review as a condition of payment to providers of services,¹⁴⁰ and uses accreditation by the Joint Commission on Accreditation of Hospitals as part of its definition of a qualified hospital.¹⁴¹ It also establishes standards of licensing, training, and services, and elaborates various residents' rights in "skilled nursing facilit[ies]."¹⁴² The Nuclear Regulatory Commission has issued regulations compelling its licensees to educate workers about the health hazards of radiation and to inform them about their exposure to it.¹⁴³ And the Department of Health and Human Services has promulgated regulations that cover various aspects of research on human subjects.¹⁴⁴

Presumably, any provisions in collective bargaining agreements deemed inconsistent with legislation or administrative rules would be unenforceable. Such limitations on the substantive results of collective bargaining, rather than restrictions on the scope of mandatory bargaining, are more conducive to coordinating the right to bargain collectively with commitment to professional values.¹⁴⁵

This recommendation does not respond fully to concerns that expanded mandatory bargaining would preclude meaningful involvement and influence by professional employees who are not active in the union and by potentially affected clients and citizens.¹⁴⁶ Yet I believe that modifying the

138. C. WOLFRAM, *MODERN LEGAL ETHICS* 943 & n.76 (1986).

139. 42 U.S.C. § 2996f(a)(10) (1982).

140. 42 U.S.C. § 1395g(b) (1982); 42 U.S.C. § 1395x(w)(2) (1982).

141. 42 U.S.C. § 1395x(e) (1982); 42 U.S.C. § 1395bb(a) (1982).

142. 42 U.S.C. § 1395i-3 (West Supp. 1989).

143. 10 C.F.R. § 19.12-13 (1989).

144. 45 C.F.R. §§ 46.109, 46.116, 46.205 (1988) (roles of Institutional Review Boards; requirements for informed consent; additional duties of Institutional Review Boards when research involves fetuses, pregnant women, or human in vitro fertilization).

145. Some subjects of bargaining have become topics for legal regulation. For example, unions of interns and residents have negotiated for limitations on their working hours, citing dangers to patient care as a key rationale. See Rabban, *supra* note 2, at 16; *supra* note 72. A highly publicized grand jury investigation of the death of a patient while under the late-night care of interns and residents prompted a commission of medical experts established by the New York State Health Commissioner to limit most interns and residents to 24-hour shifts and 80-hour weeks. While some praise these new regulations as likely to reduce fatigue and improve patient care, others criticize them as weakening medical education and harming patient care. In *Overhaul of Hospital Rules, New York Slashes Interns' Hours*, N.Y. Times, July 3, 1989, at A1, col. 1.

146. Professors Wellington and Winter assert that professional employees tend to be "keenly interested in the underlying philosophy that informs their work." H. WELLINGTON & R. WINTER, *supra* note 87, at 24. Yet bargaining by professional employees "over the noneconomic aspects of political or policy issues" affects the nature of the service they perform. *Id.* at 92. Many of these issues "are politically, socially, or ideologically sensitive." *Id.* at 23. Moreover, union positions on these matters may reflect self-interest as well as opinions based on professional expertise. See *id.* at

principles of exclusive representation and company domination addresses these legitimate concerns without denying unions of professionals the right to bargain over policy.¹⁴⁷ Requiring collective bargaining, for example, need not foreclose additional meetings on the same issues with other professional employees as individuals or through committees, with clients who use professional services, and with members of the general public.¹⁴⁸ The

139. According to Wellington and Winter, at least in the public sector it is necessary to prevent collective bargaining from excluding participation in resolving these issues either by members of the community or by professional employees in the bargaining unit who dissent from the official union bargaining positions. *Id.* at 92; *see also* Summers, *supra* note 57, at 1156, 1192-97 (concern that collective bargaining in public sector may limit legitimate voice of ordinary citizens). Professor Freidson's warning that professionals may abuse their expertise by attempting to impose their own values on clients, *see supra* note 102, applies in both the private and the public sectors.

147. Summers, *supra* note 57, at 1192-93, cites the danger to democratic decision-making as a justification for restricting the scope of public sector bargaining. Because mandatory bargaining gives public employees more power than other citizens, Professor Summers would restrict it to "subjects that substantially implicate budgetary issues," over which the interests of public employees are generally opposed to the combined interests of taxpayers and users. In contrast, Summers argues that neither public employees nor other citizens are likely to be unified on policy issues. *Id.* at 1193-95.

Summers stresses that this dramatic limitation on the subjects of bargaining should in no way be understood to suggest that professional employees lack a legitimate interest in the resolution of non-budgetary issues of policy. Indeed, Summers believes that the "special interests and competence" of professional employees should prompt, and perhaps even require, public employers to consult with them on these issues. Summers contends only "that the bargaining table is the wrong forum and the collective agreement is the wrong instrument." *Id.* at 1195.

Limiting the scope of bargaining, Summers adds, also shelters professional autonomy over some issues that should not become part of public debate.

Undoubtedly, there are decisions which should be left to professional judgment, but submitting them to collective bargaining is a clumsy, inadequate, and even dangerous way of achieving that. Bargaining is a political process responding to political forces and leaves teachers vulnerable on some matters which should be beyond reach of local majorities.

Id. at 1194 n.72. Summers does not address the possibility that despite these risks, collective bargaining may in certain circumstances be the most effective practical way to gain appropriate professional power.

Professor Harper applies analogous reasoning to the private sector by suggesting a "product market principle" to distinguish mandatory from permissive subjects of bargaining. "This principle," Harper asserts, "would exclude from compulsory bargaining *all decisions to determine what products are created and sold, in what quantities, for which markets, and at what prices.*" Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1463 (1982). Harper sees a direct analogy between his "product market principle" in private employment and the concerns expressed by Wellington and Winter and by Summers in the context of public employment. Just as "consumers should determine what goods and services private employers will offer," Harper believes that "citizens voting in the polling booth should determine the nature of goods and services that government will offer." *Id.* at 1500. "The standard for judging whether a substantive bargaining proposal made by a public sector union is a mandatory bargaining topic," Harper adds, "should be whether additional commitment of resources can satisfy the public's demand without changing the nature of the public good or service." *Id.* at 1501.

As Harper notes, his "product market principle" probably restricts the scope of bargaining for employees whose identities and behavior define the product more than for production employees or even other service employees." *Id.* at 1467-68 n.81. Professionals are a major group of employees "whose identities and behavior define the product." Yet Harper nowhere addresses the interests of professional employees in using collective bargaining to influence employer decisions about the nature of professional services. As a result, he does not explore whether potentially competing interests of employers, consumers, and citizens might be accommodated without limiting the scope of bargaining. Professor St. Antoine justly concludes that Harper's proposal "may unduly circumscribe bargaining for a class of employees that will become increasingly significant in the post-industrial world," a class that includes professional employees. St. Antoine, *supra* note 43, at 1316 n.68.

148. Professor Summers claims that legitimate professional interests in matters of policy can be accommodated "without depriving any interested group of an opportunity to be heard." Examples of

following Sections, after reviewing the background and interpretation of these legal principles, propose such modifications.

II. EXCLUSIVE REPRESENTATION

Section 9(a) of the NLRA requires that the union selected by the majority in an appropriate unit of employees shall be the exclusive bargaining representative for all employees in the unit regarding wages, hours, and other conditions of employment.¹⁴⁹ The NLRB and the courts subsequently identified these terms as the mandatory subjects of bargaining. After the selection of an exclusive representative, the legislative history of the Wagner Act made clear, employers are precluded from bargaining about these subjects with anyone else.¹⁵⁰ Exclusive representation, its proponents maintained, promotes worker solidarity that helps provide at least the semblance of equality in bargaining power necessary for effective negotiations, meaningful agreements, and stable labor relations.¹⁵¹

Advocates of exclusive representation added that it benefits employers as well as employees.¹⁵² They observed that workers who are divided against themselves cannot approach an employer "in a spirit of good will."¹⁵³ Multiple or proportional representation, many argued, divides the workers, promoting strife and chaos that impede the bargaining process and decrease the probability of agreements.¹⁵⁴ They also claimed vir-

alternative procedures to collective bargaining include discussions with employers "wholly outside the union framework" and participation in public meetings open to all citizens. Summers, *supra* note 57, at 1195 n.73. Summers does not explain why these alternative procedures would not protect the interests of citizens if used in addition to collective bargaining rather than as a substitute for it.

Professors Wellington and Winter acknowledge the possibility of limiting the scope of bargaining, but they also explore the option that additional procedures might be established to "preserve the political process" while allowing mandatory bargaining by professionals over issues of policy. H. WELLINGTON & R. WINTER, *supra* note 87, at 113. Among their suggestions are "multiparty bargaining over subjects that relate to the nature of the services the employees provide," *id.* at 150-51, public hearings during the course of negotiations between the exclusive representative and the employer, *id.* at 151, intervention by third parties or a referendum upon petition by citizens, *id.* at 152, and "strict monitoring of the scope of bargaining by governmental commissions." *Id.*

149. 29 U.S.C. § 159(a) (1982).

150. See, e.g., S. REP. NO. 573, 74th Cong., 1st Sess. 13, *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2312-13 (1935) [hereinafter LEG. HIST. NLRA]; Memorandum comparing S. 2926 (73d Cong.) and S. 1958 (74th Cong.) *Senate Comm. Print*, 74th Cong., 1st Sess. 30 (1935), *reprinted in* 1 LEG. HIST. NLRA, *supra*, at 1319, 1355; 79 CONG. REC. 7571 (1935) (statement of Sen. Wagner), *reprinted in* 2 LEG. HIST. NLRA, *supra*, at 2321, 2336.

151. See, e.g., 79 CONG. REC. 2337-38 (1935) (statement of Rep. Boland), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2430, 2441-44; 79 CONG. REC. 3184 (1935) (address by Francis Biddle, Chairman of the National Labor Relations Board), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1314, 1318.

152. See, e.g., 79 CONG. REC. 7571 (1935) (statement of Sen. Wagner), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2321, 2336; S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2300, 2313.

153. 79 CONG. REC. 2337 (1935) (statement of Rep. Boland), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2430, 2441-42.

154. See, e.g., *id.*; National Labor Relations Board, *Hearings before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 127 (1935) (statement of Lloyd K. Garrison, Dean of University of Wisconsin Law School), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1505, 1507;

tually universal recognition of the practical difficulties in applying more than one agreement to the same unit of workers or a single agreement to only a portion of those workers.¹⁵⁵

A. *The Implications of Exclusive Representation for Collegial Governance*

Neither the NLRB nor the courts has focused on the implications of exclusive representation for professional values. Yet the NLRB has acknowledged that exclusive representation does threaten collegial systems of professional governance. It noted in a faculty representation proceeding that the election of an exclusive union representative could jeopardize the viability, and even the validity, of collegial faculty bodies.¹⁵⁶ But the NLRB never pursued this crucial observation. When a group of faculty members in a subsequent case wrote a letter asking the NLRB how the election of a faculty union would affect the current "‘collegial system with its shared governance arrangements,’" the majority replied that any discussion of this issue in a representation proceeding would constitute a premature advisory opinion.¹⁵⁷

One member of the NLRB, however, dissented from this response. He pointed out that the election of a union would inevitably jeopardize the influence of non-union bodies over mandatory subjects of bargaining. The union's impact on these structures, he quickly added, could not be predicted before the negotiation of a collective bargaining agreement. While some unions might insist on their statutory right to exclusive representation regarding mandatory subjects, others might want existing collegial bodies to continue dealing with at least some of these subjects.¹⁵⁸

Faculty cases in the public sector illustrate the impact exclusive representation can have on collegial governance.¹⁵⁹ Because a teaching effective-

Memorandum Comparing S. 2926 (73d Cong.) and S. 1958 (74th Cong.) *Senate Comm. Print.*, 74th Cong., 1st Sess. 30 (1935), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1319, 1355.

155. See, e.g., H.R. REP. NO. 969, 74th Cong., 1st Sess. 18-19 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2910, 2928-29; 79 CONG. REC. 7672 (1935) (statement of Sen. Walsh), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2321, 2390; *id.* at 7571 (statement of Sen. Wagner), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2321, 2336; S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2300, 2313; *National Labor Relations Board, Hearings before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 126 (1935) (statement of Lloyd K. Garrison), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1505, 1506.

156. *Adelphi Univ.*, 195 N.L.R.B. 639, 648 n.31 (1972).

157. *Northeastern Univ.*, 218 N.L.R.B. 247, 249 (1975) (quoting faculty letter to NLRB).

158. *Id.* at 256-57 (board member Kennedy, concurring in part and dissenting in part).

159. The facts of *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), see *supra* text accompanying notes 88-100, reveal that the "meet and confer" committees controlled by the exclusive union representative replaced whatever faculty senates previously existed in the Minnesota community college system. 465 U.S. at 275-76. *Knight* thus illustrates the impact collective bargaining in a system of exclusive representation can have on collegial governance.

Yet the Court's reasoning in *Knight* is not based on the principle of exclusive representation. The statute construed in *Knight* expressly distinguished between "meet and negotiate" sessions, the setting for traditional collective bargaining over mandatory subjects, and "meet and confer" sessions, the set-

ness program developed by the faculty senate affected the retention, promotion, and tenure of professors, the Supreme Court of Michigan held that it involved a mandatory subject of bargaining. By unilaterally adopting the senate's recommendations, the court concluded, the university had violated its duty to bargain with the exclusive union representative. At the same time, the court indicated that this duty did not preclude the faculty senate from considering and making recommendations about mandatory subjects. The court only required "*the limited obligation to bargain before unilateral imposition of new criteria*" and emphasized that the university, after bargaining in good faith with the union, could ultimately adopt the recommendation of the faculty senate.¹⁶⁰

Another decision by a state supreme court highlighted the connections between exclusive representation, collegial governance, and the scope of bargaining. Emphasizing that "the purposes of exclusive representation are sometimes inapplicable in a university faculty setting," the Supreme Court of New Hampshire held that exclusive representation did not preclude the continuation of faculty advisory committees on matters such as curriculum and research. The court wanted to preserve "some play in the joints rather than to constrict or destroy campus life" in construing the state's statute governing collective bargaining by public employees.¹⁶¹ It nevertheless indicated that faculty committees dealing with wages, hours, and other conditions of employment did "impinge on exclusive union representation" and could be abolished after a union election.¹⁶² At the same time, the court recognized that it could not offer a "bright line distinction" between these two categories of committees.¹⁶³

ting for exchanges of views on nonmandatory subjects. The requirement of bargaining in good faith with the exclusive representative applied only to the "meet and negotiate" sessions. *Id.* at 273-74.

Of course, the principle of exclusive representation regarding mandatory subjects of bargaining undoubtedly influenced the legislature's decision allowing the union to designate the employee representatives in the "meet and confer" sessions. "If it is rational for the State to give the exclusive representative a unique role in the 'meet and negotiate' process," the majority observed, "it is rational for the State to do the same in the 'meet and confer' process." *Id.* at 291. Yet the state justification with respect to the "meet and confer" process is not protecting the union in its role as exclusive representative, which applies to the "meet and negotiate" process and has been recognized as sufficiently "compelling" to trump competing First Amendment interests, but its "rational" and "legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions" *Id.*

160. Central Mich. Univ. Faculty Ass'n v. Central Mich. Univ., 404 Mich. 268, 283, 273 N.W.2d 21, 27 (1978) (quoting Central Mich. Univ. Faculty Ass'n v. Central Mich. Univ., 75 Mich. App. 101, 114, 254 N.W.2d 802, 808 (1978) (Cavanagh, J., dissenting)).

161. Keene State Educ. Ass'n, 120 N.H. 32, 37, 411 A.2d 156, 160 (1980).

162. *Id.*

163. *Id.*; see also *id.* at 34, 411 A.2d at 158 (citing order of state Public Employee Labor Relations Board that "except for those committees dealing with wages, hours and conditions of employment, the faculty should be restored to a status equal to that of faculty at other campuses in the system").

B. *The Range of Permissible Nonunion Contacts Between Employers and Employees*

The principle of exclusive representation, despite its potential limitations on collegial governance, does not preclude all contacts about mandatory subjects between employers and employees outside the union framework. Legislative history, reinforced by judicial interpretation, makes clear that exclusive representation does not prevent employees from presenting grievances to employers on their own. Under some circumstances, moreover, employees can raise topics with their employers that are broader than grievances and could be subjects of bargaining, yet not engage in bargaining because of the limited nature of the discussions. The point at which permissible contacts become unfair labor practices remains unclear. Cases that reveal this largely unexplored territory between the presentation of grievances and collective bargaining arose primarily in the industrial sector. Yet they speak directly to the strong interest many professional employees have in offering their independent views on professional issues whether or not they have elected an exclusive union representative.

1. *The Distinction Between Collective Bargaining and the Presentation of Grievances*

During the debates over the Wagner Act, many employers opposed exclusive representation in any form. Yet a significant number of employers, without directly attacking exclusive representation itself, complained that section 9(a) unnecessarily restrained desirable contact between employers and employees free from union intervention. Proponents of section 9(a) responded by stressing the protection for minority rights in the original proviso to this provision, which declared that “any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing.”¹⁶⁴

Employers were not reassured by this proviso. They observed that the central thrust of section 9(a) gives the majority representative the exclusive right to represent all employees in a unit “for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”¹⁶⁵ Another employer assumed that by

164. S. 1958, 74th Cong., 1st Sess. 10 (1935), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1295, 1300; *see also* 79 CONG. REC. 7571 (1935) (statement of Sen. Wagner), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2321, 2337; S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2300, 2313; Memorandum Comparing S. 2926 (73d Cong.) and S. 1958 (74th Cong.) *Senate Comm. Print*, 74th Cong., 1st Sess. 30 (1935), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1319, 1355.

165. *National Labor Relations Board, Hearings before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 635 (1935) (statement of Harvey J. Kelly, representing American Newspaper Publishers Association; Kelly was also Chairman of the Industrial Board), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2018, 2021.

the terms of the proviso grievances "of a more or less minor character could be brought up by the minority, but the principal and basic conditions affecting the relationship of employer and employee could only be discussed through representatives of the majority."¹⁶⁶

Despite this employer concern, Congress decided that even the proposed proviso unduly jeopardized the principle of exclusive representation. In a lengthy discussion with William Green, the President of the American Federation of Labor (AFL), William Connery, the Chairman of the House Committee on Labor, explained that he was "somewhat leery" that the proviso would allow employers to settle grievances brought by minority groups on more generous terms than grievances brought by the exclusive representative. Such favoritism, Connery feared, would undermine the exclusive representative and encourage the very company unionism prohibited by other NLRA provisions. Connery suggested an additional proviso to section 9(a) mandating that any grievance presented to an employer must be settled between the employer and the exclusive representative.¹⁶⁷

Congress responded to these concerns, but not by adopting Connery's suggested additional proviso. Instead, Congress simply amended the original proviso by deleting the phrase "through representatives of their own choosing," language to which Green objected,¹⁶⁸ and by inserting "a" to modify "group."¹⁶⁹ The legislative history does not comment specifically on this deletion, but it was clearly designed to preclude the presentation of grievances by a minority union. The more subtle addition of "a" seems to reinforce this deletion by hinting that while a group of employees may present grievances, this group must be an ad hoc assembly rather than a continuing organization.

In the years following the Wagner Act, the NLRB interpreted the proviso to section 9(a) as if the additional proviso proposed by Connery in 1935 had actually become the law. The Board concluded that the enacted proviso, while allowing the presentation of grievances by an individual or

166. *Id.* at 795 (statement submitted by Muskegon Employers Association), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2179, 2181.

167. *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 210-11 (1935) (statements of Rep. Connery), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2671, 2684-85.

168. Green consistently reiterated the right of individual employees to bring grievances on their own and never responded directly to the additional proviso suggested by Connery. But Green did agree that the original proviso should be amended, and indicated that it raised the specters of multiple bargaining and company unionism. Green focused his objections on the language of the proviso allowing a group of employees to present grievances "through representatives of their own choosing," terminology he found "confusing and misleading." *Id.* at 211-12, 223 (statements of William Green, President, American Federation of Labor), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2671, 2685-86, 2285, 2697.

169. The changed proviso read: "Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer [through representatives of their own choosing]." S. 1958, 74th Cong., 1st Sess. 12 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2285, 2291.

a group of employees, gave the exclusive representative the right to take over and settle those grievances with the employer. During the consideration of the Taft-Hartley Amendments in 1947, the House rejected this "strange construction"¹⁷⁰ of the original proviso and proposed additional language stating that grievances could be settled as well as presented "without the intervention of the bargaining representative if the settlement is not inconsistent with the terms of a collective-bargaining agreement then in effect."¹⁷¹ According to the House Report, this additional language restored the proper meaning to the original proviso.¹⁷²

Opponents of this additional language, reiterating Connery's earlier concerns, complained that it would allow employers to undermine the exclusive representative by practicing favoritism in settling grievances.¹⁷³ Indeed, one Congressman pointed out that a number of labor relations consultants had successfully advised employers in the textile industry to destroy unions in precisely this way.¹⁷⁴ Apparently in response to this danger, the Senate added a second proviso allowing the bargaining representative to be present at any adjustment of a grievance.¹⁷⁵

It is striking that throughout the debate over changes in section 9(a) no one suggested that employees should have the option of presenting or adjusting grievances "through representatives of their own choosing," the

170. H.R. REP. NO. 245, 80th Cong., 1st Sess. 34 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 292, 325.

171. H.R. 3020, 80th Cong., 1st Sess. 28 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 158, 185.

172. *Id.*; H.R. Rep. No. 245, 80th Cong., 1st Sess. 34 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 292, 325.

173. H. Min. Rep. No. 245, 80th Cong., 1st Sess. 85 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 355, 376.

174. 93 CONG. REC. H.3702 (daily ed. Apr. 17, 1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 769, 781 (statement of Cong. Lanham). The House rejected the proposed deletion of this additional language. 93 CONG. REC. H.3702 (daily ed. Apr. 17, 1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 769, 782.

175. H.R. 3020, 80th Cong., 1st Sess. 86 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 226, 244; S. Rep. No. 105, 80th Cong., 1st Sess. 24 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 407, 430. Some members of Congress remained unsatisfied. They argued that the mere presence of the union at the adjustment of grievances, without any opportunity to be present during preliminary discussions or to participate more actively in the final adjustment, did not sufficiently prevent the employer from "dealing directly" and "giving favored treatment" to nonunion employees. 93 CONG. REC. S.6663 (daily ed. June 6, 1947), *reprinted in* 2 LEG. HIST. LMRA, *supra* note 30, at 1575, 1581 (analysis submitted by Sen. Murray). Nevertheless, Congress included with only minor changes in wording both the new House language and the additional Senate proviso in the Taft-Hartley Amendments.

As amended by Taft-Hartley, § 9(a) reads as follows:

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

29 U.S.C. § 159(a) (1982).

phrase deleted by the Wagner Act from the first version of this proviso. Both supporters and opponents of the additional language in the Taft-Hartley Amendments apparently assumed that the expanded rights to present and adjust grievances independently of the exclusive representative did not include resort to minority unions.

Some case law since the Taft-Hartley Amendments has addressed the difference between bargaining and the presentation of grievances under the provisos to section 9(a). According to the few cases dealing with this crucial subject, the limitation of the provisos to grievances demonstrates that Congress intended to distinguish them from bargaining. Grievances are typically defined as comparatively minor concerns affecting an individual or a subgroup of employees within a unit. Bargaining, by contrast, concerns major issues of policy involving the entire unit. Any broader definition of grievances, cases warn, could encourage "a sort of continuous 'collective-bargaining,' under the guise of presenting grievances,"¹⁷⁶ thus obliterating the significance of exclusive representation that is so crucial to the NLRA's basic structure.¹⁷⁷ Virtually all cases stated or assumed that a minority labor organization is precluded not only from bargaining, but also from presenting grievances under section 9(a).¹⁷⁸

This limited freedom to present grievances without union intervention provides scant reassurance to those worried that the election of a union could transform discussions of professional issues between employers and employees into violations of the principle of exclusive representation. Most of these issues could not fall under the relatively narrow category of grievances. For example, discussions about curriculum in schools and universities, standards of nursing and medical practice in hospitals, staffing patterns and budgets in legal services programs, and repertoire in symphony orchestras would all involve major issues of policy rather than minor concerns of a few individuals. To the extent that professional issues become mandatory subjects of bargaining, the protection of individual rights in the provisos to section 9(a) does not mitigate the threat posed by exclusive representation to independent contacts between employers and employees.

2. *Discussions of Mandatory Subjects Without Collective Bargaining*

An intriguing, limited, and ambiguous body of case law indicates that some discussion of mandatory subjects between employers and employees

176. *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1, 5 (9th Cir. 1965).

177. *West Tex. Util. Co. v. NLRB*, 206 F.2d 442, 447-48 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 855 (1953).

178. The major exception was *Douds v. Local 1250, Retail Wholesale Dep't Store Union*, 173 F.2d 764 (2d Cir. 1949). Learned Hand wrote the opinion in *Douds*, but his eminence did not prompt other judges to follow his reasoning. For criticism of *Douds*, see *Report of Committee on Improvement of Administration of Union-Management Agreements*, 50 Nw. U.L. REV. 143, 184-88 (1955); Note, *Collective Bargaining, Grievance Adjustment, and the Rival Union*, 17 U. CHI. L. REV. 533 (1950).

does not constitute collective bargaining and therefore does not violate the principle of exclusive representation. Yet these cases have only the most modest potential for promoting meaningful communication about professional issues without union involvement.

Decisions uniformly assert that the employer cannot bypass the exclusive union representative by negotiating with individual employees or groups of employees within the bargaining unit. But an employer can gather employee views about mandatory subjects of negotiation to develop its own bargaining position with the union rather than to influence the employees.¹⁷⁹ A moderate amount of "back and forth" discussions between an employer and a group of employees over wages suggested by the employees did not violate exclusive representation when the employer simultaneously bargained in good faith with the union.¹⁸⁰ And the NLRB rejected charges that an employer committed an unfair labor practice by allowing two employees who had asked questions about a proposed health and welfare plan to meet with a representative of the insurance company offering the plan. Nor did the Board criticize the employer for subsequently asking one of the employees to give his reaction to the presentation.¹⁸¹ Even in condemning a company "Speak Out" program for interfering with the negotiated grievance procedure, a court made clear that the program would not violate the NLRA if it were limited to "informational" matters. While the court did not specify what would constitute information rather than grievances, it indicated that defending company policy, announcing referrals of complaints to company officials for further investigation, and suggesting that a topic be addressed to the union as a possible subject for future collective bargaining would all be permissible.¹⁸²

A case that reached the Supreme Court in the mid-1970's presented an excellent opportunity to map out the permissible realm of extra-union interaction between employers and employees. Unfortunately, the Court barely pursued this opportunity. *Emporium Capwell Co. v. Western Addition Community Organization* arose from employees' claims that their employer had engaged in racial discrimination when making assignments and promotions. Some employees, asserting that the contractual grievance procedure was not an adequate tool to deal with the systemic discrimination they attributed to the employer, demanded a meeting with the president of the company.¹⁸³ When the president refused to meet with them, a few of these employees picketed the store and distributed handbills urging

179. Continental Oil Co., 194 N.L.R.B. 126, 131-32 (1971).

180. American Printing Co., 173 N.L.R.B. 73, 75-76 (1968).

181. Tobasco Prestressed Concrete Co., 177 N.L.R.B. 745, 748-49, 750 (1969), *enforced sub nom.*, NLRB v. Newport Concrete Co., 430 F.2d 1184 (6th Cir. 1970).

182. United Steelworkers v. NLRB, 536 F.2d 550, 559 (3d Cir. 1976).

183. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 53-55, 57 n.5 (1975).

customers to boycott it because the employer was "a 20th Century colonial plantation" and a "racist pig."¹⁸⁴ After unsuccessfully urging the picketers to cease and to rely instead on the contractual grievance procedure, the company fired them.¹⁸⁵

The NLRB, affirming the findings and conclusions of the Trial Examiner, characterized the efforts of the employees to deal with the president as attempted bargaining that would have interfered with the rights and responsibilities of the exclusive union representative. The judges on the court of appeals and the Justices on the Supreme Court, though differing about whether the employer could fire the picketing employees, all agreed that these employees were not simply presenting a group grievance under section 9(a). Rather, the dissidents, acting on behalf of all employees, wanted broad changes in management policies regarding minorities and tried to circumvent the grievance procedure and the union by negotiating directly with the company president.¹⁸⁶

The Supreme Court acknowledged that it did not know "precisely what form the demands advanced" by the employees would take.¹⁸⁷ Yet, as Judge Wyzanski pointed out in his Second Circuit opinion, any positive response by the employer would be "a political victory" for the employees and would inevitably weaken the appeal of the existing union and its leadership. Wyzanski also observed that certain employer responses could result in changes in policy that might favor minorities at the expense of the many white employees the union had a duty to represent.¹⁸⁸ The Supreme Court elevated this possibility into a certainty by assuming that the demands of the dissident employees would include transfers of minority employees into more remunerative positions, which would violate the collective bargaining agreement.¹⁸⁹

The lessons of *Emporium Capwell* are difficult to intuit. The broad goals of the employees, even if they had been connected more directly with their personal experiences, do support the conclusion that they were not simply bringing a group grievance under section 9(a). Bargaining, however, involves the activities of at least two parties. There was no evidence that the president, had he responded to the employees' demand, would have violated the company's duty to the exclusive union representative. The president might simply have given the employees the same answer they ultimately received from the Supreme Court: Any alteration in job assignments must be negotiated between the employer and the union. Al-

184. *Id.* at 55-56 n.2.

185. *Id.* at 55-56.

186. *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 929 & n.34 (majority), 937 (dissent) (1973), *rev'd sub nom. Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); 420 U.S. at 60-61 (majority), 75-76 (dissent).

187. *Emporium Capwell Co.*, 420 U.S. at 68.

188. *Western Addition Community Org.*, 485 F.2d at 937 (Wyzanski, J., dissenting).

189. *Emporium Capwell Co.*, 420 U.S. at 68.

ternatively, the president might have tried to convince the employees that the company had not engaged in systemic discrimination. Such responses, as other cases have indicated,¹⁹⁰ do not constitute bargaining.¹⁹¹

Even if the president had attempted to correct the problems the employees raised, he could have done so without interfering with the union's role as exclusive representative. After all, the collective bargaining agreement itself prohibited employment discrimination. The employer might have been able to respond to the employees' "demands" under the agreement.¹⁹² Perhaps the Court, without explicitly so stating, concluded that the totality of the employees' conduct—including their rejection of the contractual grievance procedure, their refusal to deal with any employer representative other than the president, and their insistence on picketing and distributing inflammatory handbills—revealed an attempt to circumvent the exclusive representative and to engage in collective bargaining.

A Supreme Court decision the following year, involving collective bargaining by professional employees in the public sector, further confused the distinction between permissible discussion about mandatory subjects and violations of the principle of exclusive representation. In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,¹⁹³ the Court refused to find a violation of exclusive representation under state law in circumstances that seemed to fit within a meaningful conception of attempted bargaining much more closely than the activities prohibited in *Emporium Capwell*. The school board in *City of Madison* reserved a portion of its open meetings for the expression of public opinion. During this period, the president of the local teachers' union urged resolution of the impasse in the ongoing collective bargaining negotiations between the union and the school board and presented a supporting petition signed by teachers in the bargaining unit.¹⁹⁴

190. See *supra* text accompanying notes 179–82.

191. Indeed, the Trial Examiner, whose findings on this issue the NLRB and the courts affirmed, pointed out that the company was prepared to allow "informal discussion" between the dissident employees and its personnel director. Yet the employees "scorned such talks and insisted on negotiating directly with" the president. The Trial Examiner thus implied that an "informal discussion" between employees and their employer about alleged employment discrimination would not violate the principle of exclusive representation as long as no actual bargaining occurred. The *Emporium*, 192 N.L.R.B. 173, 185–86 (1971), *rev'd sub nom.* *Western Addition Community Org. v. NLRB*, 485 F.2d 917 (1973), *rev'd sub nom.* *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (affirming NLRB decision).

192. The dissenting member of the NLRB essentially made this point. He emphasized that the employees had not sought "discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances." They only wanted "a simple conference to call attention to their situation" and "to urge upon the president to use his good offices to see to it that the alleged discriminatory treatment of the minority employees," which was prohibited by the collective bargaining agreement, would be ended. Even if the president had met the employees and had undertaken to correct the problems they raised, the dissenter insisted, he would not in any way have interfered with the union's role as exclusive representative. *Id.* at 179 (Brown, dissenting).

193. 429 U.S. 167 (1976).

194. *Id.* at 171.

The next speaker the board recognized was a teacher who had been opposing the union proposal to include a "fair share" provision in the contract. This provision would have required teachers who were not members of the union to pay full union dues in order to help cover the costs of collective bargaining that benefited all teachers.¹⁹⁵ The speaker announced that he represented an informal committee of teachers and read a petition urging deferral of the fair share proposal. The only response by any member of the school board was the president's inquiry into whether the teacher intended to submit the petition to the board. The entire presentation took approximately two and one-half minutes.¹⁹⁶

After this public meeting, the board met in executive session and decided to agree to all of the union's demands except the fair share provision. The union accepted this proposal in a negotiating session the next morning and ultimately signed a collective bargaining agreement. But the union also filed a complaint alleging that the school board had violated the exclusivity principle in the state labor act by allowing the dissident teacher to speak during its public meeting.¹⁹⁷

The Supreme Court ultimately decided *City of Madison* on First Amendment grounds,¹⁹⁸ but it addressed in passing whether the dissident teacher and the school board had engaged in prohibited collective bargaining.¹⁹⁹ The Court characterized as "cryptic" the conclusion by the state courts that under state law the teacher's interaction with the board constituted "negotiating." Observing that "calling a thing by a name does not make it so," the Court pointed out that the teacher was not authorized to negotiate an agreement with the school board and did not attempt to do so.²⁰⁰ The actual bargaining, the Court stated, had been conducted in private between the union and the school board.²⁰¹ Justice Stewart confidently added in his concurrence that exclusivity is not threatened when a member of the bargaining unit simply expresses his views on a subject of collective bargaining at a public meeting.²⁰²

As the state courts convincingly observed, however, the teacher's statement at the school board meeting did not simply express an opinion by an individual citizen. Rather, it culminated an effort by an organized minority within the bargaining unit to convince the employer to reject a provision proposed by the exclusive union representative. The teacher described himself as the representative of this minority and presented a petition on

195. *Id.* at 169.

196. *Id.* at 171-72.

197. *Id.* at 172.

198. See *infra* text accompanying notes 206-08.

199. As the Court noted, the definition of "negotiation" under state law, which would not normally be a matter for its review, became relevant because the state relied on this definition "as a predicate for restraining speech." 429 U.S. at 174 n.5.

200. *Id.* at 174.

201. *Id.* at 174 n.6.

202. *Id.* at 180 (Stewart, J., concurring).

its behalf despite requests by the union not to address the board at a particularly delicate stage of the negotiating process.²⁰³ This context resembles collective bargaining much more closely than the facts of the *Emporium Capwell* case, where the Supreme Court found that the employees had attempted to bargain.

Even the broader range of permissible interaction suggested by *City of Madison*, however, allows little optimism for those concerned about the impact of unionization on professional values. The teacher's presentation to the board was brief, and the board's response consisted only of one procedural question from its president. Courts are likely to find that frequent and detailed contacts between employers and professional employees about mandatory bargaining subjects violate the principle of exclusive representation.

3. *Experience in the Public Sector*

State statutes and the First Amendment place limits on the principle of exclusive representation in the public sector. As a result, public employees in both union and non-union settings have more access to employers than their private counterparts, who are governed by the NLRA. Interactions between employees and private employers that would violate section 9(a) may be required in public employment. Public sector experience suggests ways to modify exclusive representation in both private and public professional employment.

In many states, often because of explicit legislation, public employers must hold open meetings before ratifying collective bargaining agreements. At the same time, states frequently exempt from this requirement the collective bargaining sessions between the exclusive union representative and the public employer, thereby allowing the parties to work out a tentative agreement without the glare of publicity.²⁰⁴ These statutes protect the principle of exclusive representation while allowing citizens who are not parties to negotiations, including public employees represented by a union, to comment on proposed provisions in collective bargaining agreements that affect the public interest.

Although most laws do not specify when a public meeting must take place, some are more precise. Laws in Wisconsin and California, for ex-

203. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, 69 Wis.2d 200, 204-07, 214-15, 231 N.W.2d 206, 209-10, 213-14 (1975), *rev'd*, 429 U.S. 167 (1976). According to the union, the dissident teacher spoke "as a representative and collective bargaining agent for a dissident minority in the bargaining unit and not in the capacity as an individual citizen." Brief of Madison Teachers Inc., Appellee, at 13, 429 U.S. 167 (1976) (No. 75-946).

204. See, e.g., MASS. GEN. LAW ANN. ch. 39 § 23(B)(3) (West 1985); N.H. REV. STAT. ANN. § 91-A:2(I)(b) (1988 Supp.); OR. REV. STAT. § 192.660(2) (1987); cf. *Talbot v. Concord Union School Dist.*, 114 N.H. 532, 534-36, 323 A.2d 912, 913-14 (1974) (negotiating sessions between school board and teachers' union outside ambit of state right-to-know law, but board approval of recommendations made during negotiations must be presented at open meeting).

ample, provide that all initial bargaining proposals must be presented at a public meeting. The California Educational Employment Relations Act goes further. It requires the school employer, before closed bargaining sessions begin, to hold a meeting at which the public can express views on these proposals. Any new subject of bargaining advanced during negotiations, moreover, must be made public within twenty-four hours.²⁰⁵

City of Madison best illustrates how applying the First Amendment to open meetings provides additional rights to public employees. Reversing the state courts, the Supreme Court unanimously held that the First Amendment precludes restricting the speech of the dissident teacher, whether or not his statement could be construed as "negotiating."²⁰⁶ The Court noted that a school board could constitutionally limit the agenda of a public meeting and hold private sessions to transact business.²⁰⁷ It stressed, however, that "when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."²⁰⁸ Highlighting the relationship between exclusive representation and the scope of bargaining, the Court emphasized that "there is virtually no subject concerning the operation of the school system that could not also be characterized as a potential subject of collective bargaining."²⁰⁹ The Court's holding, while limiting the power of the union in public meetings where bargaining subjects are discussed, preserved the fundamental advantages of exclusive representation. Of greatest importance, it did not grant any other person access to the private bargaining sessions between the union and the employer.²¹⁰

C. *Suggested Modifications of Exclusive Representation in Professional Employment*

Experience in the public sector demonstrates that the essentials of exclusive representation can be maintained while broadening access to the employer by members of the public, including employees who may not support official union positions. Respect for democratic decision-making about matters of public policy and First Amendment principles lie behind the limitations on exclusive representation in public employment. The value of professional expertise and judgment to organizational decision-making suggests similar results for professional employees in both the private and public sectors. Collective bargaining, which professionals often

205. CAL. GOV'T CODE § 3547 (West 1980); see also WIS. STAT. ANN. § 111.70(4)(cm)(2) (West 1988).

206. 429 U.S. at 173-74.

207. *Id.* at 175 n.8.

208. *Id.* at 176.

209. *Id.* at 177.

210. The concurring opinions of Justice Brennan, *id.* at 177-79, and Justice Stewart, *id.* at 180, emphasized this point, which the majority recognized as well, *id.* at 174 n.6 & 175 n.8.

pursue to gain the influence to which they feel entitled,²¹¹ should not preclude individual and collegial interaction that serves the same purpose.

Professional employees should receive greater access to their employers than required by existing incursions on the principle of exclusive representation in the public sector. The public sector cases assert that if the public employer holds a public meeting on its own initiative or as mandated by a statute, then all citizens, including employees, have a right to discuss matters on the agenda. These cases also indicate that at least some interchange between the employer and employees at these meetings does not constitute bargaining. Yet the First Amendment does not require the employer to establish a public forum, as the Supreme Court majority emphasized in denying faculty members access to the "meet and confer" sessions between the Minnesota community college system and the exclusive union representative.²¹² The legitimate professional roles in organizational decision-making should entitle either the employer or the employees to initiate and maintain contacts through individuals, groups, or standing committees about matters of professional concern, whether or not the elected union representative agrees. Such contacts should be permissible as long as the employer does not use them to avoid bargaining in good faith and negotiating an agreement with the elected exclusive representative.²¹³

1. *Similarities to Original Understandings of Exclusive Representation*

This proposal closely resembles the understanding about the original draft of section 9(a) in the Wagner bill that emerged in a revealing interchange among Walter Gordon Merritt, who represented a large national employers' association called the League for Industrial Rights; Senator Walsh, the Chairman of the Senate Committee on Education and Labor; and Calvert Magruder, the chief counsel of the first NLRB. Merritt conceded that the terms of a collective bargaining agreement must be

211. See *supra* notes 21, 102, 110 and accompanying text.

212. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280-81 (1984); see *supra* text accompanying notes 97-100 (rejection of faculty First Amendment claims). The Court explicitly distinguished *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976), because the school board meeting was a public forum opened by the state. *Knight*, 465 U.S. at 281 (citing *City of Madison*, 429 U.S. at 175). In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), the Court used the school board meeting in *City of Madison* as an example of a public forum that the state did not need to create or maintain. Yet the Court stressed that as long as the forum is public, the First Amendment precludes certain exclusions from it.

213. I offer the following statutory language, as an additional paragraph in § 9(a) and in analogous legislation governing the public sector, to implement the modifications I recommend:

The principle of exclusive representation shall apply to units composed primarily of professional employees: Provided, that in such units the employer may discuss any subject with professional employees, either individually or in groups or through committees, without the intervention of the exclusive bargaining representative: Provided further, that these discussions are in addition to, and not a substitute for, bargaining in good faith about the same subjects with the exclusive representative.

acceptable to representatives of a majority and that the agreement must apply to the entire workforce. Yet he objected to the exclusion of substantial minorities from the bargaining process, a result he understood section 9(a) to compel. Senator Walsh, supported by Magruder, responded that nothing in section 9(a) prevents minority groups from talking to an employer about matters subject to collective bargaining before the employer signs a contract with the exclusive representative. The purpose of section 9(a), Walsh and Magruder stressed, is to insure that minority groups do not become partners in negotiations between the exclusive representative and the employer. Yet they believed that as long as this basic rule is followed, relationships between minority groups and employers are permissible.²¹⁴

Magruder added that the employer, "in deciding whether to accede to any demands proposed by the majority would, I assume, be at liberty to hear representations from minority groups who claim there is some unfairness in the proposal."²¹⁵ Walsh agreed, but also observed that the employer, when about to sign a contract with the exclusive representative, might tell the minority group, "I have heard you fully; I know what the majority views are and I know what the minority views are, and now I must end these negotiations by dealing with the majority."²¹⁶

Merritt, though attracted to this position,²¹⁷ thought it was inconsistent with the language of section 9(a). The main provision of section 9(a), he pointed out, gives the majority union the role of exclusive representative "for the purposes of collective bargaining," not simply for the purpose of signing an agreement. The proviso that "any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing," he added, only "very guardedly" allows the presentation of grievances, and the word grievance is much too narrow to cover discussions about what the contents of a collective bargaining agreement should be.²¹⁸

The deletion of the phrase "through representatives of their own choosing" from section 9(a) in the enacted legislation²¹⁹ and subsequent interpretation of the distinction between grievances and bargaining²²⁰ show

214. *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 320-22 (1935), reprinted in 2 LEG. HIST. NLRA, *supra* note 150, at 1695, 1706-08 (statements of Merritt, Walsh, and Magruder).

215. *Id.* at 322, reprinted in 2 LEG. HIST. NLRA, *supra* note 150, at 1695, 1708.

216. *Id.* at 323, reprinted in 2 LEG. HIST. NLRA, *supra* note 150, at 1695, 1709.

217. *Id.* at 320, reprinted in 2 LEG. HIST. NLRA, *supra* note 150, at 1695, 1706. At another point in the legislative history, however, Merritt proposed amendments that would have implemented proportional representation in bargaining. Memorandum Comparing S. 2926 (73d Cong.) and S. 1958 (74th Cong.) *Senate Comm. Print*, 74th Cong., 1st Sess. 12 (1935), reprinted in 1 LEG. HIST. NLRA, *supra* note 150, at 1319, 1335-36.

218. *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 323, reprinted in 2 LEG. HIST. NLRA, *supra* note 150, at 1695, 1709.

219. See *supra* text accompanying note 169.

220. See *supra* text accompanying notes 176-78.

that Walsh and Magruder's proposed interpretation of exclusive representation did not prevail. As Walsh and Magruder stressed, however, the main advantages of exclusive representation can be retained even if the employer independently discusses subjects of bargaining with minority groups of employees. This Article's proposed modification of exclusive representation in both private and public sector professional employment preserves many of the doctrine's benefits while allowing substantially more contacts between employers and employees.

2. *The Potential Effectiveness of Weakened Exclusive Representation*

My proposal for a weakened principle of exclusive representation would still prohibit employers' attempts to bypass the elected union. In recent years, the NLRB has found employer unfair labor practices when a state affiliate of the National Education Association engaged in direct negotiations with staff members over transfers to other positions,²²¹ a medical care program instituted a new work schedule by soliciting individual waivers of provisions in the collective bargaining agreement covering overtime pay,²²² and a college offered faculty members individual contracts governing salary and other conditions of employment.²²³ My proposal would not permit this behavior by employers of professional employees because it involves attempts to deal with employees as "a substitute for," not "in addition to," good faith bargaining with the elected union.²²⁴

Nor would my proposed revision permit employers to use the language of cooperation, which is so often stressed in the context of professional employment, to circumvent the duty to bargain with the exclusive union representative. Recent cases demonstrate this danger. The NLRB, for example, found that a nonprofit medical care facility, which emphasized its desire to "restore harmony" after a union victory in an election, violated its duty to bargain exclusively with the union. Instead of dealing with the union regarding working conditions and grievances, the facility hired an independent consultant who met with employees regarding a new employee handbook and procedures for investigating alleged violations of work rules.²²⁵ Similarly, a circuit court held that an employer had committed an unfair labor practice by attempting to convince employees, after negotiations with the union broke down, to accept reductions in benefits as part of a "partnership solution" to the employer's alleged financial problems.²²⁶ And another circuit court concluded that a "Speak Out" pro-

221. Kansas Nat'l Educ. Ass'n, 275 N.L.R.B. 638 (1985).

222. Kaiser Permanente Medical Care Program, 248 N.L.R.B. 147 (1980).

223. Kendall College, 228 N.L.R.B. 1083 (1977), *enforced*, 570 F.2d 216 (7th Cir. 1978).

224. See *supra* note 213 (proposed statutory language).

225. St. Mary's Home, Inc., 258 N.L.R.B. 1024, 1030-32 (1981), *enforced in part and enforcement denied in part on other grounds*, 690 F.2d 1062 (4th Cir. 1982).

226. NLRB v. Goodyear Aerospace Corp., 497 F.2d 747 (6th Cir. 1974).

gram, instituted by an employer to promote "efficiency, harmony, and understanding," undermined the exclusive representative by interfering with the grievance procedure in the collective bargaining agreement.²²⁷ The court observed that this program could allow the resolution of grievances before the union had notice of the dispute or an opportunity to be heard.²²⁸ All of these cases should be decided the same way under my proposed amendment to section 9(a) because the employer had not bargained in good faith with the union.

Despite its continued application to many of the contexts in which violations currently occur, the proposed modification of exclusive representation does create some of the dangers that advocates of the present law feared. Even though employers would still be required to negotiate and sign a collective bargaining agreement with the union covering all employees in the unit, the dramatic increase in the number of occasions for employers and employees to discuss issues that are also subjects of bargaining provide opportunities for employers to divide the employees and weaken the union's power. Yet the cost of the traditional interpretation of exclusive representation to healthy relationships between employers and professional employees substantially outweighs this danger. Even from the union's perspective, moreover, the benefits from my coordinated proposal to expand the scope of bargaining far exceeds the costs imposed by loosening the principle of exclusive representation. Unions gain much more from compelling bargaining over crucial issues that are now permissive than they lose from the greater ability of employers and employees to discuss the relatively narrow range of current mandatory subjects outside the union context.

III. COMPANY DOMINATION

The prohibition against company domination complements the principle of exclusive representation and complicates analysis of permissible contacts between employers and employees outside the union rubric. Section 8(a)(2) of the NLRA states that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it"²²⁹ Section 2(5) defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of

227. *United Steelworkers, AFL-CIO v. NLRB*, 536 F.2d 550, 559 (3d Cir. 1976).

228. *Id.* at 557.

229. 29 U.S.C. § 158(a)(2) (1982).

work.”²³⁰ Not every group of employees necessarily constitutes a “labor organization.” It is also theoretically possible to “deal with” a “labor organization” about the topics specified in section 2(5) without “dominating” or “interfering” with it. But the legislative history of these related provisions and the Supreme Court’s subsequent construction of them stressed that virtually any continuing body of employees dealing with the employer about mandatory subjects of bargaining is “dominated” unless it is entirely free from employer support or influence.²³¹

Congress and the Supreme Court initially developed and interpreted the interaction between sections 8(a)(2) and 2(5) in the context of industrial employment. These provisions, however, create substantial obstacles to the collegial bodies that are so important to many professional employees and their employers. Various councils of professionals and joint committees of professionals and administrators typically fit within the definition of prohibited labor organizations under sections 2(5) and 8(a)(2) or under analogous provisions in laws governing public employment. Some recent lower court decisions, often in cases involving professional employees, have upheld committee structures apparently prohibited by the traditional interpretation of these provisions. Yet the lower court decisions, when read against the legislative history and the Supreme Court precedents, are doctrinally confused or unconvincing.

A. *Legislative History*

The eradication of the widespread company unionism designed by employers to thwart the organization of independent unions was a key concern of the framers of the Wagner Act.²³² Company unions, the framers stressed, make a “mockery” of the right of employees to self-organization and reduce the process of collective bargaining to a “sham” by allowing the employer to sit on both sides of the negotiating table.²³³ Company domination of unions, they added, is not conducive to industrial peace. Good labor relations depend on the confidence of employees in the organizations that represent them, and the competition between company unions and independent unions perpetuates bitterness and strife.²³⁴

Yet even avid supporters of section 8(a)(2) expressed concern that its strong prohibitions against company unionism might go too far in limiting discussions between employers and employees. They claimed that the proviso to section 8(a)(2), which allows “employees to confer with [an em-

230. 29 U.S.C. § 152(5) (1982).

231. See *infra* Sections IIIA & IIIB.

232. See Kohler, *supra* note 27, at 527–31.

233. H.R. REP. NO. 969, 74th Cong., 1st Sess. 16 (1935), reprinted in 2 LEG. HIST. NLRA, *supra* note 150, at 2910, 2925.

234. S. REP. NO. 573, 74th Cong., 1st Sess. 10 (1935), reprinted in 2 LEG. HIST. NLRA, *supra* note 150, at 2300, 2310.

ployer] during working hours without loss of time or pay," averted this danger. They added that this proviso did not introduce a subterfuge for avoiding the fundamental prohibition against company unions. Employers who provide normal pay only while conferring with favored organizations, they made clear, commit an unfair labor practice.²³⁵

The broad definition of a labor organization in section 2(5), designed to reinforce the prohibition against company unions, more directly limited the freedom of employers and employees to interact apart from the exclusive representative. Employers had argued that various employee representation plans attacked as company unions by members of Congress were not labor organizations at all, but were "simply a method of contact between employers and employees." Many of these plans, precisely because they were dominated by employers, only dealt with and adjusted grievances and did not involve collective bargaining. Unless these plans were prohibited, Congress concluded, most of the employer domination it was seeking to eliminate would not be covered and the legislation would be "entirely nullified."²³⁶ To avoid this result, section 2(5) defined a labor organization to include groups "dealing with employers concerning grievances." A memorandum prepared for the Senate Committee on Education and Labor interpreted this definition to preclude the employer from organizing "a shop committee to present grievances on questions of safety and other minor matters even though he does not use such shop committee as a subterfuge for collective bargaining on the essential points of wages and hours."²³⁷ Underlining its commitment to this position, Congress decided to reject a proposed amendment to section 2(5), presented as "the joint thought of the Department of Labor" by Secretary Perkins,²³⁸ which would have allowed the presentation of grievances outside the union rubric by substituting "bargaining collectively with" for "dealing with" in section 2(5).²³⁹

The original House bill proposed during the debates that eventually led to the Taft-Hartley Amendments contained a provision stating that if no exclusive representative exists, an employer could form or maintain a committee of employees for the purpose of "discussing with it matters of mutual interest, including grievances, wages, hours of employment, and

235. *Id.*

236. Memorandum Comparing S. 2926 (73d Cong.) and S. 1958 (74th Cong.) *Senate Comm. Print*, 74th Cong., 1st Sess. 22 (1935), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1319, 1347.

237. *Id.* at 1, *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1319, 1320; *see also*, S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935), *reprinted in* 2 LEG. HIST. NLRA, *supra* note 150, at 2300, 2306 (term "labor organization" deliberately "phrased very broadly" to include employee-representation committees and plans under prohibitions of § 8).

238. *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 66 (1935) (statement of Secretary Perkins), *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1433, 1442.

239. *Id.* at 67, *reprinted in* 1 LEG. HIST. NLRA, *supra* note 150, at 1433, 1443.

other working conditions”²⁴⁰ The framers of this provision viewed it as an exception to section 8(a)(2). Impressed by the effectiveness of labor-management committees established with government encouragement during World War II, they wanted to permit the continuation of these committees during peacetime. They insisted that this provision did not reintroduce company unionism. While the employer and the committee could “discuss and reach decisions,”²⁴¹ neither party could compel the other to engage in formal negotiations or to make agreements. Nor could the committee be a “formal organization” exhibiting the “common characteristics of a labor union.”²⁴²

The House minority, however, maintained that this provision would “resurrect and legitimatize” the very company unions that section 8(a)(2) was enacted to destroy. That these committees would not have the formal characteristics of labor organizations only exacerbated their probability of becoming “the nucleus for a company-dominated organization” unable to bargain effectively on behalf of employees. Allowing their continuation, the minority added, would undermine the current organizing efforts of unions.²⁴³

This provision did not pass. But its supporters implied that the new language in the proviso to section 9(a), by permitting employers to answer the grievances of individual employees and groups of employees, allowed the discussions between employers and employees that the unsuccessful proposal explicitly authorized.²⁴⁴ This implication, however, was not convincing. The new proviso to section 9(a) did not suggest that group grievances could be equated with informal discussions between committees of employees and employers on subjects of bargaining.²⁴⁵

B. *Supreme Court Decisions*

Two unanimous Supreme Court decisions, which broadly construed the definition of a labor organization under section 2(5) and the meaning of company domination under section 8(a)(2), loom over interpretation of these key statutory provisions. They reflect the concern, emphasized throughout the legislative history, that employee committees lacking struc-

240. H.R. 3020, 80th Cong., 1st Sess. 26 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 31, 56.

241. H.R. REP. NO. 245, 80th Cong., 1st Sess. 33 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 292, 324.

242. *Id.*

243. H.R. MIN. REP. NO. 245, 80th Cong., 1st Sess. 85 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 355, 376; *see also id.* at 77, *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 355, 368 (warning that proposed changes in definitions of labor organization and company domination constituted “an open invitation to revival of company-dominated unions”).

244. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 45 (1947), *reprinted in* 1 LEG. HIST. LMRA, *supra* note 30, at 505, 549.

245. *See supra* text accompanying notes 168–78 (discussing original proviso to § 9(a), Taft-Hartley Amendments to it, and interpretive case law since Taft-Hartley).

tural independence from the employer contain the seeds of company domination. According to the Court in *NLRB v. Cabot Carbon Co.*,²⁴⁶ the "dealing with employers" that defines a labor organization in section 2(5) is a much broader concept than collective bargaining. Discussions that do not amount to collective bargaining may still constitute dealing. And in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*,²⁴⁷ the Court emphasized that an employer violates section 8(a)(2) even if the employer establishes and supports a labor organization for the best organizational reasons and without any hostility toward unions.

The employer in *Cabot Carbon*, following the suggestion of the War Production Board during World War II, established employee committees. The employer continued these committees or formed new ones after the war ended.²⁴⁸ The employer and employee representatives drafted the committee bylaws. These bylaws stated that the committees would meet with management to provide a forum for considering employee ideas on matters such as safety, efficiency, ingenuity, initiative, conservation of supplies and equipment, and grievances at nonunion plants.²⁴⁹ Eventually, some employee committees discussed additional concerns, including seniority, job classifications, working schedules, sick leave, and the improvement of company facilities and working conditions. Company officials sometimes granted committee requests, sometimes referred them to local managers, and sometimes rejected them.²⁵⁰

At many of the company plants, the employee committee coexisted with an exclusive union representative.²⁵¹ For many years, no union complained about the existence of the employee committees.²⁵² Eventually, however, a union affiliated with the AFL sought to abolish them. The

246. 360 U.S. 203 (1959).

247. 308 U.S. 241 (1939).

248. 360 U.S. at 205; Brief for the National Labor Relations Board at 8-9, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (No. 329).

249. 360 U.S. at 205-06 n.2.

250. *Id.* at 207-08, 213-14.

251. *Id.* at 209. The employee and union committees at the same plant often had overlapping membership; occasionally, the same employee chaired or served as the grievance representative for both committees. *Cabot Carbon Co.*, 117 N.L.R.B. 1633, 1644 (1957), *enforcement denied*, 256 F.2d 281 (5th Cir. 1958), *rev'd*, 360 U.S. 203 (1959) (affirming NLRB decision); Record at 420, 870, 876, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (No. 329) (1959). Yet the functions of these committees generally remained separate. Although employee committees, sometimes in conjunction with union committees, met with the employer to discuss and make suggestions about various conditions of employment, the employer and the employee committees never engaged in bargaining. 360 U.S. at 213-14; Record at 616, 909. One committee member testified that he did not feel free even to discuss wage rates with the employer. Record at 801. After the election of an exclusive union representative, the functions of the employee committees typically were reduced to matters of efficiency, the handling of grievances for nonunion members, safety, and fund-raising for groups such as the Red Cross and the Boy Scouts. 360 U.S. at 209; Record at 401, 406-07, 458, 868, 873.

252. *Cabot Carbon Co. v. NLRB*, 256 F.2d 281, 284 (5th Cir. 1958), *rev'd*, 360 U.S. 203 (1959). Indeed, some unions seemed pleased that these committees were handling secondary but helpful tasks that the unions themselves had no interest in performing. Record at 870, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (No. 329). When conflict between union and committee functions arose, the committee generally yielded to the union. 256 F.2d at 284.

union wanted to exercise exclusive responsibility over making suggestions to the employer about conditions of employment.²⁵³ After the employer refused, the union filed an unfair labor practice charge alleging that the employee committees were labor organizations dominated by the employer.²⁵⁴

The proper interpretation of "dealing with employees" in section 2(5) constituted the major legal debate in *Cabot Carbon*. While acknowledging that "dealing with" is a broad phrase that includes the concept of "discussing with," the court of appeals refused to equate these two terms. Instead, it treated "dealing with" as the equivalent of "bargaining with"²⁵⁵ and concluded that "a group of employees is not a labor organization unless it exists for the purpose of negotiating or bargaining with employers."²⁵⁶ According to the court, an employee committee or other combination of employees can discuss subjects of bargaining with the employer and even present grievances as long as no bargaining occurs.²⁵⁷

The unanimous Supreme Court convincingly rejected this interpretation of section 2(5). The Court reinforced its observation that "dealing with" is more inclusive than "bargaining with" by citing Secretary Perkins' failed proposal to substitute "bargaining with" for "dealing with" when Congress originally included section 2(5) in the Wagner Act. The reenactment of section 2(5) without change in the Taft-Hartley Amendments and the consistent judicial identification of employee committees as labor organizations provided further support for the Court's conclusion. The Court persuasively refuted the lower court's suggestion that the language added to section 9(a) by the Taft-Hartley Amendments essentially incorporated the unsuccessful House proposal to allow employee committees established during World War II. It distinguished the presentation of group grievances permitted under section 9(a) from the presentation of such grievances by "an employee committee," which is a "labor organization" as defined in section 2(5) and used in section 8(a)(2).²⁵⁸

Underlying this debate over the meaning of the term "dealing with" was a fundamental disagreement over whether these employee committees presented a danger of company domination. The Trial Examiner cited as evidence of domination his finding that "all aspects of collective bargaining are either frustrated or entirely absent."²⁵⁹ Revealingly, the court of appeals cited this language to support its conclusion that the employee

253. Record at 938-39, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (No. 329).

254. 360 U.S. at 206-07.

255. 256 F.2d at 286.

256. *Id.* at 285.

257. *Id.* at 288-89.

258. 360 U.S. at 217-18; *see supra* text accompanying notes 238-39 (Perkins proposal), 164-69 (legislative history of proviso to § 9(a)), 244-45 (unconvincing reading of Taft-Hartley proviso to § 9(a) by supporters of defeated exception to § 8(a)(2)).

259. *Cabot Carbon Co.*, 117 N.L.R.B. 1633, 1647.

committees were not labor organizations subject to the prohibition against company domination in section 8(a)(2).²⁶⁰ The Supreme Court explicitly rejected the lower court's reasoning and conclusion.²⁶¹

The Supreme Court's decision in *Cabot Carbon*, a case involving a relatively sympathetic employer, underlined the breadth of its definition of a labor organization under section 2(5). Yet at least in theory, *Cabot Carbon* did leave some room for discussions about mandatory subjects without union involvement as long as these discussions do not shade into the actual bargaining that section 9(a) reserves to the exclusive agent. For example, some groupings of employees may not constitute labor organizations even if they deal with the employer about these subjects. Perhaps a spontaneous group, as opposed to an ongoing employee committee, would not be defined as a labor organization. In addition, as the Supreme Court stressed in *Cabot Carbon*, an employer can deal even with a labor organization about conditions of employment as long as it steers clear of the prohibitions against domination, interference, and support found in section 8(a)(2).²⁶²

The Supreme Court's prior construction of section 8(a)(2), however, was as strict as its view of section 2(5) in *Cabot Carbon*. It therefore seemed likely that the Court would find dealing with an employee organization evidence of unlawful domination or interference. The Supreme Court's major interpretation of section 8(a)(2), its 1939 decision in *Newport News*, anticipated *Cabot Carbon* by applying the prohibitions of the NLRA against a relatively sympathetic employer. In 1927, before Congress passed the Wagner Act, the employer had instituted an employee representation plan in cooperation with its employees. Immediately after the Supreme Court upheld the constitutionality of the NLRA in 1937, the employer changed the plan in ways designed to meet NLRA requirements. It replaced the joint committee of employee and employer representatives in the original plan with a committee composed solely of repre-

260. 256 F.2d at 290. The court of appeals deleted the word "entirely" from its quotation of the Trial Examiner.

261. 360 U.S. at 212-13. The longstanding and generally peaceful coexistence of an employee committee and a labor union at many of the employer's plants provided an additional argument against defining the committees as labor organizations. The employer emphasized that it had originally established the committees at the government's request rather than to deter the threat of unionization or to "serve as disguised bargaining agents." Brief for Respondents in Opposition to Petition for Certiorari at 10, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (No. 329). The employer had never been accused of anti-union animus and had bargained in good faith with whatever unions the employees elected. According to the employer, this possibly unique combination of factors constituted "mute but indisputable evidence that the committees served no purpose at which even the original Section 8(a)(2) of the Act was aimed." Brief for Respondents at 20. The Supreme Court did not respond directly to this argument, apparently concluding that the language and legislative history of § 2(5) precluded an exception when an entity that otherwise qualifies as a labor organization coexists with a union. Without explicitly so stating, the Supreme Court, perhaps influenced by the related principle of exclusive representation, recognized the union's right to prevent another employee organization from sharing any role regarding mandatory subjects.

262. 360 U.S. at 218.

sentatives elected by employees. The new plan also eliminated employer payments to employee representatives.²⁶³

The Supreme Court readily acknowledged many positive aspects of the employee representation plan. All labor disputes had been effectively settled under it. The employer had never tried to prevent employees from joining labor unions and had never discriminated against those who did join. The overwhelming majority of employees had voted in elections for employee representatives, which had been held without any interference from the employer. Moreover, in a secret ballot referendum, the employees voted overwhelmingly to continue the employee representation plan as modified in 1937.²⁶⁴

These facts prompted the court of appeals' refusal to hold that the plan violated section 8(a)(2). The court recognized that the Wagner Act had been designed to protect the rights of employees to select representatives of their own choosing and to bargain collectively "with complete freedom and independence." The court also acknowledged that this right had been "too frequently denied in the past." Yet the court insisted that these rights would be destroyed rather than vindicated by disestablishing an organization freely chosen by a huge majority of employees.²⁶⁵

The Supreme Court, however, maintained that the relationship between the employer and the employee representation plan violated the prohibitions against employer domination and interference in section 8(a)(2). It stressed that the statute required structural independence of the labor organization from the employer. "In applying the statutory test of independence," the Court concluded, "it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental" and the result of "good motives."²⁶⁶

C. *NLRB and Appellate Court Decisions*

The appellate courts and the NLRB have generally followed the Supreme Court's broad definitions of section 2(5) in *Cabot Carbon* and of section 8(a)(2) in *Newport News*. Under this approach, several decisions have held that employers violated section 8(a)(2) by establishing and supporting committees of professional employees. Yet some appellate courts, particularly in recent years, have tried to limit the reach of these Supreme Court precedents, often in cases involving professional employees. They have harnessed creative interpretations of sections 2(5) and 8(a)(2) to a theory of the NLRA's overall structure that emphasizes cooperative labor

263. 308 U.S. at 244-47.

264. *Id.* at 248.

265. 101 F.2d 841, 847 (4th Cir. 1939), *rev'd*, 308 U.S. 241 (1939).

266. 308 U.S. at 251.

relations and employee free choice rather than the traditional concern about the structural independence of labor organizations. While acknowledging the tension between a literal interpretation of these two provisions and the general purposes attributed to the entire NLRA, the innovative lower courts maintain that a legitimate reconciliation can be achieved. Most of their decisions, however, are unpersuasive.

The juxtaposition of sections 2(5) and 8(a)(2) suggests a logical analytical progression. First, determine whether an entity is the kind of grouping of employees that can constitute a "labor organization" under section 2(5). Next, examine whether the labor organization is "dealing with" the employer concerning the matters specified in section 2(5). Finally, evaluate whether the employer, in dealing with the labor organization, has violated the prohibitions in section 8(a)(2) against domination, interference, and support.

Few cases, however, follow such a neat formula. They frequently pay more attention to an underlying conceptual issue than to the particular statutory provision. The NLRB and the courts have addressed such issues as employer motivation, employee free choice, and the importance of labor-management cooperation both in defining a labor organization under section 2(5) and in determining employer domination, interference, or support under section 8(a)(2). This overlap does not indicate mere analytical carelessness or conceptual confusion. As the legislative histories of these two statutory provisions indicate, and as the Supreme Court's decisions in *Cabot Carbon* and *Newport News* reflect, sections 2(5) and 8(a)(2) are so closely related that the same issues can arise with respect to both.

1. *Traditional Analysis*

Cases following the traditional analysis established by *Cabot Carbon* and *Newport News* have held that various employee committees were labor organizations under section 2(5) and that employers had violated section 8(a)(2). These cases stressed that employers had mandated, or at least had encouraged, the formation of committees, and had controlled their composition, administration, and meetings.²⁶⁷ Employers lost section 8(a)(2) cases by reserving the right to approve committee bylaws, preparing the minutes of committee meetings, and deciding whether a particular issue fell within the jurisdiction of the employee committee or the union.²⁶⁸ Committee meetings on employer property during paid working

267. See, e.g., *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 291 (6th Cir. 1982); *South Nassau Communities Hosp.*, 247 N.L.R.B. 527, 530 (1980); *Alta Bates Hosp.*, 226 N.L.R.B. 485, 490 (1976); *North Am. Rockwell Corp.*, 191 N.L.R.B. 833, 837-38 (1971).

268. See, e.g., *South Nassau Communities Hosp.*, 247 N.L.R.B. at 530; *Alta Bates Hosp.*, 226 N.L.R.B. at 490; *North Am. Rockwell Corp.*, 191 N.L.R.B. at 837-38.

time prompted findings of section 8(a)(2) violations.²⁶⁹ So did indications that employee committees lacked independent sources of funds.²⁷⁰ Although some of these cases cited employer bad faith as part of the evidence, they made clear that even employers who acted in good faith could not escape section 8(a)(2) prohibitions against interference, domination, and support.²⁷¹

The professional purposes of employee committees did not sway traditional analysis under section 2(5) or section 8(a)(2). For example, the Board, citing *Newport News*, rejected the argument that a hospital is free to dominate an advisory committee of nurses "so long as the purpose of such an organization is to improve patient care." The Board agreed with the hospital that Congress had passed the 1974 health care amendments to the NLRA to encourage a form of unionization that would improve health care. Yet the Board noted that Congress, while adding several provisions to existing law to address this goal, had made no changes in either section 2(5) or section 8(a)(2).²⁷² While recognizing in another case that an advisory committee of nurses considered many professional issues outside the scope of mandatory bargaining, the Board found that these permissible contacts did not "negate" the committee's role in "dealing with" the hospital administrators about matters specified in section 2(5).²⁷³

2. *Innovative Analysis*

Courts that depart from the traditional approach to sections 2(5) and 8(a)(2)²⁷⁴ have resisted finding company domination of a labor organiza-

269. See, e.g., *Alta Bates Hosp.*, 226 N.L.R.B. at 491; *North Am. Rockwell Corp.*, 191 N.L.R.B. at 837-38. But see *South Nassau Communities Hosp.*, 247 N.L.R.B. at 530 (meetings were bargaining sessions not prohibited by 8(a)(2)).

270. See, e.g., *Alta Bates Hosp.*, 226 N.L.R.B. at 490.

271. See, e.g., *South Nassau Communities Hosp.*, 247 N.L.R.B. at 530; *Alta Bates Hosp.*, 226 N.L.R.B. at 491. In *Alta Bates* the Board added that employer motivation, while irrelevant to a charge under § 8(a)(2), is a defense to an alleged violation of the duty to bargain in good faith under § 8(a)(5). *Id.*

272. *Alta Bates Hosp.*, 226 N.L.R.B. at 491.

273. *South Nassau Communities Hosp.*, 247 N.L.R.B. at 530. Indeed, § 2(5) states that an employee committee is a labor organization if it deals "in whole or in part" with these matters. 29 U.S.C. § 152(5) (1982) (emphasis added).

274. Several articles have evaluated this innovative case analysis. Slight variations exist in the characterization of the innovations. Compare Note, *Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?*, 49 IND. L.J. 516, 533-35 (1974) [hereinafter *Indiana Note*] (focusing on subjective perspective of employees, distinction between illegal support and permissible aid that falls short of "control," and distinction between illegal "actual domination or interference" and permissible "potential domination or interference") with Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 520-25 (1973) [hereinafter *Yale Note*] (focusing on employer intent to coerce and employee free choice).

Substantial disagreement exists about the persuasiveness of this innovative case analysis as doctrine or policy. See, e.g., Kohler, *supra* note 27, at 543-51 (rejecting innovative analysis as inconsistent with purposes of NLRA and as bad policy because threatening to autonomous employee associations); Sockell, *supra* note 27 (approving innovative analysis as good policy while concluding that it violates §§ 2(5), 8(a)(2), and 9(a) of NLRA); Note, *Collective Bargaining as an Industrial System: An*

tion simply because an employee committee lacks the institutional strength that guarantees independence from the employer.²⁷⁶ They have stressed instead employee free choice, employer motivation, and the desirability of cooperation between labor and management.

If uncoerced employees recognized the difference between a weak committee structure and a union and still preferred employee committees, some courts refused to construe the NLRA as precluding this choice.²⁷⁶ Employees' freedom to reject collective bargaining, they reasoned, should include the freedom to accept employee committees.²⁷⁷ According to an especially graphic judge, the NLRA does not require either the employer or the NLRB to "baby" employees into choosing a union bargaining agent instead of employee committees.²⁷⁸ Whatever the actual structure of an employee organization, these courts seemed willing to find unfair labor practices only if the employer either misled the employees into thinking the organization was the functional equivalent of a collective bargaining agent²⁷⁹ or otherwise "exerted subtle and insidious control over ignorant or protesting employees."²⁸⁰ Even employer attempts to control weak com-

Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act, 96 HARV. L. REV. 1662 (1983) (opposing focus of innovative decisions on employee free choice as inconsistent with current structure of labor law and labor relations based on arms-length bargaining); Indiana Note, *supra* (opposing innovative analysis as inconsistent with NLRA policy of guaranteeing structural independence of labor unions); Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985) (supporting emphasis on employee free choice in innovative analysis as furthering policy of NLRA and distinguishing permissible participatory committees from traditional representation committees); Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021 (1987) (supporting policy conclusions of innovative decisions while claiming that they are inconsistent with congressional intent); Yale Note, *supra* (supporting policy conclusions of innovative decisions and claiming that they are consistent with congressional intent).

275. See, e.g., *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 293-94 (6th Cir. 1982); *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 918-19 (6th Cir. 1968); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967); *Coppus Eng'g Corp. v. NLRB*, 240 F.2d 564, 572, 573 (1st Cir. 1957); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955); *General Foods Corp.*, 231 N.L.R.B. 1232, 1234 (1977).

276. See, e.g., *Streamway Div. of Scott & Fetzer Co.*, 691 F.2d at 295. Cases interpreting § 2(5) pointed out that employers established employee committees without the prompting of union organizing drives or employee unrest which could have led to unionization. See, e.g., *General Foods Corp.*, 231 N.L.R.B. at 1234. These committees may appropriately be perceived as alternatives to unionization, but should not be defined as labor organizations for that reason alone. See, e.g., *id.* at 1235 n.4.

277. The fact that employees, who worked under a system of employee committees, twice rejected a union in fair elections convinced one court not to disturb the status quo. Any other decision would "tip the scales" against the employees' own free choice and in favor of the unionization they clearly did not want. *Streamway Div. of Scott & Fetzer Co.*, 691 F.2d at 295. Similarly, evidence that employees themselves suggested employee committees and rejected unions in free elections convinced courts to reject claims that employers had violated § 8(a)(2). See, e.g., *Modern Plastics Corp.*, 379 F.2d at 204; *Coppus Eng'g Corp.*, 240 F.2d at 571-73; *Chicago Rawhide Mfg. Co.*, 221 F.2d at 168-69. Even the employer's commission of an unfair labor practice during a prior election campaign did not dissuade a court from citing employee free choice as the reason for refusing to find that a committee composed of associates and partners at an architectural firm violated § 8(a)(2). *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 627, 630-31 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975). For my disagreement with this decision, see *infra* note 307.

278. *Coppus Eng'g Corp.*, 240 F.2d at 574 (Magruder, J., concurring).

279. E.g., *Federal-Mogul Corp.*, 394 F.2d at 918.

280. *Modern Plastics Corp.*, 379 F.2d at 204.

mittees did not constitute prohibited domination. These attempts were permissible because the employees resisted and remained independent.²⁸¹

A relentless hostility against employee committees, moreover, "erects an iron curtain between employer and employees" that can be penetrated only by an exclusive union representative.²⁸² The NLRB should not "abort" an employer's healthy cooperative relationship with groups of employees simply because "an outside union wants to take over."²⁸³ A more recent decision added that "changing conditions in the labor-management field seem to have strengthened the case for providing room for cooperative employer-employee arrangements as alternatives to the traditional adversary model."²⁸⁴ And one case suggested that the traditional "close contact" between professional employees and their employers would make a committee system in which management representatives participate an attractive alternative to collective bargaining.²⁸⁵

These innovative decisions have approved employee committees exhibiting characteristics that under traditional analysis led to findings of unlawful domination, interference, or support. Committees met on company time and on company premises, used company bulletin boards, and received company assistance in the preparation of minutes.²⁸⁶ Committees had no membership dues or other independent means of financial support.²⁸⁷ Nor did committees have formal constitutions or bylaws.²⁸⁸ Employers did not provide any protection against discipline or dismissal for employees who served on these committees.²⁸⁹ And committees sometimes included management representatives²⁹⁰ or employees chosen by management.²⁹¹ Some decisions attempted to justify these results by describing

281. See, e.g., *Federal-Mogul Corp.*, 394 F.2d at 920.

282. *NLRB v. Walton Mfg. Co.*, 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting in part). Judge Wisdom had written the circuit court opinion that the Supreme Court reversed in *Cabot Carbon*.

283. *Modern Plastics Corp.*, 379 F.2d at 204.

284. *NLRB v. Northeastern Univ.*, 601 F.2d 1208, 1214 (1st Cir. 1979).

285. An associate in an architectural firm proposed such a "weak" committee system after the employees decertified a union that itself had attempted unsuccessfully to negotiate a similar scheme as a complement to the collective bargaining relationship. The court held that the adoption of this proposal did not violate § 8(a)(2), even though the employer had committed another unfair labor practice that invalidated the decertification election. *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 631, *passim* (9th Cir. 1974); for my disagreement with this decision, see *infra* note 307.

286. See, e.g., *Northeastern Univ.*, 601 F.2d at 1214; *Hertzka & Knowles*, 503 F.2d at 629; *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 919 (6th Cir. 1968); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 170 (7th Cir. 1955).

287. See, e.g., *Northeastern Univ.*, 601 F.2d at 1214; *Federal-Mogul Corp.*, 394 F.2d at 918; *Modern Plastics Corp.*, 379 F.2d at 202; *Coppus Eng'g Corp. v. NLRB*, 240 F.2d 564, 572 (1st Cir. 1957).

288. See, e.g., *Federal-Mogul Corp.*, 394 F.2d at 918; *Modern Plastics Corp.*, 379 F.2d at 202.

289. See, e.g., *Coppus Eng'g Corp.*, 240 F.2d at 572; *Chicago Rawhide Mfg. Co.*, 221 F.2d at 170.

290. See, e.g., *Hertzka & Knowles*, 503 F.2d at 626.

291. See, e.g., *Northeastern Univ.*, 601 F.2d at 1211.

facts indicating management control as “de minimis” or as only part of “the totality of the evidence.”²⁹²

3. *The Unpersuasiveness of Doctrinal Innovations*

Most of the attempts by the lower courts to limit *Cabot Carbon* and *Newport News* are clearly inconsistent with these Supreme Court precedents and with the legislative history of the NLRA.²⁹³ Congress designed sections 2(5) and 8(a)(2) as interlocking provisions to eradicate and prevent the resurgence of the company-dominated organizations that had previously plagued independent unions and employees. It assumed that effective employee organizations must be independent from employer control and that independence requires strength. Many of the factors cited by the lower courts—including the desirability of labor-management cooperation, the existence of employee free choice, and the employer’s motivation—are irrelevant to this fundamental congressional emphasis on strong and independent employee organizations.

Congress insisted on a broad definition of a labor organization in section 2(5) to insure that the prohibitions against company interference and domination in section 8(a)(2) would extend to employee organizations too weak even to bargain. This concern prompted Congress to use the term “deal” rather than “bargain,” to include grievances and relatively minor matters under the definition of dealing, and to indicate that labor organizations could be dominated even if they are not used as “a subterfuge for collective bargaining.”²⁹⁴ Worries about the potential resurrection of company unions prompted Congress to reject proposals which would have weakened the prohibitions in section 8(a)(2) and permitted the continuation of employee committees established during World War II. Opponents of these proposals did not claim that the employee committees were ineffective or that employers actually had dominated them. They simply worried that the committees could be easily transformed into “subservient” labor organizations imposed by employers on employees.²⁹⁵ Passage of these proposals would have allowed many of the interpretations unconvincingly proffered in the subsequent lower court cases. Their rejection, however, reinforced the original emphasis in the Wagner Act on the need for structural autonomy of employee organizations.

Nor were the innovative lower courts convincing in tying their reinterpretation of sections 2(5) and 8(a)(2) to employee free choice and labor-management cooperation. The courts accurately identified the importance

292. See, e.g., *Federal-Mogul Corp.*, 394 F.2d at 921; *Coppus Eng'g Corp.*, 240 F.2d at 573 (majority), 574 (concurrency).

293. The articles cited *supra* note 274 present differing views on this issue.

294. See *supra* text accompanying notes 236–39.

295. H.R. MIN. REP. NO. 245, 80th Cong., 1st Sess. 85, reprinted in 1 LEG. HIST. LMRA, *supra* note 30, at 355, 376.

of both goals in the NLRA. Protecting employee free choice is central to the Wagner Act, and the Taft-Hartley Amendments stress that this freedom includes the right to "refrain" from union activities.²⁹⁶ The introduction to the NLRA, moreover, specifies "the friendly adjustment of industrial disputes" as a fundamental policy.²⁹⁷ Yet sections 2(5) and 8(a)(2) reflect the congressional judgment, based on the prior experience of employer domination, that neither free choice nor cooperation can truly exist when employee organizations lack the independence provided by strength. Weak organizations of employees, Congress concluded, are too easily manipulated by employers in ways that may give the appearance of free choice and cooperation but that actually undermine both. The NLRA thus protects the right of employees to vote against union representation but does not allow them to choose organizational structures that Congress feared would permit, and even encourage, employer domination. Congress considered this danger too high to risk cooperative and possibly constructive experiments with weak committees of employees. The legislative choice—expressed in the Wagner Act and reaffirmed by the Taft-Hartley Amendments—may have been wrong, but it clearly limited alternatives to unionization.

More technical attempts to distinguish traditional analysis are generally unpersuasive as well. It is conceivable that certain discussions between groups of employees and an employer may be permissible "conferring" under the proviso to section 8(a)(2) and may not amount to the "dealings" that constitute a labor organization under section 2(5). But periodic meetings with an ongoing committee such as a faculty senate, in contrast to more spontaneous interactions, seem to fit well within the definition of dealing in section 2(5), particularly as interpreted by *Cabot Carbon*.²⁹⁸

296. 29 U.S.C. § 157 (1982).

297. *Id.* at § 151 (1982).

298. Courts observed that not all communication between an employer and employees should be construed as "dealing" under section 2(5). During the course of conversations with an employer, employees could move from discussions to "dealings" that transformed them from a group into a "labor organization." See *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 169 (7th Cir. 1955). *Cabot Carbon*, a subsequent decision observed, did not resolve the amount of interaction between the employer and employees needed to find "dealing." *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 291-92 (6th Cir. 1982). This decision even suggested that an employee committee could make recommendations to the employer about conditions of employment without being designated a labor organization. It contrasted the "communication of ideas" with "a course of dealing." While acknowledging that this "vital" difference "at times is seemingly indistinct," the court attempted to give it meaning. The court unpersuasively stressed that "dealing" involves "a continuous interaction between employer and committee" beyond the mere presentation on a periodic basis of issues, questions, and complaints related to conditions of employment. *Id.* at 294.

Rejecting a university's claim that its faculty senate was a labor organization, the NLRB observed in another case that the senate functioned as a group of advisory committees making recommendations to the administration, a situation the Board considered "totally different from bargaining demands that a union would make upon an employer during contract negotiations . . ." *Northeastern University*, 218 N.L.R.B. 247, 248 (1975). In reaching this conclusion, the Board did not even refer to *Cabot Carbon*, where the Supreme Court convincingly reversed the court of appeals precisely because the lower court erroneously had defined "dealing with" under § 2(5) as the equivalent of "bargaining with." See *supra* text accompanying notes 255-58.

Work teams may not constitute labor organizations, but simply rotating membership on employee committees seems insufficient evidence that they do not represent employees, even assuming section 2(5) requires representativeness.²⁹⁹ Discussions of "managerial" functions are outside the subjects listed in section 2(5), but this provision states that an employee committee is a labor organization as long as it deals "in part" with statutory subjects.³⁰⁰ In any event, under this Article's proposal to expand the scope of bargaining, subjects that currently are "managerial" would become "conditions of work" under section 2(5).

The innovative decisions occasionally recognized that they were straining the meaning of sections 2(5) and 8(a)(2) to conform to their interpretation of the NLRA's general purposes. In the very process of developing novel analyses of these provisions, courts acknowledged that literal constructions could not support the decisions they reached. Yet they protested that traditional analysis, by frustrating or undermining the Act's commitment to employee free choice, would be "myopic."³⁰¹ While urging sufficient flexibility to permit "constructive" employee committees, one opinion recognized the barriers of prior cases and asked Congress for "a helping hand" in defining when employers could deal with such committees without committing an unfair labor practice.³⁰² Although these opinions did not recognize the relationship between the literal language they minimized and the overall structure of the NLRA, they did reflect awareness that some of the more creative attempts to reinterpret sections 2(5) and 8(a)(2), including their own, were implausible.

299. According to some cases, groups of employees that do not "represent" the entire workforce fall outside the definition of a labor organization in § 2(5). "The essence of a labor organization," one Board decision asserted, "is a group or a person which stands in an agency relationship to a larger body on whose behalf it is called upon to act." *General Foods Corp.*, 231 N.L.R.B. 1232, 1234 (1977). Otherwise, any staff meeting could be construed as the creation of a labor organization. As long as members of any employee group speak in their individual capacities rather than as representatives of other employees, the group should not be called a labor organization. *Id.* at 1234-35.

The Board developed this position in a case where the employer had divided the entire workforce into teams. None of the teams, the Board held, constituted a labor organization. *Id.* A subsequent circuit court decision extended this reasoning to a standing employee committee composed of only a fraction of the employees. Influenced by the "continuous rotation" of committee membership designed to spread participation widely throughout the workforce, the court reasoned that the members of this committee related to management as individuals, not as representatives of their fellow workers. *Streamway Div. of Scott & Fetzer Co.*, 691 F.2d at 294-95.

300. 29 U.S.C. § 152(5) (1982). One decision contrasted "managerial" functions with the statutory list. Examples included various aspects of job enrichment programs, such as interviewing job applicants and setting starting and quitting times. *General Foods Corp.*, 231 N.L.R.B. at 1235. Some cases defined as a managerial responsibility the adjudication, as opposed to the presentation, of grievances. *See, e.g., Sparks Nugget, Inc.*, 230 N.L.R.B. 275, 276 (1977), *modified sub nom. NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980) (modified on other grounds). *See generally* *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108 (1977). And committee work that occasionally shaded into statutory areas could be construed as insufficient to transform the committee into a labor organization. *General Foods Corp.*, 231 N.L.R.B. at 1235.

301. *See, e.g., Streamway Div. of Scott & Fetzer Co.*, 691 F.2d at 295; *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974).

302. *NLRB v. Walton Mfg. Co.*, 289 F.2d 177, 188 (5th Cir. 1961) (Wisdom, J., dissenting).

D. *Suggested Modifications of Company Domination in Professional Employment*

The development of a legal structure more conducive to the implementation of professional values requires changes in the concept of company domination. Current law seems to permit standing employee committees negotiated as part of collective bargaining agreements. The employer cannot dominate committees when an independent union is involved with their "formation and administration" and can refuse to agree to their continuation in a subsequent agreement.³⁰³ But the broad definition of "dealing with" under section 2(5) and the emphasis on lack of structural autonomy as the key test of company domination under section 8(a)(2) essentially preclude the existence of employee committees in other circumstances. Collegial committees of professional employees need the support from employers that violates section 8(a)(2). It is unrealistic and unreasonable to expect employees themselves to sustain the costs of these organizations.

Neither employees nor employers should be precluded from choosing collegial committee structures to encourage input from professional employees on policy issues related to their expertise. Professional employees should be able to select traditional methods of collegial governance, despite their lack of structural independence from the employer, as an alternative to collective bargaining. And employers of professionals should have discretion to establish such structures as long as they do not manipulate them to avoid unionization or prevent them from operating effectively.

Collegial governance after a union election, moreover, should not depend on the agreement of either the union or a majority of the professional employees. As long as the employer adheres to the terms of the collective bargaining agreement, it should be able to foster professionalism by maintaining and consulting with collegial bodies, just as it should be able to hear the views of an individual or group of professional employees. Under my proposed expansion of the scope of bargaining, the employer would still be required to negotiate with the union over the broadened scope of mandatory subjects. But this requirement should not preclude discussions on the same topics with standing committees of professional employees.

Implementing these suggestions requires going beyond the innovative, though legally unconvincing, analysis contained in recent interpretations

303. Kohler, *supra* note 27, at 547, apparently agrees that committees established as part of worker participation programs do not violate the NLRA if management simultaneously accepts the legitimate role of a "self-organized, autonomous employee association." Sockell, *supra* note 27, at 554, convincingly argues that the NLRB and the courts would probably find an unfair labor practice if "a union challenged an employees' committee operating outside union control." Yet she unpersuasively seems to add, with little supporting argument, that even union backing cannot save employee committees whose functions in any way overlap with those of the union. *Id.*

of sections 2(5) and 8(a)(2). For example, linking the legitimacy of employee committees to employee free choice prevents employers who believe in formal professional involvement in organizational decision-making from establishing such committees over the objections of employees who do not share this fundamental professional value. And allowing employee committees and employers to confer only as long as it does not constitute dealing under section 2(5) seems to preclude the more substantial relationship that should characterize professional employment. In my view, the definition of company domination that best promotes professional values should be limited to actual employer interference with the independent decision-making of employee committees, whether or not this interference derives from anti-union animus. Unless committees of professional employees are able to reach their own conclusions, they cannot provide the employer with the expert advice that justifies their existence.

By allowing discussions between employers and committees of professional employees about subjects of collective bargaining, my proposed amendment to the treatment of exclusive representation in section 9(a)³⁰⁴ also suggests limitations on the reach of company domination in the professional setting. An analogous amendment to section 8(a)(2) would complement this proposed amendment to section 9(a) and would reinforce its message in the context of company domination.³⁰⁵

A looser definition of company domination, like the corresponding proposed amendment to section 9(a), would still prohibit much of the objectionable employer behavior precluded by the current statute. For example, the NLRB, union activists, and scholars have all identified situations in which employers established or revitalized faculty governance either as an attempt to defeat the union during an organizing campaign or to avoid bargaining with the exclusive representative after a union election.³⁰⁶ These employers would violate my proposed amendment to section 8(a)(2)

304. See *supra* note 213 (text of proposed amendment).

305. The following language could function as an additional proviso to § 8(a)(2) and in analogous legislation governing the public sector:

Provided, that in units composed primarily of professional employees an employer, after consultation with the exclusive representative if one exists, may form and support committees of employees or joint committees of employees and management representatives. An employer may discuss any subject with such committees as long as the employer does not manipulate them (1) to prevent their effective operation, (2) to avoid unionization, or (3) to violate the duty to bargain in good faith with an exclusive union representative.

This language would legitimate and extend the creative standards of interpretation in the innovative decisions under § 2(5) and § 8(a)(2) that cannot be justified under existing law.

306. See, e.g., *Stephens Inst.*, 241 N.L.R.B. 454, 470 (1979) (principal stockholder and president of proprietary art college created faculty senate to oppose efforts of teachers to organize union), *enforced*, 620 F.2d 720 (9th Cir. 1980); F. KEMERER & J. BALDRIDGE, *UNIONS ON CAMPUS* 163-64, 210-12 (1975) (discussing claims of attempts to avoid unions at City University of New York, Central Michigan University, and Pennsylvania State University); Yellowitz, *Academic Governance and Collective Bargaining in the City University of New York*, 73 *ACADEME* 8 (Nov.-Dec. 1987) (union officer asserts administration at City University of New York established faculty senate to prevent union election).

as well as the current statute. Moreover, employers' commission of independent unfair labor practices could constitute evidence of prohibited manipulation under this amendment.³⁰⁷ And the amendment's reference to the "effective operation"³⁰⁸ of employee or joint committees should be construed to require that employers provide them with sufficient information to fulfill their professional responsibilities. Committees of professional employees, like unions, need adequate information to function properly.³⁰⁹

Yet my suggested modification of company domination does create some of the dangers the framers of sections 2(5) and 8(a)(2) intended to avoid. Of greatest concern, the substantial expansion of permissible contacts between employers and committees of professional employees would make it easier for employers to dominate and interfere with these committees and to subvert unions. Actual manipulation would still be forbidden, but the potential for manipulation without detection would be dramatically increased. Nonetheless, this risk is worth taking to facilitate the independent communication of professional expertise and judgment between employees and employers in both union and non-union contexts. The expansion I propose in the scope of bargaining, moreover, provides at least a partial check on the employer's power after the selection of an exclusive union representative.

IV. CONCLUSION

Current legal rules about exclusive representation and company domination, like those distinguishing between mandatory and permissive subjects of bargaining, create unfortunate barriers to the development of collective bargaining compatible with the legitimate goals of professional employees. All of these legal rules, which are derived from assumptions about collective bargaining in the industrial sector, impede efforts by professional employees to communicate effectively with their employers about crucial matters of professional concern. The distinction between mandatory and permissive subjects restricts professional influence through unions, while exclusive representation and company domination limit the

307. A Ninth Circuit panel held that an architectural firm through various speeches during a decertification election had threatened its professional employees in violation of § 8(a)(1). *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974). Yet the panel rejected claims that the firm had violated § 8(a)(2) by establishing joint committees of employees and partners after it won the election. The panel did not even address whether its findings of prior employer threats should affect in any way its evaluation of the subsequent establishment of joint committees. *Id.* at 629-31. Although I advocate a broader range of employer discretion in establishing committees of professional employees than the innovative decisions interpreting the current law, I would be reluctant to approve over union opposition any committee formed by an employer who had recently or simultaneously demonstrated hostility to unionization by committing unfair labor practices of any sort.

308. See *supra* note 305 (text of proposed amendment to § 8(a)(2)).

309. The Supreme Court has recognized an obligation to disclose relevant information to the union as part of the employer's duty to bargain in good faith. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-54 (1956). Bellace, *supra* note 124, at 82 would require a "right of information" as part of her proposal regarding "mandatory consultation."

impact of individual employees and employee committees outside the union rubric.

Requiring employers to negotiate about subjects that are currently defined as permissive would encourage the inclusion of provisions on issues of professional concern in enforceable collective bargaining agreements. Topics for mandatory bargaining might include collegial governance and academic freedom in universities, guidelines for nursing practice in hospitals, and codes of professional responsibility in legal services programs. At the same time, modifications in the current principles of exclusive representation and company domination would promote an application of labor law to professional employment that does not preclude non-union contacts about professional issues. Employers could consult informally with employees and implement collegial structures whether or not employees have voted for union representation.³¹⁰

This proposal cannot guarantee a system of collective bargaining that promotes professionalism. Unions and employers committed to following the traditional industrial model of labor relations cannot be forced to negotiate agreements that incorporate professional values. Unions could bargain for and even strike in support of provisions that favor a reactive grievance procedure over consultative collegial bodies. Employers could seek or agree to such provisions and refuse to take advantage of expanded opportunities to consult with professional employees outside the union framework. Yet this proposal at least overcomes existing legal obstacles and better reconciles the basic right to bargain collectively with the benefits of professionalism.

The recommendations of this proposal are interrelated. Neither the abolition of the distinction between mandatory and permissive subjects of bargaining nor the loosening of the principles of exclusive representation and company domination should be attempted alone. Broadening the scope of bargaining without loosening exclusive representation and company domination would limit excessively the ability of individuals and committees outside the union rubric to express their professional expertise and judgment. Loosening exclusive representation and company domination without broadening the scope of mandatory bargaining would unduly weaken a union's ability to exercise collective strength in matters of legitimate professional concern to its members. But simultaneously broadening

310. At least one decision in the public sector supports such a system. The Supreme Court of California rejected the assertion by school districts that the public interest in education demands a narrow definition of the scope of collective bargaining. The court pointed out that the state statute governing teacher negotiations requires early and meaningful public disclosure of collective bargaining proposals and opportunities for citizens to express their views on these proposals before negotiations between the parties begin. As a result, the court concluded, the public interest can be accommodated even when mandatory bargaining includes major issues of policy. *San Mateo City School Dist. v. Public Employment Relations Bd.*, 33 Cal. 3d 850, 863-64, 191 Cal. Rptr. 800, 809, 663 P.2d 523, 532 (1983). Analogous reasoning suggests a broad scope of mandatory bargaining combined with significant opportunities for other expressions of professional views to employers.

the scope of mandatory bargaining while loosening exclusive representation and company domination might allow a combination of union and non-union influence that accommodates collective bargaining and professionalism much more successfully than the current system of labor law. If this proposal is implemented and proves successful in professional employment, its application to other employees might then be considered, particularly given current trends away from industrial employment and innovative departures from the traditional system of labor relations within the industrial sector itself.