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REDEFINING THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT

MURRAY L. SACKMAN*

INTRODUCTION

In recent years there has been tumultuous change in the various frameworks governing collective bargaining in the public sector of employment.[1] Practical experience, mainly in the last decade, has prompted reevaluation of some of the fundamental assumptions on which were based the initial approaches to defining the scope and process of public sector bargaining structures. This reevaluation, in turn, has generated a move toward redefining the initial public sector bargaining structures. Changing economic and political climates have contributed significantly to this redefinitional process. The adverse economic impact of recession, unemployment, inflation and fiscal crisis has touched off hostile political reactions by taxpayers and their representatives to the results of public sector collective bargaining. In addition, conceptual and political conflicts continue to exist over the proper role of collective bargaining in the political process which allocates governmental resources. These conflicts, which today remain either unresolved or poorly resolved, represent an attempt to balance broad public interest in the level, nature and quality of governmental services with the interest of public employees in their conditions of employment. Moreover, the ultimate resolution of this conceptual and political balancing in the redefinitional process is threatened by fluctuation in the political power of, and support for, public employees.

As part of the redefinitional process, and in response to the changing

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The author wishes to express a deep sense of gratitude to his wife Perrie for her love and understanding throughout the writing of this article and to Harry T. Edwards, Professor of Law at the University of Michigan Law School, who inspired this article and gave freely of his ideas, teaching and support.

[1] The duty to bargain between state and local governments and their employees, if such a duty exists, is generally established in one of three ways: state legislation, *see, e.g.*, MASS. GEN. LAWS ANN. ch. 150E, §§ 1 *et seq.* (Supp. 1976); N.Y. CIV. SERV. LAW §§ 200 *et seq.* (McKinney's Supp. 1976); executive order, *see, e.g.*, Ill. Exec. Order No. 6 (1973) (state employees); Exec. Order No. 11,491, 3 C.F.R. 254 (1974) (federal employees); or, municipal or county enactment, *see, e.g.*, Los Angeles, Cal., Municipal Ordinance No. 141,527 (1971), *reprinted in* GOV'T. EMPL. REL. REP. (BNA) Ref. File 51:1419 [hereinafter GERR]; Los Angeles, Cal., County Ordinance (Sept. 3, 1968), *reprinted in* GERR Ref. File 51:1426.

The legislative or executive source of the bargaining obligation defines to varying degrees the scope of bargainable issues and other features of the bargaining process, such as unfair labor practices, impasse resolution procedures, and whether employees have the right to strike. Further definition of the scope of mandatory or permissible bargaining is often left to administrative agencies, where they exist, or to state courts. Thus the frameworks for collective bargaining in the public sector may contain legislative, executive, judicial and administrative components to varying degrees. In addition, the scope of bargaining may be affected by existing legislation, municipal enactment, or administrative regulation independent of the bargaining framework. It should be noted that not all jurisdictions require or even permit collective bargaining and that in those that do, not all public employees are granted collective bargaining rights.

attitudes about the proper role of collective bargaining in the political process, many public sector jurisdictions have recently altered, legislatively or judicially, the scope of mandatory and/or permissive bargaining.[2] The initial redefinitional trends appeared to favor broadening the scope of permissive bargaining while striking a balance between the scope of mandatory and permissive bargaining.[3] More recently when public employees have sought judicial enforcement of the collective bargaining agreement, there has been a movement toward restricting the permissible scope of bargaining in order to protect public policy concerns.[4] Neither of these approaches, however, has confronted adequately the political conflict that underlies public sector bargaining. A permissive category of bargaining issues, part of the baggage of the years of private sector bargaining experience, may not be justifiable in public sector bargaining. The permissive category ostensibly preserves the political accountability of decisions involving managerial policy and prerogative. However, the permissive category can dull sensitivity to considerations of the political process in which public sector bargaining takes place if inexperienced or politically expedient public employers are allowed to make unilateral and unaccountable decisions on permissive subjects of bargaining. Furthermore, the focus of the permissive category on managerial prerogative and policy rather than on more purely public policy concerns has been used to justify both too great an intrusion into the appropriate subjects of mandatory bargaining and too wide a range of permissible bargaining in the form of the public employer's discretionary decision to bargain or not. For these reasons, the redefinitional approaches which continue to utilize the permissive category fail to separate out those issues which should be resolved in a political context from those which should be resolved in a bargaining context.

In addition to confronting inadequately the mandatory-permissive scope of bargaining, the reappraisals and redefinitions have also not gone far enough to resolve the wider structural problems raised by the bargaining experiences of the last decade. Some jurisdictions have established or expanded the functions of existing administrative agencies (PERBs),[5] loosened restrictions on the right to strike,[6] and mandated binding impasse resolution procedures.[7] But the tentative steps taken in these directions and the dogged resistance in particular to allowing the right to strike or some form of binding impasse resolution indicate that many jurisdictions have yet a tougher reappraisal process ahead.

This article will examine the factors which have prompted the re-

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[2] "Mandatory" subjects of bargaining are those subjects over which employer and employees have an obligation to bargain in good faith to the point of impasse. At impasse the employer may act unilaterally. "Permissive" subjects of bargaining are those issues over which either side may but is not required to bargain. Neither side may insist on a permissive issue to the point of impasse or as a condition to agreement on other issues. If agreement is reached on a permissive issue, however, it is binding. *See, e.g.*, National Labor Relations Board v. Wooster Division of Borg-Warner, 356 U.S. 342, 348-49 (1958).

[3] See text at notes 88-100 and 118-30 *infra*.

[4] See text at notes 101-17 *infra*.

[5] See note 49 *infra*. PERB stands for Public Employment Relations Board. It is the generic term that will be used in this article when reference is made generally to administrative agencies whose functions in the public sector is similar to those of the National Labor Relations Board in the private sector.

[6] See text and note 33 *infra*.

[7] See text and note 36 *infra*.

appraisal and redefinitional process: the conceptual political conflict, the economic and political climate, and practical experience with the traditional public sector strike ban and absence of alternative impasse resolution procedures. After discussing initial approaches to the scope of bargaining issue in public employment, the redefinitional response, influenced by the above factors, will be discussed and evaluated. Finally, it will be submitted that use of the mandatory/permissive scope of bargaining framework is not warranted in the public sector, and that a mandatory/illegal framework would best protect the interests of public employees, employers, and the public at large.

I. FACTORS PROMPTING REAPPRAISAL AND REDEFINITION

A. *Conceptual Political Conflict*

Collective bargaining in the public sector is inseparable from the political process allocating governmental resources and structuring social relationships. As stated in one commentary, "what is involved in public sector bargaining is the redistribution of income by government rather than the allocation of resources by market forces."[8] Public employees compete with all other interest groups for tax dollars allocated through the governmental budgetary process. Public employees also seek influence over the nature of the services they provide. To the extent that issues of concern to public employees are subject to bargaining, decisions about such issues are removed from resolution in the political arena. Thus, there is always an underlying political conflict in defining structurally those issues which ought to or can be locked into a collective bargaining agreement and those issues which ought to be left open for change and influence in the usual political process.

Early commentators cautioned legislative bodies that the private sector bargaining model might make the path to the governmental machinery allocating resources too smooth for public employee organizations. For example, Harry Wellington and Ralph Winter argued that the conceptual political conflict over the proper role of collective bargaining within the political process should be resolved structurally so as to limit the power of public employee unions in relations to other interest groups.[9] Two particular structural features, in their view, required attention.

First, the scope of bargainable issues in public sector bargaining had to be limited. In the private sector, the argument ran, market restraints and price competition limit the total bargaining pot. If a private sector union attempted to expand the scope of bargaining it effectively traded "more of less for less of more,"[10] because additional benefits gained imposed a monetary cost on the employer who in the private sector was restrained by a competitive market. Thus, benefits gained in one area predictably resulted in losses in other areas if the employer was to avoid pric-

[8] Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 807 (1970) [hereinafter *Wellington & Winter*].

[9] *See* H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES Ch. 1 (1971); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1126 (1969).

[10] *Wellington & Winter*, *supra* note 8, at 857.

ing itself out of the market. Furthermore, private sector unions rarely bargain about the nature of the product. Accordingly, an expanded scope of bargaining in the private sector would lead neither to allocational distortions nor to changes in the nature of the product or service. In the public sector, on the other hand, there appeared to be less of a tradeoff between subjects of bargaining:

> Interest groups will exert pressure against union demands only when they are directly affected. Otherwise they will join that large constituency which wants to avoid labor trouble. Tradeoffs can occur only when several demands are resisted by roughly the same groups. Thus, budgetary demands can be traded off when they are opposed by taxpayers. But when the identity of the resisting group changes with each demand, political leaders may find it expedient to strike a balance on each issue individually, rather than as part of a total package, by measuring the political power of the constituency pressing for labor peace. Expansion of the subjects of bargaining in the public sector, therefore, may increase the total quantum of union power in the political process.[11]

Thus, political factors in the public sector may outweigh the financial factors which in the private sector guarantee a tradeoff on subjects of bargaining. Furthermore, because public employees perform a service, expansion of the scope of bargaining to include bargaining over the manner or means of performing the service could change its nature. Wellington and Winter noted that many public services are performed by professionals who are concerned precisely with the sensitive political, social and ideological questions underlying that service. Negotiations resulting in binding agreements might preclude other affected groups from influence over the nature or extent of the service they pay for or receive. The influence which affected groups extend over the nature of public service, Wellington and Winter argued, should take place in the wider political arena. Thus, the scope of public sector bargaining should be limited to ensure that all affected groups can participate in the resolution of any questions related to the nature of the public service provided.

The attempt to resolve structurally the conceptual and political conflict underlying public sector bargaining was not limited to concern with the scope of bargaining. A second structural feature required attention if the power of public employee groups was to be neutralized. Wellington and Winter argued that public employees could not be granted the right to strike:

> . . . If public employee unions are free to strike as well as to employ the usual methods of political pressure, interest groups with competing claims and different priorities will be put at a competitive disadvantage and the political process will be distorted.
>
> . . .
>
> In addition, the functioning of the " 'normal' American political process" will be altered not only in the way it determines mone-

[11] *Id.* at 858-59.

> tary issues, critical as they are, but also in the way it resolves other matters which, while they affect union members, are traditional grist for the political mill.[12]

Thus, without limits on both the scope of bargaining and the right to strike, collective bargaining would "... institutionalize the power of the public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage."[13]

Given that collective bargaining grants a special advantage to public employees the conflict arises over whether and when such a special position is warranted. The arena for the conflict is political because the battle is primarily one of political power over the allocation of governmental resources. This conflict has given rise to much of the redefinitional process as jurisdictions have reappraised their initial efforts at controlling the power of public employee unions while granting public employees a meaningful voice in decisions affecting their working interests.

B. *The Economic and Political Climate*

The recent period of fiscal crisis has stimulated an extraordinarily hostile political response to the end results of public sector collective bargaining which is spurring the ongoing process of reappraisal. State and local governments have been adversely affected both by reduced tax revenues that result from recession and unemployment and by increased costs and employee demands fueled by inflation. Taxpayer opposition to the cost of public services has been mounting steadily. The public has reacted strongly to the perception that inept managers have "given away the shop." In order to make known their dissatisfaction, taxpayers have resorted to the political process to override the collective bargaining process. They have attempted to redefine politically the scope and process of bargaining so as to limit severely the competitive advantage over other interest groups initially granted by collective bargaining to public employee unions.

Some of the consequences of this taxpayer opposition have been highly visible. In growing numbers, legislative bodies and the public, fiercely resisting the rising cost of public services, have been rejecting budget proposals made by public officials. These rejections have led to complete curtailments of affected services, including schools, in some areas of the country.[14] Such resistance has also found expression in the executive

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[12] *Id.* at 807-08. *See also* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1101, 1123 (1969).

[13] H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 30 (1971).

[14] Taxpayer rejections of local school levies forced closings of several school districts in Ohio, Oregon, Connecticut and Washington, GERR No. 688, at 17 (Dec. 27, 1976), GERR No. 691, at 17 (Jan. 17, 1977) and GERR No. 692, at 9-10 (Jan. 24, 1977). In early 1976, the citizens of Swampscott, Massachusetts, voting on a special petition, turned down the town selectmen's request to appropriate funds for negotiated police and fire fighter agreements. The special petition had been instituted by that town's school committee, which had hoped thereby to make available funds for the schools in a backhanded attack on other public employee negotiations. The Massachusetts Labor Relations Commission (MLRC) dismissed unfair labor practices filed against the town by the police and fire fighters since the school committee could not be considered to be agents of the town in its negotiations with those employees. Town of Swampscott & Firefighters, Local 1499, 3 MASS. LAB. REL. REP. 1003 (MLRC 1976).

branch of state governments. Governors Carey of New York, Dukakis of Massachusetts, and Brown of California, all elected with the support of public employee unions, achieved notoriety for their strong stands against public employee demands in the face of the fiscal crunch.[15] Moreover, residency requirements for public employees, affirmed by the Supreme Court on a recent constitutional challenge,[16] have been imposed by many jurisdictions both to assert a measure of political control[17] and to highlight for such employees the direct relation between rising labor costs and rising property tax rates. Other jurisdictions have enacted "sunshine laws" — requiring that meetings of governmental agencies be open to the public — in order to enhance the political accountability of bargaining decisions.[18] Governor Mills of Virginia went so far as to order his state's attorney-general to bring suit to declare that, in the absence of an authorizing statute, collective bargaining agreements between a school board and its teachers would be void and unenforceable.[19] The state's highest court agreed.[20] On the national level, the depth of resistance to public employee bargaining led backers of a federal bill establishing minimum standards for state and local government employee bargaining to retreat and retrench.[21] This reawakened interest in the costs of public employee collective bargaining by citizens and elected officials has exerted pressure on the redefinitional process.[22]

In Berlin, Connecticut, the Association of Concerned Taxpayers forced the collective bargaining contract with its teachers to a special referendum. The pact proposals were defeated twice before being finally approved by only 42 votes in May of 1977. GERR No. 711, at 19 (June 6, 1977).

[15] One commentator associates Brown and Dukakis with what he calls "the militant embourgeoisification of the electorate." Weber, *Prospects for the Future,* in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 3, 7 (A. Knapp ed. 1977) [hereinafter KNAPP]. Governor Carey managed to impose a salary freeze on state employees for 1976. More recently, he attempted to subject binding interest arbitration of bargaining impasses to approval by local legislative bodies when New York's binding arbitration law came up for legislative extension. He lost that struggle. *See* GERR No. 713, at 16-17 (June 20, 1977). Governor Dukakis went so far as to veto the legislative extension of Massachusetts's arbitration statute but his veto was overridden. GERR No. 716, at 13 (July 11, 1977).

[16] McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 647 (1976).

[17] One such requirement enacted by the Boston School Committee immediately after the Supreme Court decision was challenged as an unfair labor practice and held subject to mandatory bargaining by the MLRC. Boston School Comm. and Boston Teachers Union, 3 MASS. LAB. REL. REP. 1148 (MLRC 1977). *But cf.* Wis. Employment Rel. Comm'n v. Teamsters Local 563, 75 Wis.2d 602, 250 N.W.2d 696 (1977) (holding that a city and union could *not* bargain out of an ordinance requiring residency).

[18] A recent Colorado decision held a collective bargaining agreement entered into in violation of the open meeting law void and unenforceable. Littleton Educ. Ass'n v. Arapahoe County School Dist. No. 6, Colo., 553 P.2d 793 (1976).

[19] Raskin, *The Current Political Contest,* in PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 203, 209 (ed. 1976) [hereinafter RASKIN].

[20] Virginia v. Bd. of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1977). A Colorado decision reached the opposite conclusion but held the agreement unenforceable since it was in violation of the open meeting law. Littleton Educ. Ass'n v. Arapahoe County School Dist. No. 6, Colo., 553 P.2d 793 (1976).

[21] RASKIN, *supra* note 19, at 211. The Supreme Court recently resurrected the 10th Amendment in holding unconstitutional extensions of the Fair Labor Standards Act to state employees. *See* National League of Cities v. Usery, 426 U.S. 833 (1976), *noted in,* 18 B.C. IND. & COM. L. REV. 736 (1976).

[22] The economic climate in New York City led to an effective redefinition of the scope and process of bargaining for the foreseeable future. In response to the deteriorating financial

The impetus to politicize the collective bargaining process comes from public employees as well as from taxpayers and elected officials. For example, when New York's Emergency Financial Control Board rejected the agreement reached between the United Federation of Teachers (UFT) and the Board of Education of New York City after a strike in 1975, the UFT sought help from the state legislature. The legislature passed a bill mandating that the proportion of the educational appropriation in the city's budget be equal to previous years.[23] After tortuous political maneuvers the legislature even overrode a gubernatorial veto for the first time in eighty years in order to keep the bill alive. The money from that bill has yet to be seen,[24] but the experience illustrates the ability of public employees to

situation in New York City the state legislature in 1975 created an Emergency Financial Control Board (EFCB) with the authority to approve proposed collective bargaining agreements reached with public employee unions in New York City. The Board responded by exercising its authority not only to reject the total costs of proposed agreements, but also to eliminate from agreements specific provisions considered to be inefficient or too costly and to insist on specific cost-saving provisions such as productivity levels. The EFCB used its authority to reject an agreement reached between the United Federation of Teachers (UFT) and the Board of Education after a strike in 1975. Only fifteen months later did the parties reach a new agreement. GERR No. 689, at 16 (Jan. 3, 1977). EFCB also postponed cost of living increases in an agreement between the Transit Authority and the Transport Workers Union and enacted a productivity requirement to apply to all newly negotiated contracts. Bargaining in New York City has been so affected by the spectre of bankruptcy that Albert Shanker, president of the UFT proposed that collective bargaining be suspended for the duration of the financial emergency. *See* The New York Times, Nov. 13, 1976, at 1, col. 3. To prove that the suggestion was serious, the UFT also took out a paid advertisement. The New York Times, Nov. 21, 1976, at 9, sec. IV, col. 5.

The hostile political climate in San Francisco created a politicized bargaining process which has redefined the scope and process of bargaining. In July of 1976, after a long period of public employee strife, the San Francisco Board of Supervisors abolished the Municipal Employee Relations Panel (MERP) while MERP was investigating eighteen unfair labor practice charges filed against the Board of Supervisors and its negotiators since the beginning of the unrest. GERR No. 671, at B-15 (Aug. 23, 1976). As an additional response to public employee strikes the San Francisco voters approved a number of referendum issues restricting the bargaining power of public employees in the general November elections. The voters removed several traditional issues from the scope of bargaining. They authorized the Board of Supervisors to subcontract work, without bargaining with the affected employees, whenever lower costs could be achieved. *See* GERR No. 683, at B-14 Proposition J. (Nov. 15, 1976). They voted reduced pension benefits for newly hired police officers and firefighters. *See id.* Proposition L. The voters enacted severely restrictive impasse resolution procedures. One proposal approved provides that if by March 15 of any year there remains a bargaining impasse over salary, the union's last wage demand is to be submitted to the voters. If rejected, the last wage offer of the Board of Supervisors will automatically become effective. *See id.* Proposition O; GERR Ref. File 51:1440. The voters also mandated the dismissal of any striking municipal employee by a special commission empowered to receive charges against a striker from any person. *See e.g. id.* Proposition B; GERR Ref. File 51:1439. Most jurisdictions allow only the employer to move affirmatively to dismiss a striking employee or to enjoin a strike, thus effectively leaving strike ban enforcement to the changing currents of collective bargaining. *See, e.g.* Mass. Gen. Laws Ann. c.150E, §9A(G) (1973). *But cf.* New York's Taylor Law, N.Y. CIV. SERV. LAW § 210-2(g) (McKinney Supp. 1976) (mandates an automatic deduction of two day's pay for each day on strike). The experience of New York and San Francisco illustrate further the role of hostile political and adverse economic forces in the redefinition process.

[23] N.Y. EDUC. LAW 2576 (McKinney 1976).

[24] Although the legislature's action was held to be valid in Board of Educ. v. City of New York, 41 N.Y.2d 535, 362 N.E.2d 948, 394 N.Y.S.2d 148 (1977), after a prolonged court challenge, the Court of Appeals held that it could not consider the possibility of conflict with provisions of the Financial Emergency Act because the Emergency Financial Control Board

utilize the political process in securing gains, and in countering the political power of opposing interest groups.

In all, the changing economic and political atmosphere surrounding public sector bargaining in the last two or three years has produced severe dislocations in the scope and process of bargaining in many areas of the country. Some of the changes effected may be ill-conceived and short-lived. However, the reaction has highlighted the underlying political conflict which propels the ongoing process of redefining public sector bargaining in a way that may produce permanent changes.

C. *The Strike Ban and The Absence of Impasse Resolution Procedures*

A third element which must be factored into the reappraisal and redefinitional process is the ongoing debate over the proper "mechanism" to produce finality in public employee collective bargaining. In the relatively early period of public sector bargaining, up to about 1970, the major structural effort to resolve the underlying political conflict so as to limit the power of public employee unions focused on banning the right to strike.[25] Most jurisdictions still prohibit strikes by public employees. Thus, while the strike in the private sector performs the necessary function of bringing pressure to bear on both parties to resolve their disputes, the absence of effective procedures to bring bargaining disputes to an end has been a major problem in public sector bargaining.

Recent experience has questioned the legitimacy of the strike ban as a means of limiting public employee power so as to resolve the conceptual conflict over the role of collective bargaining in the political process. On the one hand, the strike ban has been generally ineffective. Public employees enjoy a de facto right to strike nearly as effective as the legal right,[26] although the recent reaction to public employee bargaining may have sparked renewed interest in enforcing the strike ban.[27] On the other

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was not a party to the proceeding. Therefore, it did not grant the mandamus relief specifically requested, but instead remanded to the lower court for further proceedings. 41 N.Y.2d at 545, 362 N.E.2d at 955, 394 N.Y.S.2d at 155.

[25] For a partial list of the voluminous literature on the theoretical aspects of the strike ban, see R. SMITH, H. EDWARDS & R. CLARK, JR., LABOR RELATIONS LAW IN THE PUBLIC SECTOR 684-85 n.1 (1974) [hereinafter SMITH, EDWARDS & CLARK].

Not all commentators have urged that strikes be prohibited. *See* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 440 (1970).

[26] *See* Edwards, *The Impact of Private Sector Principles in the Public Sector: Bargaining Rights for Supervisors and the Duty to Bargain*, IN UNION POWER AND PUBLIC POLICY 51, 66 (D. Lipsky, ed. 1975) [hereinafter *Edwards*]; Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CALIF. L. REV. 678, 681 n.14 (1976) [hereinafter *Grodin*].

The Bureau of Labor Statistics reported that the number of work stoppages in the public sector rose sharply in 1975 to 478 from only 384 in the previous year. GERR No. 694, at 18 (Feb. 7, 1977). Even in states like New York and Massachusetts, which enforce the strike proscription with some vigor, strikes are not an infrequent occurrence. Indeed, so common are teachers' strikes in New York that the School Administrators Association recently conducted a series of strike seminars to teach principals of schools how to deal with the problems which strikes cause. GERR No. 712, at 19 (June 13, 1977). However, in the fall of 1976, teachers' strikes in 16 states fell from 109 the previous year to 66, 32 of which were in Pennsylvania, where strikes are legal. GERR No. 676, at D-1 (Sept. 27, 1976).

[27] For instance, the Missouri Supreme Court took an interesting approach to strike enforcement by declaring that agreements resulting from an illegal strike are completely void

hand the strike, legal or not, may not be as frightening a weapon as it once was perceived to be. Although the strike is still an effective economic weapon, the awesome mystery which initially clothed public sector strikes has worn off:

> Employers in the public sector increasingly perceive the strike with less emotion and, indeed, many are now willing to accept strikes as an alternative not only to compulsory and binding arbitration, but also though less frequently to the standard public sector mandated impasse procedures.
>
> For a period of time the employers' perception of the strike was that it was tantamount to anarchy. That perception . . . is fading . . . .[28]

Moreover, inconvenienced constituencies no longer clamor for settlement at any cost: "Unless public health or safety are threatened, the taxpayer is inclined to greet the strike with apathy and indifference — an attitude which brings little pressure on the public employer."[29] Some public employers even see strikes as a cost-saving device in times of fiscal crisis, when service in non-essential employment areas can be sacrificed.[30] Additionally, replacements are easy to find when unemployment is high. In sum, public employers may prefer in certain situations to face a strike rather than grant a costly settlement or accede to binding interest arbitration in which they lose decision-making control.[31] Even the unions have begun to reassess the utility of the strike as a pressure device.[32]

This evidence, which questions the effectiveness of strikes in the public sector as well as the necessity for strike bans, is encouraging reappraisal of that means of limiting union power in order to resolve the underlying

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and unenforceable in the courts even if the public employer "ratifies" the agreement by acting in accord with it. St. Louis Teachers Ass'n v. Board of Educ., 544 S.W.2d 573, 575 (Mo. 1976).

[28] Helsby, "*Has Government Preempted Collective Bargaining?*," Address to Society of Professionals in Dispute Resolution, Toronto (Oct. 25, 1976), *reprinted in*, GERR No. 681, at F-1, F-3 (Nov. 1, 1976) [hereinafter *Helsby*]. Mr. Helsby is chairman of the New York PERB.

[29] *Id.* Helsby's assessment may even be too cautious. The San Francisco voters unleashed a vicious response to public employee strikes, see note 22 *supra*, after the craft and transport unions surrendered following a one month long strike in March and April, 1976. *See* RASKIN, *supra* note 19, at 207-08. Berkeley endured a 25-day firefighters strike in 1975. The terms of settlement were said to be closer to that of the city's position. *See Grodin, supra* note 26, at 700 n.76.

[30] *See Helsby, supra* note 28, at F-3.

It has been reported that the salary savings resulting from the recent teachers strike in Buffalo, New York, financed the pay raise resulting from that strike. GERR No. 692, at 14 (Jan. 24, 1977).

[31] *See Helsby, supra* note 28, at F-3. Another commentator argues that prohibiting public employees from striking is not sound policy because alternatives such as interest arbitration may be too expensive. Lewin, *Collective Bargaining and the Right to Strike*, in RATHER, *supra* note 19, at 145. Lewin feels that strikes ought to be treated simply as ". . . events whose consequences must be weighed against other bargaining outcomes." *Id.* at 163.

[32] On the other side of the coin, unions are beginning to reassess their previous contention that the strike is the so-called "equalizer" at the table; that the right to strike is an essential ingredient of collective bargaining; that the strike and the threat of a strike are the only way to receive equity from their public employer. In short, the strike, in most situations, has not proved to be the pressure device and the equalizer that it was expected to be . . . . The result is that many unions are beginning to push for some form of statutory arbitration.

Helsby, supra note 28, at F-3.

political conflict. The number of jurisdictions permitting public employees to strike is slowly growing.[33] Given the de facto right to strike which results from the procedural barriers preventing enforcement of the strike ban, policymakers cannot rely on the strike prohibition to allow a broader scope of bargaining.[34] In public sector jurisdictions which continue to ban strikes, the absence of strike-induced pressure to settle bargaining disputes heightens the need for effective alternative means of impasse resolution, if only to remove the incentive to strike.

In response to the need for impasse resolution procedures, legislatures are providing, and the parties to bargaining have made greater use of, nonbinding procedures such as mediation and fact-finding.[35] The virtue of a nonbinding procedure is that the parties can participate with less fear that the final decision is being taken from their hands. Taxpayers present less resistance because the procedures hardly distort the political process at all. However, nonbinding procedures tend to continue interminably without resolution. Thus, in jurisdictions where the idea of public employees striking remains politically unacceptable, despite questions concerning the legitimacy of the strike prohibition, compulsory, binding forms of resolution are needed.

Quite a few jurisdictions have recognized the need for binding resolution of bargaining disputes at least in the area of "essential services." In recent years the number of jurisdictions allowing either party to demand binding interest arbitration in non-essential services has been growing slowly but steadily.[36] However, efforts to compel binding arbitration have been subject to intense political opposition[37] and in many states to constitu-

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[33] Strikes are now permitted in Alaska, Hawaii, Minnesota (but only if the public employer does not agree to binding arbitration), Montana, Oregon, Pennsylvania, and Vermont. Clark, *The Scope of the Duty to Bargain in Public Employment*, in KNAPP, *supra* note 15, at 81, 99 n.114. The home rule city of Eugene, Oregon recently decided to allow strikes as well as binding arbitration. GERR No. 687, at B-9 (Dec. 13, 1976).

Model legislation drafted by the National Public Employer Labor Relations Association includes a provision allowing strikes. GERR No. 673, at B-9 (Sept. 6, 1976); GERR Ref. File 51:181.

[34] Michigan, for instance, has allowed a wide scope of mandatory bargaining in reliance on the strike prohibition. *Cf.* Westwood Community Schools, 1972 MERC LAB. OP. 313, *reprinted in* SMITH, EDWARDS & CLARK, *supra* note 25, at 397, 401-02. Yet MERC and the Michigan courts have thrown so many procedural roadblocks into the enforcement scheme that employees may strike with little fear of sanction. *Edwards*, *supra* note 26, at 54.

[35] For example, when the first round of negotiations for state employees under the new bargaining statute in Massachusetts resulted in a strike, the Labor Relations Commission sought and received an injunction order that compelled the parties to mediate the dispute. Massachusetts and Alliance, AFSCME/SEIU, 3 MASS. LAB. REL. REP. 2 (1976).

Although still opposed to public sector bargaining, the American Association of School Administrators recently proposed a model bargaining statute for jurisdictions where the issue is being considered. The model statute would mandate mediation in the event of impasse, allow fact-finding, but not allow binding arbitration. GERR No. 689, at 14 (Jan. 3, 1977). For recent legislation establishing or improving nonbinding impasse procedures, *see e.g.*, CONN. GEN. STAT. ANN. § 5-276 (West 1976); WASH. REV. CODE ANN. § 41.58 (1975).

[36] *See, e.g.*, CONN. GEN. STAT. ANN. §§ 7-473, 7-474 (West 1976) (municipal employees); IND. CODE ANN. § 22-6-4-11 (Burns Supp. 1976); IOWA CODE ANN. § 20.22 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 150E, § 9 (West Supp. 1976) (essential employees); N.Y. CIV. SERV. LAW § 209(4)(o) (McKinney Supp. 1976) (essential employees). For an exhaustive list of legislation providing for binding interest arbitration, see *Grodin*, *supra* note 26, at 678-79 n.2.

[37] Binding arbitration in New York and Massachusetts narrowly survived intense political opposition when the original statutes expired in June of 1977. Governor Carey of New

tional challenges.[38] The concern is that politically unaccountable, private individuals are deciding public policy issues, issues which have a major impact on the level of taxes and services. Accordingly, interest arbitration has been challenged as a subversion of the representative legislative function and the one-person, one-vote principle.

These constitutional arguments advanced against binding arbitration suggest the presence of the same political conflict that underlies the other structural attempts to limit the influence of collective bargaining on the normal political process: fear that arbitration, like the right to strike or expansion of the scope of bargaining, will institutionalize public employee power and, by removing issues from the political arena, will create substantial and permanent disadvantages to competing groups in the political process. For example, judicial decisions in two states upholding the constitutionality of compulsory interest arbitration only by an evenly divided vote suggest an extraordinary level of concern with the scope of bargaining. In

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York attempted to make arbitration awards subject to local legislative approval in order to enhance the political accountability of binding arbitration. The effort was ultimately defeated. Governor Dukakis of Massachusetts actually vetoed the bill extending the arbitration statute but the veto was overridden. GERR No. 716, at 13 (July 11, 1977). Acts of 1977, ch. 347, *amending* MASS. GEN. LAWS ANN. c. 150E §4. The new law includes more detailed "ability to pay" criteria, including consideration of existing property tax burdens. *Id.*

In November, 1977, Massachusetts amended the binding arbitration provisions of its collective bargaining statute by creating a thirteen member Joint Labor-Management Committee. The committee is empowered to enter a contract dispute and decide whether an impasse exists, which points in negotiation should go to arbitration, and who should arbitrate. Acts of 1977, ch. 730, *amending* MASS. GEN. LAW ANN. c. 150E, § 1. *See also* GERR No. 687, at B-1, B-7 and E-1 (Dec. 20, 1976) (describing a conference on binding arbitration in New York and a report on experiences and recommendations).

[38] State courts have struck down municipal or county provisions providing for binding interest arbitration as unconstitutional delegations of authority delegated to elected officials by the state legislature. Bagley v. Manhattan Beach, 18 Cal.3d 24, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976); Greeley Police Union v. City Council of Greeley,___Colo.___, 553 P.2d 790 (1976); Classified Employees Ass'n v. Anderson, GERR No. 687, at B-15 (Md. Cir. Ct. 1976). State courts have similarly struck down state legislative provisions. Sioux Falls v. Firefighters, Local 814,___S.D.___, 234 N.W.2d 35 (1975); Salt Lake City v. Firefighters Local 1645,___Utah___, 563 P.2d 786 (1977).

State courts have upheld the constitutionality of binding interest arbitration when provided for either by a home rule city, Firefighters Local 1186 v. Vallejo, 12 Cal.3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), or by state legislative provisions, Biddeford v. Biddeford Educ. Ass'n, 304 A.2d 387, 403 (Me. 1973) (Wernick, J., separate opinion) (split vote); Arlington v. Board of Conciliation and Arbitration, 1976 Mass. Adv. Sh. 2035, 352 N.E.2d 914; Firefighters Union v. Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975) (Williams, J., separate opinion) (split vote); Orleans Educ. Ass'n v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975); Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975) (see the concurring opinion by Justice Fuchsberg answering substantive due process problems); Harney v. Russo, 435 Pa. 183, 155 A.2d 560 (1969) (amendment to the state constitution); Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969) (performance by the arbitration panel of a public function, making the arbitrator a public officer, removed the delegation problem); Spokane v. Spokane Police Guild, 87 Wash.2d 457, 553 P.2d 1316 (1976); Firefighters Local 946 v. Laramie, 437 P.2d 295 (Wyo. 1968) (panel was held to be performing an executive, not a legislative function). The courts of Massachusetts and New York, *supra*, were quick to point out to the citizens of Arlington and Amsterdam respectively, that the arbitration legislation in each state would expire in June of 1977 and any complaints should be addressed to the legislature. *See also* OP., ATT. GEN. OF TEXAS NO. H-965 (March 29, 1977), concluding that Texas' binding arbitration statute is constitutional. GERR No. 707, at 14 (May 9, 1977).

Biddeford v. Biddeford Teachers Association,[39] the Supreme Judicial Court of Maine barely allowed compulsory arbitration for municipal employees to stand, when the school board challenged the law as an unconstitutional delegation of lawmaking power by the legislature. Ultimately, the deciding factor appears to have been the view that statutory exclusions from arbitration of "educational policies" and of monetary items such as salaries, pensions and insurance benefits provided a primary standard or intelligible principle guiding the exercise of arbitral discretion.[40] Arbitral consideration of the underlying conflict between public policy and working interests, guided by legislative and judicial exclusions of items considered to be too politically sensitive to entrust to binding arbitration, overcame objections that an arbitrator who was not politically accountable was entrusted with legislative functions.[41]

On a similar constitutional challenge to compulsory interest arbitration, the Michigan Supreme Court also focused on the allegedly illegal delegation of legislative functions. In *Dearborn Fire Fighters Union v. Dearborn*,[42] the key issue for the court appeared to be "... the power of the [arbitrator], who does not have continuing responsibility, to make critical choices on economic and noneconomic issues without political accountability."[43] One justice was moved by the fact that under the rare circumstances of the case the arbitrator was close enough to the elective process to swing the balance to the side of constitutionality.[44] The city's refusal to participate in arbitration had led to the appointment of a neutral arbitrator by the chairman of the Michigan Employment Relations Commission (MERC) who was himself appointed by the governor. Had the arbitrator not been appointed by a politically accountable official — had the arbitral process followed the normal statutory course — the arbitral award probably would have been struck down as unconstitutional.[45]

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[39] 304 A.2d 387 (Me. 1973).

[40] *Id.* at 414 (Wernick, J., separate opinion).

[41] The arbitrators will be obliged to bear in mind that (1) the legislature deemed "educational policies" to involve value choices so fundamental that binding decisions concerning them should be made essentially unilaterally and by persons directly responsible to the people and (2) for this reason, even though the arbitrators might reasonably believe a concrete item to embody a sufficient measure of the features of "working conditions" to overbalance an admixture of "educational policy"—thereby warranting a conclusion that the subject-matter is to be classified as "working conditions" ... subject to binding arbitrational determinations ...—the arbitrators must acknowledge the continuing importance of such generalized interests of the citizenry in the overall domain of education as might be relevantly in play. The arbitrators must balance the impacts of such "educational policy" overlays as inhere in fact (even though they might not have been sufficient to require that the subject matter ... be totally excluded from ... binding arbitration) against the weight of the "working conditions" interests of the teachers ....

Id.

[42] 394 Mich. 229, 231 N.W.2d 226 (1975).

[43] *Id.* at 270, 231 N.W.2d at 242 (Levin, J., separate opinion) (would hold compulsory arbitration unconstitutional).

[44] *Id.* at 314-15, 231 N.W.2d at 267-68 (Williams, J., separate opinion) (would hold compulsory arbitration constitutional).

[45] The statutory process for selecting the neutral arbitrator in Michigan has since been amended so as to give MERC a more permanent role in the selection of the neutral arbitrator. MICH. COMP. LAWS ANN. § 423.235 (1976 Supp.).

The Michigan Supreme Court did not feel compelled to exclude any items from arbitration as had been done in Maine. However, those justices who would have held compulsory arbitration to be unconstitutional were concerned that conditions of employment subject to mandatory bargaining and arbitration had been defined so broadly by MERC and the courts that hot political issues might be resolved in arbitration rather than "in the halls of local and state legislatures."[46] The Michigan Court, which had in several cases prior to *Dearborn* allowed a wide scope of bargaining, suddenly seemed to be concerned that arbitrators might grant awards in areas which would hinder political tradeoffs.[47] Although the controversy in both the Maine and Michigan cases arose at the arbitration award enforcement stage, both courts made clear their concern with the scope of bargaining issues and its potential effect on the political process.

What becomes clear from the controversy surrounding compulsory arbitration — evaluated in light of the continuing conceptual political conflict and the existing political and economic climate — is that the real problem is not the political accountability of the decisionmaker but of the decision itself. The remedy is not to declare binding arbitration unconstitutional. Rather, the remedy is to define the scope of bargaining so as to ensure the political accountability of important public policy decisions. If a decision involves political choices which should not be isolated in collective bargaining to the exclusion of other affected groups the decision should be subject neither to binding agreement nor to binding determination by an arbitrator. Legislatures and courts should be facing these definitional problems at the scope of bargaining stage. Refinements at this earlier level would help to alleviate the overdetermined political opposition to strikes or interest arbitration, overdetermined because of unresolved political concerns which lead to mistrust of the results of collective bargaining.[48] Thus, if political concerns were dealt with at the scope of bargaining level it might be easier to accept strikes and compulsory arbitration less as a distortion of the political process and more as merely a structural means of assuring the smooth functioning of collective bargaining in the public sector.[49]

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[46] 394 Mich. at 266-67, 231 N.W.2d at 240 (Levin, J., separate opinion).

[47] Justice Levin noted that any provision relating to work rules, workload and safety was subject to mandatory bargaining in Michigan. If the arbitrator were to make an award in the area of manning levels because of concern with safety and workload, the public employer might be precluded from reducing or freezing the level of the work force in order to effect budgetary savings. *Id.* at 265-67, 231 N.W.2d 239-40. See discussion of negotiability of staffing and manning levels, text at notes 154-62 *infra*.

[48] The Michigan experience amply illustrates the point. In *Dearborn*, Justice Levin complained that arbitration panels might decide whether to impose residency requirements, "a manifestly legislative-political question." 394 Mich. at 265, 231 N.W.2d at 239 (footnote omitted). Yet his remarks during oral argument of the case in which residency requirements were held to be a mandatory subject indicated no such concern. *See* Detroit Police Officers Ass'n v. Detroit, 391 Mich. 44, 60-61, 214 N.W.2d 803, 811 (1974).

[49] Apart from conceptual and political problems underlying scope of bargaining determinations, one functional problem in public sector bargaining has been the absence in many jurisdictions of administrative agencies with the expertise necessary both to apply whatever scope of bargaining standards exist and to assist in dispute resolution. Most courts do not have the expertise to make scope of bargaining determinations on first impression. To assist the smooth functioning of the bargaining process many jurisdictions recently have established administrative agencies or expanded the functions of existing agencies so as to oversee the bargaining process from organization of employees through bargaining and dispute resolution. *See, e.g.*, CAL. GOV'T CODE § 3548 (West 1976) (establishing Educational Employment Re-

The following sections of this article will examine past and present approaches to resolving structurally the scope of bargaining issues. Because it has been suggested that refinements at this earlier level more appropriately resolve the underlying and unanswered political conflicts, the article will proceed by examining the early definitions of the scope of bargaining as well as the recent redefinitional responses, with special emphasis given to the role of permissive subjects of bargaining where used. After these bargaining trends have been appraised, a model for determining negotiability of bargaining issues, which does not contain a permissive category, will be set out and explored.

II. INITIAL DEFINITIONS OF THE SCOPE OF BARGAINING

A. *The Scope of Bargaining*

Scope of bargaining questions were relatively rare in the early period of public sector bargaining. Increasingly, the focus of controversy over the proper role of collective bargaining in the political process has shifted from the strike issue to the attempt to limit the scope of bargaining.[50] Three problems were apparent in the earliest attempts to define scope of bargaining in public employment. First, the initial definitional approaches were subject to continual shifts in the resolution of the underlying political conflict as acceptance of public sector bargaining and the relative power of public employee unions ebbed and flowed. Second, the initial approaches were themselves not always clearly defined by the legislature. PERBs, where they existed, and courts had to free-lance in the case-by-case application of often very general legislative standards. Where the results of their efforts did not fit the original or shifting legislative intent, changes took place. Third, careful definition of the scope of bargaining has been hampered in many jurisdictions by the absence of administrative agencies with collective bargaining expertise. Even where such agencies exist, scope of bargaining issues may be deflected to the courts when public employees seek judicial

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lations Board); CONN. GEN. STAT. ANN. § 5-276 (West Supp. 1977) (extending coverage to state employees in 1975); IND. CODE ANN. § 22-6-4-10 (Burns Supp. 1976) (extending coverage of education employment relations board to all public employees in 1975); IOWA CODE ANN. § 20.5 (West Supp. 1976) (establishing Iowa PERB in 1974); MASS. GEN. LAWS ANN. ch. 150E, §§ 3, 4, 9, 9A and 11 (West Supp. 1976) (broadening functions of existing commission and extending to state employees in 1974); N.J. STAT. ANN. §34:13A-5.4 (West 1975) (establishing in 1975 a commission with exclusive power to render negotiability determinations); WASH. REV. CODE ch. 41, § 58.010 (Supp. 1975) (creating public employment relations commission in 1975). But even if the jurisdiction has established an administrative agency with responsibility for resolving negotiability questions, the agency may never see the question. Most PERBs are equipped to handle negotiability questions only in a refusal to bargain proceeding. Thus, the agency mostly will see questions regarding the scope of mandatory negotiations. If instead agreement has been reached and the union is attempting to enforce the agreement in arbitration or in court, the negotiability question evades the PERB altogether. Accordingly there is a need for expedited procedures whereby the courts can defer negotiability questions to the PERB.

[50] Although William Kilberg was able to state accurately in 1970 that "[t]here has been relatively little litigation over the scope of bargaining in public employment," [Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations*, 30 MD. L. REV. 179, 189 (1970)], in the . . . years since Kilberg's article there has been a virtual onslaught of litigation.

Clark, *The Scope of the Duty to Bargain in Public Employment*, in KNAPP *supra* note 15, at 82.

enforcement of the collective bargaining agreement.

Most jurisdictions that have collective bargaining legislation for public employees have taken a two step approach to defining the scope of bargaining. The first step is to determine the issues over which the public employer is legally permitted to negotiate to binding agreement. Questions as to the public employer's authority to negotiate a particular issue and as to the enforceability or binding effect of agreement as to that issue have come to be treated as one and the same.[51] In jurisdictions which do not have collective bargaining legislation establishing a duty to bargain this is the only scope of bargaining determination that is made.[52]

In jurisdictions that mandate collective bargaining over some issues, questions concerning negotiability and enforceability have only been the stepping stone to the next scope concern. Most jurisdictions, with varying degrees of precision, attempt to distinguish "mandatory" subjects over which bargaining to the point of impasse may be required by either side from "permissive" subjects over which either side, usually the public employer, need not bargain. The discretion granted to employers in the *private* sector to decide whether to bargain over a permissive issue is designed to preserve a core area of managerial concern for unilateral decision when so desired by the private employer. The judicially or legislatively created permissive category in the *public* sector is designed to preserve discretion over seemingly similar concerns. Yet the existence of a permissive category may not be justifiable in the public sector. Discretion to make unilateral decisions should be designed to protect collective political choices. Merely allowing the public employer discretion to decide whether to bargain over politically sensitive allocational or ideological issues may not adequately protect those choices.[53]

B. *Definitional Approaches to Negotiability and Enforceability*

In jurisdictions that required bargaining over any issues, there evolved three general approaches to determine whether the public em-

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[51] *But cf.* Boston Teachers Union v. School Comm., 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707 discussed in text at notes 137-40 *infra*.

[52] *See* cases cited at notes 99-100 *infra*.

[53] See text and notes 133-34 *infra*. The permissive category has been statutorily eliminated in only two jurisdictions where collective bargaining over at least some conditions of employment is required. In Hawaii, and very recently in California for teachers but for no other public employees, an issue must be bargained if either side insists or if it cannot be bargained at all. *See* HAW. REV. STAT. § 89-9(a) (1975). This act requires negotiations over wages, hours and conditions of employment but § 89-9(d) bars any agreement which would interfere with the rights of a public employer to direct employees; determine qualifications and standards for work; hire, promote, transfer, assign and retain employees or discipline employees for proper cause; reduce staff size for legitimate reasons; maintain efficiency of governmental operations; and determine the methods, means, and personnel of operating. *See* CAL. GOV'T CODE §§ 3540-3549.3 (West 1976) (effective July 1, 1976). This act (the "Rodda" Act) specifically enumerates the scope of mandatory negotiations to include, in addition to wages and hours, such items as class size, evaluation and grievance procedures, safety, and transfer policies. All matters not specifically enumerated, "may not be a subject of meeting and negotiating," although the public employer may consult on all matters, particularly "the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks . . . ." *Id.* at § 3543.2. The Winton Act of 1965, CAL. EDUC. CODE

ployer had legal authority to negotiate to binding agreement over a particular issue.[54] The three approaches differed in the extent to which negotiability or enforceability of an agreement was deemed to be limited by existing enactments which either established statutory procedures for the resolution of the issue or expressly or implicitly granted power over the resolution of the issue to particular public agencies or officials.[55]

The first approach provided that collective bargaining legislation would govern in the event of conflict with existing legislation. For example, in Michigan, one of the first states to adopt pervasive legislation governing public sector bargaining, the state's highest court saw fit in 1971 to contour the preexisting statutes to the collective bargaining framework where the bargaining statute was silent as to the effect of preexisting legislation. In *Civil Service Commission v. Wayne County Board of Supervisors*,[56] the court held that the earlier civil service statute allowing counties to establish procedures for determining conditions of employment was impliedly repealed to the extent of any repugnancy with the later bargaining statute.[57] The scope of bargaining in Michigan thereby received no more restrictive an interpretation on account of existing statutes than the bargaining statute might itself be interpreted to authorize.

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§§ 13080-13090 (West 1975), replaced by the Rodda Act, provided only for consultation on all matters within the discretion of the public school employer.

Indiana may have eliminated the permissive category. The bargaining statute, not effective until 1976, mandates the conventional duty to bargain over wages, hours, and conditions of employment. IND. CODE ANN. §§ 22-6-4-1(k), 22-6-4-2 (Burns Supp. 1976). The statute contains a fairly conventional management rights clause, reserving to the employer the "responsibility and authority to manage and direct . . . the operations and activities of the public agency," including the right to direct employees; establish policy; hire, promote, demote, transfer, assign, retain, or discipline employees; and maintain the efficiency of public operations. *Id.* at § 22-6-4-3. Tucked away in § 22-6-4-13 is the admonition that "[a] contract may not include provisions in conflict with . . . any right or benefit established by . . . state law; [or] public employer rights as defined in [§ 22-6-4-3]."

[54] Negotiability questions may arise in the context of suits for a declaration of authority to negotiate, *e.g.*, Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972); suits to compel grievance arbitration, *e.g.*, Dunellen Board of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973); suits to enforce or vacate arbitration awards, *e.g.*, Boston Teachers Union v. School Committee, 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707; and other contract enforcement suits in the absence of arbitration.

[55] Some of the differences arise from different legislative expressions of the effect to be given to legislative, municipal or administrative enactments which may conflict with the terms of the bargaining agreement. *See, e.g.*, MICH. STAT. ANN. § 17.455 *et seq.* (1976) and N.Y. CIV. SERV. LAW §§ 200 *et seq.* (McKinney's Supp. 1976), both silent on the effect to be given to conflicting enactment and both interpreted to give collective bargaining a rather wide scope, see text at notes 56-60 *infra*. The Massachusetts bargaining statute and the Connecticut municipal employee bargaining statute both enumerate a limited number of enactments over which the terms of a collective bargaining agreement shall prevail, *see* CONN. GEN. STAT. ANN. § 7-474(f) (West Supp. 1976) and MASS. GEN. LAWS ANN. ch. 150E, § 7 (West Supp. 1976). *See* HAW. REV. STAT. § 89-9(d) (1975), elaborating a range of issues over which bargaining is not allowed, *supra* note 53, and CAL. GOVT CODE § 3543.2 (West 1976), barring negotiation over all matters not specifically enumerated, *supra* note 53. *Cf.* WASH. REV. CODE ch. 41, § 59.910 (1976) (bargaining statute and the terms of the collective bargaining agreement shall prevail when in conflict with another statute, or a resolution, rule, policy or regulation of the employer). See also text at notes 88-89 *infra* (New Jersey approach); text at note 94 *infra* (Minnesota approach); text at notes 96-98 *infra* (Oregon approach); and text at notes 92-93 *infra* (Pennsylvania approach).

[56] 384 Mich. 363, 184 N.W.2d 201 (1971).

[57] *Id.* at 373-74, 184 N.W.2d at 204-05. The Michigan Supreme Court has since retreated slightly from this very expansive position. See text at note 91 *infra*.

The second approach allowed the scope of bargaining permitted by the bargaining statute to be limited by preexisting enactments but only by express, specific statutory prohibitions. For example, in New York, another of the early states to adopt an extensive framework for collective bargaining in public employment, the Court of Appeals adopted this approach in 1972 in *Board of Education of Union Free School District No. 3 v. Associated Teachers of Huntington.*[58] The court in *Huntington* held that a public employer has authority to negotiate a provision if it falls within the definition of terms or conditions of employment unless a specific statutory provision "expressly" prohibits collective bargaining over that term.[59] Accordingly, the court held negotiable a provision for binding arbitration of disciplinary action pursuant to a just cause standard of substantive review, because there was no statutory provision "expressly" prohibiting bargaining over such an item. The court found that the negotiated grievance provision did not supplant the existing tenure law provisions for hearing procedures prior to disciplinary action.[60] Finding that the grievance procedure did not and could not preclude a teacher's choice of other methods of statutory appeal, the court allowed the statutory procedures and the bargained provision to stand side by side.

The third approach to negotiability determinations looked not just to specific prohibitions but also to existing enactments or procedures as expressions of a policy that a particular issue be resolved in a certain way or by a certain official. The New Jersey Supreme Court, for instance, initially carved a large section out of the range of subjects entrusted to bilateral negotiations. In 1973 the court held in *Dunellen Board of Education v. Dunellen Education Association,*[61] that the Board's decision to consolidate two departments into one, thus eliminating one chairmanship, could not be subject to review under contractual grievance procedures culminating in binding arbitration. The court compared the very general terms of the duty to bargain mandated in the bargaining statute[62] with the statutory responsibility vested in the Board by the Education Law to make determinations of educational policy. The court found that ". . . the decision to consolidate was predominantly a matter of educational policy which had . . . at most only remote and incidental effect, on the 'terms and conditions of employment' . . . ."[63] Since the decision was a policy matter the contrac-

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[58] 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).

[59] *Id.* at 127, 130, 282 N.E.2d at 112, 113, 331 N.Y.S.2d at 21, 23. The Board of Education was held to have the authority to negotiate provisions providing for reimbursement both for job-related property damage and for tuition for advanced studies; for a salary increment in the last year of teaching before retirement; and for binding arbitration pursuant to a just cause standard of any disciplinary action taken against tenured teachers.

[60] The court considered the pre-dismissal hearing required by the tenure law to be a prerequisite to the Board's decision to impose disciplinary action. Such action is itself a prerequisite to substantive review under the grievance provision, which was therefore supplementary, not conflicting. *Id.* at 131, 282 N.E.2d at 114, 331 N.Y.S.2d at 24.

[61] 64 N.J. 17, 311 A.2d 737 (1973).

[62] N.J. STAT. ANN. 34:13A-5.3 (West 1974), mandating a duty to bargain over "terms and conditions of employment." At the time of decision the bargaining statute provided that no provision in the statute shall ". . . annul or modify any statute or statutes of this state." N.J. STAT. ANN. 34:13A-8.1 (West 1974). Immediately after the *Dunellen* decision the legislature amended the provision so as to grant priority over negotiated provisions only to pension statutes. 1974 N.J. LAWS ch. 123, § 6.

[63] 64 N.J. at 29, 311 A.2d at 743.

tual grievance mechanism could not replace the responsibility of the Commissioner of Education to supervise policy determinations and resolve disputes about such determinations arising under the school laws.

Dicta in *Dunellen* provided a significant surprise. The resignation of one chairman before the decision to consolidate had eliminated the necessity for the court in its holding to weigh educational policy interests against the interests of the teacher in conditions of employment. Yet even if a teacher had been dismissed the court expressed doubts that the affected teacher could contest the decision under the contractual grievance procedure. The court found that in the field of education long-standing statutes specifically vested in the Commissioner of Education jurisdiction over controversies relating to educational policy, including the demotion or dismissal of teachers.[64] Accordingly, on that basis the *Dunellen* court indicated that such statutes would predominate over contractual grievance procedures culminating in binding arbitration on the same subject. Thus, while the New York court in *Huntington* at least allowed binding arbitration under the contract to exist alongside of statutory procedures for review, the New Jersey court in *Dunellen* indicated that existing statutory procedures would be given exclusive effect.[65]

In sum, when determining whether a public employer had legal authority to negotiate or enforce a binding agreement on a particular issue, initial judicial decisions took one of three approaches: (1) that collective bargaining statutes governed in cases of conflict with existing legislation, (2) that the scope of bargaining permitted by the enabling statute could be limited only by an express, preexisting statutory provision, and (3) that even in the absence of a specific prohibition in a preexisting statute, the statute might express a policy requiring that a particular issue be resolved in a certain way. The scope of bargaining thus could be expanded or limited by judicial decision, depending on which of the three approaches was taken.

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[64] *Id.* at 28-29, 311 A.2d at 743.

[65] The experience in Massachusetts in the early 1970's illustrates a corollary approach to that adopted in *Dunellen*. The Supreme Judicial Court took the position that statutes granting power to or imposing responsibility on particular public officials or agencies take precedence over the results of collective bargaining. In Chief of Police v. Dracut, 357 Mass. 492, 258 N.E.2d 531 (1970), the Supreme Judicial Court held that the powers of a police chief granted by the "strong chief" statute, MASS. GEN. LAWS ANN. ch. 41, § 97A (West 1975), prevailed over certain fairly traditional terms of collective bargaining, such as seniority preferences and grievance procedures, in an agreement between the police officers and the town. 357 Mass. at 502, 258 N.E.2d at 537. Additionally, the court in Doherty v. School Committee, 363 Mass. 885, 297 N.E.2d 494 (1973), sustained an arbitration award granting back pay to a golf coach who had not been reappointed but barred reinstatement since the superintendent retained sole discretion under the school laws to initiate appointments. 363 Mass. at 885, 297 N.E.2d at 495.

The miscellaneous provisions which once governed municipal employee bargaining in Massachusetts provided that a bargained provision was subordinated if in conflict with any law, ordinance or by-law. MASS. GEN. LAWS ANN. ch. 149, § 178I (West 1971). After the institution of the action in *Dracut*, section 178I was amended to provide that the terms of collective bargaining agreements prevail over the regulations of police or fire chiefs. 1969 Mass. Acts ch. 341; 1970 Mass. Acts. ch. 340. After the decision in *Doherty*, MASS. GEN. LAWS ANN. ch. 149, § 178I (West 1971), was repealed in a complete overhaul of collective bargaining in Massachusetts, but the statutory conflict provision was preserved with some limitations on the precedence of conflicting enactments in MASS. GEN. LAWS ANN. ch. 150E, § 7 (West Supp. 1976). For recent decisions interpreting the statute as amended, see text at notes 113-15 and text at notes 135-42 *infra*.

C. *The Mandatory/Permissive Dichotomy*

Many states chose to focus their efforts to limit the relative advantage in the political process granted by collective bargaining to public employees not by excluding sensitive policy issues from bargaining but by allowing the public employer to decide whether to bargain over policy issues or managerial prerogatives. These jurisdictions felt that accountability of the public employer would act as a check on the employer's bargaining discretion.

The private sector definition of the mutual obligation of the employer and employees to bargain in good faith over "wages, hours, and other terms and conditions of employment" served as a model for most public sector bargaining legislation.[66] Litigation in the private sector over the definitions of wages and hours has been relatively straightforward.[67] However, the attempt to define "conditions of employment" has engendered confusion. In *National Labor Relations Board v. Wooster Division of Borg-Warner*,[68] the Supreme Court stated for the first time that the obligation to bargain is limited to those matters which come within the definition of "conditions of employment:"[69] "As to . . . matters [other than conditions of

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[66] Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1970). *Cf.* ALASKA STAT. § 23.40.070(2); § 23.40.250(1) (1976); CAL. GOV'T CODE § 3505 (West 1968) (local employees); CAL. GOV'T CODE § 3529 (West 1973) (state employees); CONN. GEN. STAT. ANN. § 7-470(c) (West 1975) (municipal employees); CONN. GEN. STAT. ANN. § 5-272(c) (West 1975) (state employees); HAW. REV. STAT. § 89-9(a) (1976); IND. CODE ANN. § 22-6-4-1(k) (Burns Supp. 1976); MICH. STAT. ANN. § 17-455(15) (1965); N.H. REV. STAT. ANN. § 273-A:1(XI); N.Y. CIV. SERV. LAW § 201(4) (McKinney 1973); N.D. CENT. CODE § 15-38.1-09 (1969) (teachers); 43 PA. CONS. STAT. ANN. § 1101.701 (Purdon's Supp. 1976); SAN FRANCISCO, CAL. ADMIN. CODE art. XI.A, § 16.201(16); WASH. REV. CODE ANN. § 41.56.030(4) (Supp. 1976); WIS. STAT. ANN. § 111.70(1)(d) (West 1973) (municipal employees). *Cf.* with slight variations, FLA. STAT. ANN. § 447.203(14) (West Supp. 1976); KAN. STAT. § 72-5413(g) (1972) (teachers); ME. REV. STAT. tit. 26, § 965(1)(C) (Supp. 1976) (municipal employees); ME. REV. STAT. tit. 26 § 979D(E)(1) (1976) (state employees); MASS. GEN. LAWS ANN. ch. 150E, § 6 (West Supp. 1976); MINN. STAT. ANN. §§ 179.66(2) and 179.63(18) (West 1966); MONT. REV. CODES ANN. § 59-1603(1) and § 59-1605(3) (Supp. 1975). *Cf.*, with slightly more detail than in section 8(d), DEL. CODE. tit. 19, § 1301(c) (1965); OR. REV. STAT. § 243.650(7) (1975); WASH. REV. CODE ANN. § 111.91 (1971) (state employees); and WIS. STAT. ANN. § 111.91(1) (West 1971) (state employees). For very detailed statements of mandatory subjects of bargaining, see CAL. GOV'T CODE § 3543.2 (West 1976) (public school employees); IND. CODE ANN. § 20-7.5-1-4 (Burns 1973) (educational employees); IOWA CODE ANN. § 20.9 (West 1974); KAN. STAT. § 75-4322(t) (Supp. 1976); and NEV. REV. STAT. § 288.150(2) (1975).

However, variations may have significant consequences. For instance, for teachers in Connecticut the duty to bargain is defined "with respect to salaries and other conditions of employment." CONN. GEN. STAT. ANN. § 10-153e(d) (West Supp. 1976); *see also* MO. REV. STAT. § 105.520 (1969). The Connecticut Supreme Court interpreted the absence of any reference to hours as an expression of legislative intent that as a matter of policy school boards should not be obligated to bargain over the school calendar and the length of the school day. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 580, 295 A.2d 526, 534 (1972). For the same result in other jurisdictions under different statutory language, see Biddeford v. Biddeford Educ. Ass'n, 304 A.2d 387, 421 (Me. 1973) (teaching hours and school calendar not mandatory); Burlington County College Faculty Ass'n v. Board of Trustees, 64 N.J. 10, 311 A. 2d 733 (1973) (school calendar not mandatory). *But cf.* Westwood Community Schools, 1972 MERC LAB. OP. 313, *reprinted in* SMITH, EDWARDS AND CLARK, *supra* note 25, at 397 (school calendar a mandatory subject); Board of Educ. v. Englewood Teachers Ass'n, 64 N.J. 1, 311 A.2d 729 (1973) (teaching hours are mandatory); Beloit v. Wisconsin Emp. Rel. Comm'n, 73 Wis.2d 43, 242 N.W.2d 231, 240 (1976) (school calendar mandatory).

[67] See GORMAN, BASIC TEXT ON LABOR LAW (1976) at 498-503 and cases cited therein.

[68] 356 U.S. 342 (1958).

[69] *Id.* at 349.

employment], each party is free to bargain or not to bargain, and to agree or not to agree."[70] Thus, while a party could not insist to the point of impasse on matters not encompassing terms or conditions of employment, the parties would be permitted to bargain over such matters.

Although the scope of mandatory bargaining under the NLRA primarily focuses on the term "conditions of employment" it is not limited by the words of the statute alone. In *Fibreboard Paper Products Corp. v. National Labor Relations Board,*[71] Justice Stewart, in a concurring opinion, spoke of a range of managerial decisions

> . . . which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment . . . . If . . . the purpose of section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon [working conditions or] employment security should be excluded from that area.[72]

Thus, Justice Stewart sketched out an area in which the need to preserve managerial discretion over certain decisions collided with the policy favoring collective bargaining as the means of resolving employment disputes. Conditions of employment involving matters of vital concern to employees, may be removed from bargaining because they are fundamental to the basic direction of the enterprise. In public employment the concern for preservation of the prerogative to make traditional managerial decisions is to preserve important policy decisions for resolution in the political process. Accordingly the area of overlap between conditions of employment and fundamental management or policy decisions becomes that much more crucial.

The preservation of managerial decision-making, which limits the scope of mandatory bargaining in the private sector, has been defined judicially and administratively. The words of the statute do not make such a limitation explicit. In the public sector, some jurisdictions followed or approximated the loose private sector definition of the duty to bargain and left to PERBs, if in existence, and to courts, the difficult question whether to follow private sector precedent or to look to differences in public sector bargaining in delineating an area of managerial decision-making exempt from the duty to bargain.[73] Other jurisdictions statutorily reserved certain

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[70] For a similar expression in the public sector, see West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 581, 295 A.2d 526, 535 (1972) ("Nevertheless, the phrase 'conditions of employment' limits the area of negotiability.") *But see* CAL. GOV'T CODE § 3529 (West 1973) (scope of bargaining includes "but is not limited to" wages, hours, and conditions of employment.).

[71] 379 U.S. 203 (1964).

[72] *Id.* at 223 (Stewart, J., concurring opinion).

[73] *See, e.g.,* CAL. GOV'T CODE §§ 3526-3536 (West 1971) (state employees); CONN. GEN. STAT. ANN. §§ 7-467 *et seq.* (West Supp. 1976) (municipal employees); CONN. GEN. STAT. ANN. § 5-272(C) (West Supp. 1976) (state employees); DEL. CODE, tit. 19 §§ 1301 *et seq.* (1965); KAN. STAT. §§ 72-5413 *et seq.* (1972) (teachers); ME. REV. STAT. tit. 26 § 969 (1973) (state employees); MASS. GEN. LAWS ANN. ch. 150E, §§ 1 *et seq.* (West Supp. 1976); MICH. STAT. ANN. § 17.455 (1965); NEB. REV. STAT. §§ 48-801 *et seq.* (1974); N.Y. CIV. SERV. LAW §§ 200 *et seq.* (McKinney's

areas of management rights in which the public employer could not be required to bargain, although still leaving to courts and PERBs the task of delineating the legislated standards in case-by-case application.[74] A limited number of jurisdictions listed those issues subject to mandatory negotiations.[75]

Since any particular issue can involve elements both of managerial or public policy and of conditions of employment, the lack of specificity in most definitions of the duty to bargain led courts and PERBs to search the statutes for expressions of legislative intent concerning particular items. Such expressions, if capable of interpretation, weighed heavily in scope of bargaining decisions.[76] Failing such illuminating expressions, PERBs and courts began to attempt to apply various standards for comparing the impact of an issue on managerial prerogatives and public policy with the impact on conditions of employment. The standards would vary according to the decision-making body's view of the proper balancing of competing public sector interests and the factors taken into account in applying the standard adopted.[77]

Supp. 1976); OR. REV. STAT. §§ 243.650 *et seq.* (1973); R.I. GEN. LAWS §§ 36-11-1 *et seq.* (1970) (state); R.I. GEN. LAWS §§ 28-9.4-1 *et seq.* (1967) (teachers).

[74] *See* ALASKA STAT. § 23.40.250(7) (1976) (terms and conditions of employment do not include "the general policies describing the functions and purposes of a public employer"); CAL. GOV'T CODE § 3504 (West 1968) (excepting consideration of merits, necessity or organization of service provided by local employees); FLA. STAT. ANN. § 447.209 (West Supp. 1976) (reserving unilateral right to determine purpose; set standards of services; exercise discretion over organization and operations; and direct and discipline employees); IND. CODE ANN. § 22-6-4-3 (Burns Supp. 1976); IOWA CODE ANN. § 20.7 (West 1974) (reserving exclusive power, duty and right to determine and implement methods, means, assignments and personnel by which public operations are to be conducted); KAN. STAT. § 75-4326 (Supp. 1976); ME. REV. STAT. ANN. tit. 26, § 965(1) (1973) (reserving educational policies); MINN. STAT. ANN. § 179.66 (West 1973) (excepting from mandatory bargaining "matters of inherent managerial policy," including functions and programs of the employer, overall budget, utilization of technology, organizational structure, and selection, direction and number of personnel); MONT. REV. CODES ANN. § 59-1603 (Supp. 1975); NEV. REV. STAT. § 288.150(3) (1975) (reservation includes right to determine staffing levels, work performance standards, workload factors, quality and quantity of services to be offered, and means and methods of offering services); N.H. REV. STAT. ANN. § 273-A (Supp. 1975); N.J. STAT. ANN. § 34:13A-8 (1965); PA. STAT. ANN. tit. 43, § 1101. 702 (Purdon Supp. 1975); S.D. COMPILED LAWS ANN. § 3-18-15.4 (1970); WIS. STAT. ANN. § 111.90 (West 1971) (state employees). *See also* HAW. REV. STAT. § 89-9(d) (1968).

In one instance, however, the management rights clause has been interpreted as simply a codification of private sector precedent. *See* Firefighters Local 1186 v. Vallejo, 12 Cal.3d 608, 614, 526 P.2d 971, 976-77, 116 Cal. Rptr. 507, 512-13 (1974).

[75] IND. CODE ANN. § 20-7.5-1-4 (Burns 1973) (salary, wages, hours, and salary and wage related fringe benefits); IOWA CODE ANN. § 20.9 (West 1974); KAN. STAT. § 75-4322(t) (Supp. 1976); NEV. REV. STAT. § 288.150(2) (1975). *See also* CAL. GOV'T CODE § 3543.2 (West 1976).

[76] *See* Los Angeles County Dept. of Pub. Social Services and Dept. of Personnel, Case No. UFC 55.3 (1971), *reprinted in* SMITH, EDWARDS, and CLARK, *supra* note 25, at 454, 456-57 (report adopted by Board of Supervisors found to be expression of intent that caseload be mandatorily negotiable); National Educ. Ass'n. v. Board of Educ., 212 Kan. 741, 751-53, 512 P.2d 426, 434-35 (1973) (legislative rejection both of proposed mandatory bargaining over all "matters of mutual concern" and of proposed mandatory bargaining limited to economic conditions of employment found to be determinative); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 580, 295 A.2d 526, 534 (1972) (elimination of "hours" from statutory definition of duty to bargain held to express legislative intent that school board not be required to bargain over school calendar and length of school day).

[77] In applying the standards adopted or in the absence of any standard, PERBs and courts have looked for guidance . . .

(1) to whether bargaining over the matter is already a common practice,

The significant relationship standard was perhaps the earliest test to be adopted by PERBs. The standard was borrowed from the private sector where it was first used in *Westinghouse Electric Corp. v. National Labor Relations Board*[78] to determine when an issue tinged with elements of managerial policy would be considered to be a mandatory bargaining subject. In the *Westinghouse* case the Fourth Circuit stated:

> . . . [S]ince practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend on whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment.[79]

Under this test issues bearing a significant relationship to wages, hours, and

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e.g., West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 584, 295 A.2d 526, 536, 537 (1972); *Board of Education v. Associated Teachers (Huntington)*, 30 N.Y. 2d at 128, 282 N.E.2d at 112-13, 331 N.Y.S.2d at 122;

(2) to federal precedent in the private sector, *e.g.*, Firefighters Local 1186 v. Vallejo, 12 Cal.3d 608, 615-17, 526 P.2d 971, 976-77, 116 Cal. Rptr. 507, 512-13 (1974); Kerrigan v. Boston, 361 Mass. 24, 27, 278 N.E.2d 387, 390 (1972); Police Officers Ass'n v. Detroit, 391 Mich. 44, 53, 214 N.W.2d 803, 808 (1974); *but cf.* National Educ. Ass'n v. Board of Educ. 212 Kan. 741, 753, 512 P.2d 426, 435 (1973) (federal precedent not controlling because of differences between private sector and public sector bargaining); West Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46, 50, 315 N.E.2d 775, 777, 358 N.Y.S.2d 720, 722 (1974); Pennsylvania Labor Relations Board v. State College Area School Dist., 461 Pa. 494, 499-500, 337 A.2d 262, 264 (1975);

(3) to the existence or absence of a strike prohibition, *e.g.*, Westwood Community Schools, 1972 MERC LAB. OP. 313, *reprinted in* SMITH, EDWARDS & CLARK, *supra* note 25, at 397, 402 (strike prohibition allows broader scope of mandatory bargaining); Teamsters Local 320 v. Minneapolis, 302 Minn. 410, 414, 225 N.W.2d 254, 257 (1975) (same);

(4) to the availability of binding impasse procedures, *e.g.*, Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); *see also Grodin, supra* note 26, at 695-98. Many arbitration provisions exclude otherwise mandatory issues from interest arbitration, *e.g.*, ME. REV. STAT. tit. 26, § 97-D (1974) (salaries, pensions and insurance excluded); R.I. GEN. LAWS § 36-11-9 (Supp. 1976) (wages). *But cf.* Firefighters Local 1186 v. Vallejo, 12 Cal. 3d 608, 614 n.5, 526 P.2d 971, 975 n.5, 116 Cal. Rptr. 507, 511 n.5 (1974) (scope of mandatory bargaining and scope of interest arbitration are the same); School Comm. of Boston v. Boston Teachers Union Local 66, 1977 Mass. Adv. Sh. 1069, 1075-76, 363 N.E.2d 485, 488-89 (1977) (even matters outside the scope of mandatory bargaining may be submitted to voluntary interest arbitration if mandatory items are also in dispute);

(5) to the effect on other interest groups of bargaining over an issue, *e.g.*, Board of Higher Educ., 7 PERB 3028 (1974), *quoted in Clark, supra* note 33, at 96, *discussed at* note 167 *infra*.

Reference to bargaining practices, private sector precedent, and the existence of a strike prohibition tends to broaden the scope of mandatory bargaining. Concern with the availability of binding arbitration and with protecting affected interest groups tends to restrict the scope of mandatory bargaining. Clark rightly argues that only the need to resolve some issues in the public arena because of the effect on other interest groups should be considered in scope of bargaining determinations. *Clark, supra* note 33, at 95-99. However, the best way to preserve meaningful participation by other interest groups, when necessary, is to eliminate the permissive category and redesign present standards used for determining negotiability. See text at notes 131-48 *infra*.

[78] 387 F.2d 542 (4th Cir. 1966).

[79] *Id.* at 548.

other conditions of employment, despite elements of managerial policy, are presumptively mandatory subjects of bargaining. It is not necessary to show that the impact on conditions of employment is heavier than or even as weighty as the policy or management elements involved in order for the subject of concern to be considered to be mandatory. Rather, all that is necessary is to demonstrate the significant relationship between the issue sought to be bargained over and the conditions of employment of the employee group. Thus, the burden on employees desiring to bargain over such an item is lighter than under other standards which balance competing interests.

In 1971, the Los Angeles County Employment Relations Commission applied the significant relationship standard in deciding that the caseload of welfare eligibility workers was a mandatory subject of bargaining despite the reservation of management rights in the county bargaining ordinance.[80] The Commission emphasized the existence of workload factors, a traditional mandatory subject of bargaining in the private sector. Since determinations of caseload affect the level or amount of service required of the involved employees, they bear a significant relationship to conditions of employment. Thus, even though such determinations were arguably related to management policy, they were held to be mandatory subjects of bargaining under the significant relationship test. The Nevada PERB, despite a statutory management rights clause, also adopted the significant relationship test in 1971 in holding that provisions relating to teacher preparation time, class size, student discipline, school calendar, teaching load and textbook selection were mandatory subjects.[81]

Another standard that developed was the balancing standard, first enunciated by the Michigan Employment Relations Commission in 1972.[82] This standard weighs the interests of both the employer and the employees in determining whether the contested subject requires mandatory bargaining. Such a test was subsequently adopted by the Kansas Supreme Court, which stated:

> It does little good, we think, to speak of negotiability in terms of "policy" versus something which is not "policy." Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these issues. The key, as we see it, is how direct the impact of an issue is on the well-being of an individual teacher, as opposed

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[80] Los Angeles County Dept. of Public Social Services and Dept. of Personnel, case No. UFC 55.3 (1971), *reprinted in*, SMITH, EDWARDS AND CLARK, *supra* note 25, at 454, *aff'd*, 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 (1973).

[81] Clark County School Dist., Washoe County School District, Item #3 (Nev. Local Gov't Employee Management Relations Bd. 1971), *aff'd*, 90 Nev. 442, 530 P.2d 114 (1974) (mandatory bargaining will not dilute public employer's statutory right to direct employees within broad policy framework established by employer). The statutory management rights reservation has since been considerably strengthened. NEV. REV. STAT. § 288.150(3) (1975). See text and notes 119-22 *infra*.

[82] *See* Westwood Community Schools, 1972 MERC LAB. OP. 313, *reprinted in* SMITH, EDWARDS & CLARK, *supra* note 25, at 397, 400 (conflict between management rights and employee interests appropriately reconciled by balancing interests; school calendar mandatory). The Hawaii PERB adopted a balancing standard, not to distinguish mandatory from permissive subjects but to distinguish mandatory from excluded subjects. Department of Education, Haw. PERB, Dec. No. 26 (1973), *reprinted in* SMITH, EDWARDS & CLARK, *supra* note 25, at 446.

> to its net effect on the operation of the school system as a whole. The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can.[83]

Thus, by weighing the directness of a bargaining issue's impact on the individual teacher against the net effect of the issue on the operation of the total school system, the court arrived at a balancing standard which weighed both employee and employer interests. Except in Michigan, where the strike ban has been held to justify a broad scope of bargaining,[84] such a balancing standard is less expansive of the scope of mandatory bargaining than the significant relationship standard because it goes beyond a determination that the issue bears significant relation to working conditions and considers how the issue affects the employer involved. Accordingly, the standard has been utilized in holding class size to be merely permissive despite the impact of class size on working conditions.[85]

Other jurisdictions swung even further away from the expansive significant relationship test. In 1972 the Nebraska Supreme Court announced that it would require mandatory bargaining "only over those matters directly affecting the teacher's welfare."[86] In 1974 the South Dakota Supreme Court excluded from mandatory bargaining any items which were not "materially" related to working conditions.[87]

Thus, in utilizing the mandatory/permissive dichotomy of the private sector, courts reached different results on scope of bargaining issues depending on whether they used the significant relationship test, under which "conditions of employment" were likely to be expanded, the less expansive balancing approach, which required courts to consider managerial and policy concerns, or the least expansive approach, which excluded from mandatory bargaining any item not "materially related" or "directly affecting" working conditions.

III. THE REDEFINITIONAL RESPONSE

The remaining sections of this article will examine redefinitional responses to scope of bargaining issues as well as redefinitions of the distinction between mandatory and permissive subjects of bargaining. After analyzing problems apparent in the mandatory/permissive dichotomy, a model for negotiability determination in the absence of a permissive category will be recommended and discussed.

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

[84] See description and criticism of this approach at note 34 *supra.*

[85] *See* National Educ. Ass'n v. Board of Educ., 212 Kan. 741, 753, 512 P.2d 426, 435 (1973) (class size, curriculum, use of substitute teachers and teacher aides merely permissive; transfer, evaluation and disciplinary procedures mandatory); Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973) (class size, teaching day length, school calendar, curriculum merely permissive; length of required day, use of teaching aides and specialist teachers mandatory).

[86] Seward Educ. Ass'n v. School Dist. of Seward, 118 Neb. 772, 784, 199 N.W.2d 752, 759 (1972) (class size, curriculum, and hiring of specialists permissive).

[87] Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.,—S.D.—, 215 N.W.2d 837 (1974) (class size, preparation periods, use of teacher aides, and expansion of audio-visual use excluded from mandatory bargaining).

A. *The Scope of Permissible Bargaining and Enforceable Agreement*

1. The Initial Trend

The response to the initial formulations of a standard of negotiability appeared to favor expansion of the scope of permissible negotiations. Many jurisdictions looked with approval to the standard adopted by the New York Court of Appeals in *Huntington*, in which the employer's authority to negotiate was limited only by specific, clear statutory prohibitions. For instance, the New Jersey legislature, although not explicitly adopting the *Huntington* standard, rejected the more deferential approach to preexisting statutory procedures which reposit duty or discretion in particular public officials or governmental agencies. The New Jersey Court in *Dunellen* had barred arbitration of a decision to abolish a chairmanship and in dicta might have barred arbitration of all dismissal decisions because of existing statutory procedures for review of controversies involving determinations of educational policy. In 1974 the state legislature reacted to that decision by enacting grievance procedure legislation dealing with such potential statutory conflict which effectively overruled that dicta and possibly the holding as well.[88] At the same time the legislature amended the earlier statutory conflict provision so as to give precedence over collectively bargained outcomes only to pension statutes.[89] It is still unclear how expansively the courts will interpret the bargaining statute as amended.[90]

Other states had similar responses. The Michigan Supreme Court retreated slightly from its more expansive stance—providing that collective bargaining legislation would govern in the event of conflict with existing

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[88] Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

N.J. REV. STAT. ANN. § 34:13A-5.3, (West 1965) *as amended by* 1974 N.J. Laws ch. 123, § 4.

[89] N.J. REV. STAT. ANN. 34:13A-8.1 (West 1965) *as amended by* 1974 N.J. Laws ch. 123, § 6.

[90] While the New Jersey Supreme Court has yet to rule on the effect of the 1974 amendments, the lower courts continue to preserve a hard-core area of managerial discretion. *See* Clifton Teachers Ass'n v. Board of Educ., 136 N.J. Super. 336, 346 A.2d 107 (App. Div. 1975) (no bargaining may be allowed over statutory right to withhold salary increments for inefficiency or other good cause; management's prerogative to assess quality of teacher performance); Board of Educ. v. North Bergen Teachers Ass'n, 141 N.J. Super. 97, 357 A.2d 302 (App. Div. 1976) (public employer's right to determine criteria for promotion and to select candidates for promotion from within or without the bargaining unit not arbitrable); Board of Educ. v. Englewood Teachers Ass'n, 150 N.J. Super. 265, 375 A.2d 669 (App. Div. 1977), *rev'g* 2 N.J. PERC 72 (March 23, 1976) (termination of nontenured teachers pursuant to reductions in force not arbitrable). *But cf.* Red Bank Bd. of Educ. v. Warrington, 138 N.J. Super. 564, 351 A.2d 778 (App. Div. 1976) (1974 amendments favoring resolution of disputes through contractual grievance mechanisms helped persuade the court to hold that the assignment of an extra teaching period during time formerly used as a preparation period was arbitrable); Newark Teachers Union Local 481 v. Board of Educ., 95 L.R.R.M. 2525 (App. Div. 1977) (failure to follow contractual evaluation procedures in terminating nontenured teachers arbitrable, but relies on N.J. PERC decision overturned in *Englewood, supra*). *See also* Board of Educ. and Rockaway Township Educ. Ass'n, Docket No. SN-76-2, N.J. PERC (June 3, 1976), GERR No. 680, C-5, applying substantive law as construed in *Dunellen* since the contract in issue predated the 1974 amendments, and finding a contractual provision calling for automatic extended sick leave benefits to be neither arbitrable nor negotiable because inconsistent with a specific provision of the Education Law.

legislation—to a position which produced results similar to that of the *Huntington* standard.[91] In addition, courts in Vermont, Pennsylvania, Maine and Rhode Island explicitly adopted the *Huntington* approach and limited the scope of permissible bargaining only by specific prohibitions or only where bargained provisions actually violated existing law.[92] In Pennsylvania, an issue was removed from bargaining only if the legislature had specifically mandated that a particular responsibility be performed exclusively by the employer.[93]

Courts in Minnesota and Oregon also reached results which may indicate an approach nearly as expansive as that adopted in *Huntington*. The Minnesota Supreme Court demonstrated reluctance to limit collective bargaining except when agreement is in direct conflict with another statute, municipal charter or statewide administrative regulation.[94] The court held that a collective bargaining agreement could not limit a city charter's grant of official discretion to suspend subordinates for disciplinary purposes. However, the court also held that the subject of written reprimands, though a lesser exercise of discretion, was mandatorily negotiable since that subject was not dealt with in the charter.[95]

Similarly, the Oregon appellate courts limited the exclusive effect of existing enactments to explicit prohibitions.[96] For instance, the court of ap-

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[91] *See* Detroit Police Officers Ass'n v. Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974) (Instead of reaffirming its earlier holding that the bargaining statute impliedly repeals existing enactments to the extent of any repugnancy, the court went to great lengths to construe the earlier Home Rule Cities Act narrowly enough to permit collective bargaining over pension plans. The Court divined a distinction between the broad "procedural" outline of a plan, subject to amendment only by popular vote, and the "substantive" details to be filled in by collective bargaining). *See also* Local 1905, AFSCME v. Recorder's Court Judges, 399 Mich. 1, 248 N.W.2d 220 (1976) (A specific statute establishing dismissal procedures for court employees prevails over a bargained grievance procedure). *But cf.* Pontiac Police Officers Ass'n v. Pontiac, 397 Mich. 674, 246 N.W.2d 831 (1974) (bargained grievance procedure for review of discipline of police officers prevails over city charter provision for civilian review board).

[92] *See* Superintending School Comm. v. Winslow Educ. Ass'n, 363 A.2d 229 (Me. 1976); Labor Relations Board v. State College Area School District, 461 Pa. 494, 509, 337 A.2d 262, 269 (1975); Belanger v. Matteson, 115 R.I. 332, 346 A.2d 124 (1975); Danville Bd. of School Directors v. Fifield, 132 Vt. 271, 275-76, 315 A.2d 473, 475-76 (1974). Although the Maine Court adopted the New York and Pennsylvania approaches, 363 A.2d at 231-32, language in the opinion may indicate differences in the application of that standard. See text at note 116 *infra*.

It is interesting to note that both Maine and Pennsylvania also use the balancing standard for determining mandatory negotiability. See text at notes 82-85 *supra* and notes 123-25 *infra*.

[93] Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 510, 337 A.2d 262, 269-70 (1975). The Pennsylvania court has since determined under the announced test that a school board may agree to arbitrate the dismissal of non-tenured teachers pursuant to a just cause standard. Board of Educ. v. Philadelphia Fed. of Teachers, 464 Pa. 92, 346 A.2d 35 (1975). Very recently the court held that an unsatisfactory performance rating is arbitrable although the rating was one basis of a dismissal proceeding instituted against a tenured teacher. Milberry v. Board of Educ.,—Pa.—, 354 A.2d 559 (1976).

[94] *See* Teamsters Local 320 v. Minneapolis, 302 Minn. 410, 225 N.W.2d 254 (1975).

[95] *Id.* at 415, 225 N.W.2d at 257, 259. The court held that it was required to defer to the specific charter provision by MINN. STAT. ANN. § 179.66(5) (West 1973), voiding contract provisions which violate or conflict with statutes, regulations or municipal charter provisions. *See also* Minneapolis Fed. of Teachers, Local 59 v. School Dist. No. 1, 95 L.R.R.M. 2359 (Minn. 1977) (individual transfers of teachers are arbitrable).

[96] *See* Central Point School Dist. v. Employment Rel. Bd., 27 Or. App. 285, 555 P.2d 1269 (1976) (no constitutional or statutory proscription of school district's agreement to arbi-

peals in that state rejected the view of the Oregon Employment Relations Board that bargaining ". . . over matters which rest primarily in the policy or governmental domain, or which are entrusted to their exclusive discretion by law . . ." would constitute an illegal delegation of statutory duties.[97] Thus, the Oregon courts appeared to move away from the view that existing enactments exude an aura of exclusivity to a view more accepting of the role of collective bargaining in the political process.[98]

In states which still have no collective bargaining legislation expressing any legislative intent to defer to bargained determinations of conditions of employment, the scope of permissible negotiations has remained much narrower[99] or even non-existent.[100] The policy expressed in existing formulations actually may limit the public employer's discretion to afford the employees more protection than is already afforded by enactment. Thus, overall the initial trend of redefinition in formulating a standard of negotiability favored an expansive scope of bargaining by adopting the *Huntington* approach which required specific and clear statutory prohibitions before an employer's authority to negotiate would be limited.

2. Contract Enforcement: The Redefinitional Pendulum Swings Back

More recently, as jurisdictions have defined and redefined their initial approaches to balancing the interest of public employees in a meaningful

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trate questions of teacher dismissal); Springfield Educ. Ass'n v. School Dist. No. 19, 24 Or. App. 751, 547 P.2d 647 (1976) (reversing Oregon Employment Relations Board holding that bargaining over school district's contracts with university for student teaching programs was prohibited). *See also* Sutherlin Educ. Ass'n v. School Dist. No. 30, 25 Or. App. 85, 548 P.2d 204 (1976) (remanding to Oregon Employment Relations Board its holding that bargaining over student disciplinary rules was merely permissive because of statutory requirement that school boards adopt disciplinary rules; bargaining allowed as to content of rules so long as agreement is consistent with statewide rules).

[97] Springfield Educ. Ass'n v. School Dist. No. 19, 24 Or. App. 751, 760, 547 P.2d 647, 650 (1976).

[98] *But see* City of Hermiston v. Employment Rel. Bd., 27 Or. App. 755, 557 P.2d 681 (1976) (bargaining statute unconstitutional as applied to home rule cities). It is difficult to reconcile this opinion with the general trend in Oregon except to analyze the decision as concerning those employees covered by the bargaining statute and not as concerning the permissible scope of bargaining of those employees covered. But in a sense, the lack of coverage under the statute may only be a broader expression of those enactments which may restrict the permissible scope of bargaining. *Compare* Teamsters Local 320 v. Minneapolis, 302 Minn. 410, 225 N.W.2d 254 (1975) (home rule city charter provision allowing discipline of employees prevails over bargained grievance procedure, under statutory conflict provision) *and* PA. STAT. ANN. tit. 43, § 1101.703 (1970) (preserving precedence of home rule charter provisions) *with* Police Officers Ass'n v. Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974) (home rule cities required to bargain over pension plans and residency requirements) *and* Pontiac Police Officers Ass'n v. Pontiac, 397 Mich. 674, 246 N.W.2d 831 (1976) (bargained grievance procedures for review of discipline of police officers prevails over provision in municipal charter for civilian review board). See also text and note 57 *supra* and note 95 *supra*.

[99] *Cf.* Illinois Educ. Ass'n v. Board of Educ., 62 Ill.2d 127, 340 N.E.2d 7 (1975) (contractual procedures for evaluation of probationary teachers neither negotiable nor enforceable); Board of Trustees v. Cook County College Teachers Union, 62 Ill.2d 470, 343 N.E.2d 47 (1976) (questions relating to dismissal or demotion of non-tenured teachers neither arbitrable nor enforceable).

[100] *Cf.* Commonwealth of Va. v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977) (county board and school board may not enter into collective bargaining agreement in absence of authorizing statute). *But cf.* Littleton Educ. Ass'n v. Arapahoe County School Dist. No. 6,— Col.—, 553 P.2d 793 (1976) (school board has power to enter into collective bargaining agreement despite absence of express legislative authority).

voice in determining their conditions of employment and the public interest in maintaining a meaningful voice in political decisions allocating governmental resources, a countertrend has developed calling for greater recognition of public policy concerns. A growing number of judicial decisions in the last two years has reintroduced policy concerns restrictive of the permissible scope of bargaining at the contract enforcement stage. This may reflect a lasting effect of the changing economic and political climate.

The New York Court of Appeals in *Huntington* had initially established an expansive tone for the policy favoring collective bargaining, limiting permissible bargaining only by express prohibitions in existing political enactments. Despite the trend in other jurisdictions favoring this expansive approach the New York Court itself recently displayed second thoughts about looking only to explicit statutory prohibitions to limit the scope of negotiations and binding agreement. In 1975 the court announced in *Susquehanna Valley Central School District v. Susquehanna Valley Teachers Association*[101] that it would consider policy factors in delineating the limits of enforceable agreement:

> Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may also restrict the freedom to arbitrate.
>
> Key to the analysis is that the freedom to contract in exclusively private enterprises . . . does not blanket public school matters because of the governmental interests and public concerns which may be involved, however rarely that may be.[102]

The Court of Appeals struggled to flesh out an area of concern in which statutes which do not expressly proscribe the bargained result may yet serve as notice that the courts should look harder at the underlying policy interests. However, the willingness to consider policy concerns in determining the scope of enforceable agreement did not aid the school district in *Susquehanna*. The court actually held that neither public policy nor plain and clear statutory prohibitions existed to prevent a school board from agreeing to stabilize the size of the work force.[103] While the *Susquehanna* court felt that the injection of public policy considerations did not tip the scales in favor of the public employer on this issue, its language served notice that the court would not hesitate in future disputes to search for expression of governmental interests and public concerns.

Despite the New York Court of Appeals' new concern with public policy interests, recent decisions have not indicated a consistent trend toward a more limited scope of negotiability. In several recent cases the

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[101] 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975).

[102] *Id.* at 616-17, 339 N.E.2d at 133-34, 376 N.Y.S.2d at 429.

[103] Even so, the attempt to introduce policy limits arising out of existing political expressions did not slide by easily. The move aroused a vigorous response from Justice Fuchsberg:

> The notion that courts may freely assume the role of arbitrators of public policy is a very much exaggerated one. Most especially, they should avoid doing so in the face of a statutory scheme which bespeaks its own policy considerations . . . . It can hardly be disputed that legislative concern, activity and enactment are at the heart of the sensitive and growing field of labor relations in the public sector

Id. at 618, 339 N.E.2d at 134, 376 N.Y.S.2d at 430 (concurring opinion).

Court of Appeals has found no more restrictive public policy than was present in *Susquehanna.*[104] For example, in *Board of Education, Yonkers City School District v. Yonkers Federation of Teachers,*[105] the court upheld the arbitrability of job security provisions freezing staff size despite the generally conservative fiscal policy expressed in the Financial Emergency Act for the City of Yonkers.[106] In fact the *Yonkers* decision may have even expanded the *Huntington* standard. Relying on New York PERB determinations, a lower court had held that since the abolition of a position for budgetary reasons did not constitute a term or condition of employment, job security provisions preventing such action were not enforceable.[107] Although *Huntington* had established only that a public employer had the power, limited by statutory prohibitions, to negotiate over terms or conditions of employment,[108] the court cited *Huntington* in support of an even broader proposition:

> . . . [P]ublic employers are required to negotiate collectively with public employee organizations in determining the "terms and conditions of employment" . . . . But this is not the limit of the employer's power. To effectuate the public policy favoring negotiation as the means of insuring "harmonious and cooperative relationships between government and its employees," a public employer possesses broad power voluntarily to negotiate all matters in controversy, whether or not they involve "terms and conditions of employment" subject to mandatory bargaining, and to agree to submit such controversies to arbitration . . . .[109]

Thus, *Yonkers* seemingly expanded the *Huntington* standard by suggesting that a public employer might voluntarily negotiate and agree to arbitrate matters not involving terms and conditions of employment. Since the job security provision had been negotiated before the financial emergency was declared, that is, before any definitive public policy statement on job security, the court in *Yonkers* held that it was arbitrable.

Not until 1976 did the New York Court of Appeals finally grant a restrictive interpretation to public policy concerns. In *Cohoes City School District*

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[104] *Cf.* Matter of Burke v. Bowen, 40 N.Y.2d 264, 353 N.E.2d 567, 386 N.Y.S.2d 654 (1976) (job security provision arbitrable); Board of Educ. v. Yonkers Fed. of Teachers, 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976) (same); New York City School Boards Ass'n v. Board of Educ., 39 N.Y.2d 111, 347 N.E.2d 568, 383 N.Y.S.2d 208 (1976) (reduction in students' hours of instruction negotiable); Board of Educ. v. Bellmore-Merrick United Secondary Teachers, 39 N.Y.2d 167, 347 N.E.2d 603, 383 N.Y.S.2d 242 (1976) (arbitral award of temporary reinstatement of probationary teacher without tenure doesn't violate public policy). *But cf.* Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976) (tenure decisions not arbitrable); Board of Educ. v. Areman, 95 L.R.R.M. 2165 (1977) (school board's right to examine teachers' files not arbitrable).

[105] 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976).

[106] *Id. See also* Matter of Burke v. Bowen, 40 N.Y.2d 264, 353 N.E.2d 567, 386 N.Y.S.2d 654 (1976) (job security provision arbitrable). *But cf.* Crossing Guard Union v. Yonkers, 39 N.Y.2d 964, 354 N.E.2d 846, 387 N.Y.S.2d 105 (1976) (contract provision not a bona fide job security provision, therefore not arbitrable).

[107] Matter of Lippman v. Delaney, 48 App. Div.2d 913, 914-15, 370 N.Y.S.2d 128, 130 (1975).

[108] *Huntington,* 30 N.Y.2d at 127, 282 N.E.2d at 112, 331 N.Y.S.2d at 21.

[109] *Yonkers,* 40 N.Y.2d at 271, 353 N.E.2d at 571-72, 386 N.Y.S.2d at 659, *quoting* Civil Service Law, § 204, subd. 2, and *Huntington,* 30 N.Y.2d 122, 130, 331 N.Y.S.2d 17, 23, 282 N.E.2d 109, 113.

v. Cohoes Teachers Association,[110] the court held that an arbitral award of reinstatement which would result in a grant of tenure violates the public policy expressed in the Education Laws leaving tenure decisions to school boards. The school board could not relinquish through a just cause provision the ultimate responsibility vested in the Board by statute to make tenure determinations.[111] Similarly, in another recent case the Court of Appeals held that public policy bars a school board from bargaining away its right to examine teachers' files. Especially in the area of tenure decisions, the New York Court noted, school boards should ultimately be responsible for the employment of qualified teachers.[112] Thus, the *Huntington* standard in New York has been partially eroded by the recognition of policy concerns not explicitly expressed in statutes or areas conflicting with collective bargaining statutes.

While the New York Court of Appeals was still paying lip service to restrictive policy concerns, the Supreme Judicial Court of Massachusetts took to heart the idea expressed in *Susquehanna* that public policy concerns, even if only implicit in statutory law, may restrict the scope of permissible bargaining and enforceable agreement. In *School Committee of Hanover v. Curry,*[113] the Massachusetts Court held, contrary to *Yonkers,* that a decision to abolish a position, even if the decision results in lay-off or demotion, is not arbitrable.[114] The Supreme Judicial Court found the policy concerns implicit in that state's education law sufficient to commit a decision to abolish a position to the exclusive, nondelegable decision of the school committee. The court thereby delineated an area of exclusive managerial prerogative similar in scope to that defined by the holding of the New Jersey Supreme Court in *Dunellen* that the decision to consolidate departments is not arbitrable.[115]

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[110] 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976).

[111] Although an arbitral award of reinstatement cannot result in tenure, the arbitrator can award temporary reinstatement without tenure for purposes of reevaluation where violations of contractual evaluation procedures are found. Board of Educ. v. Bellmore-Merrick United Secondary Teachers, 39 N.Y.2d 167, 347 N.E.2d 603, 383 N.Y.S.2d 242 (1976). See discussion of recent Massachusetts decisions at notes 113-14 *infra. See* Central Point School Dist. v. Employment Rel. Bd., 27 Or. App. 285, 555 P.2d 1269 (1976), where the Oregon Court, using a standard very much like the original *Huntington* test, allowed arbitration of teacher dismissal though resulting in tenure.

[112] Board of Educ. v. Areman, 95 L.R.R.M. 2165 (N.Y. Ct. App. 1977).

[113] 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144 (1976).

[114] *Id.* at 397, 343 N.E.2d at 145. *But cf.* School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145 (1976) (though arbitrator could not order reinstatement since decision to abolish position was not arbitrable, arbitrator could determine that the affected teacher was entitled to compensation).

The opposite result reached in New York in *Yonkers* from that in Massachusetts in *Hanover* may be in part a function of the absence of any provision in the New York bargaining statute, N.Y. CIV. SERV. LAW §§ 200 *et seq.* (McKinney Supp. 1976), granting any precedence to existing enactments and the presence of such a provision in both the statute at issue in *Hanover,* MASS. GEN. LAWS ANN. ch. 149, § 1781 (West 1973), and the present public employee bargaining statute, MASS. GEN. LAWS ANN. ch. 150E, § 7 (West Supp. 1976). See note 55 *supra.*

[115] See text at note 61 *supra.* It is interesting to note the similarity of the statutory conflict provision in Massachusetts, MASS. GEN. LAWS ANN. ch. 150E, § 7 (formerly, ch. 149, § 1781) (West 1976), to that which existed in New Jersey prior to the 1974 amendments, *supra* note 62. It is possible that despite the amendment, the range of managerial decisions represented by the narrow holding of *Dunellen* may survive. See note 90 *supra.* In a recent triumverate of cases involving the arbitrability of tenure decisions the Supreme Judicial Court continued its commitment to honoring exclusive, nondelegable statutory duties as or more re-

Although the Maine Supreme Judicial Court recently adopted the *Huntington* standard, the court's application of that standard in a recent case indicates that the scope of permissible bargaining in Maine could be restricted not only by specific statutory prohibitions but also by statutes vesting broad responsibility or discretion in particular government agencies.[116] At issue was whether the school committee could be forced by interest arbitration to accept just cause and arbitration provisions in a 1973-74 collective bargaining agreement. Absent a recent amendment which expressly permitted the negotiation of just cause provisions, language in the court's opinion suggested that a school board could not agree to substantive review of dismissal decisions pursuant to a just cause standard. The court noted that existing statutory procedures expressed legislative balancing of the interests of teachers, pupils and the public.[117]

In sum, therefore, these judicial decisions of the past two years have reintroduced policy concerns that serve to restrict the permissible scope of bargaining at the contract enforcement stage, thereby eroding the expansive scope of the *Huntington* standard.

B. *Redefinition of the Distinction Between Mandatory and Permissive Subjects*

The initial trend expansive of the scope of permissible bargaining perhaps was made possible by the fact that most jurisdictions focused their efforts to preserve a core area of policy concern on the distinction between mandatory and permissive subjects. The tremendous variety of means used by state and local legislative, judicial and administrative bodies to define the distinction makes it no less difficult to characterize attempts to redefine the intial approaches. Yet it can be said that if any definitional trend has emerged from these bodies, that trend favors the use of the balancing standard over the significant relationship test in determining whether to require bargaining over an issue.[118]

In 1975 the Nevada legislature rewrote the provisions regarding the scope of mandatory bargaining in that state's public employee bargaining

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strictive of the scope of permissible bargaining as public policy concerns in New York. *See* School Comm. of Danvers v. Tyman, 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877 (1977) (nonrenewal of teacher's contract arbitrable where failure to comply with evaluation procedure is alleged though arbitrator may not grant tenure); Dennis-Yarmouth Reg'l School Comm. v. Dennis Teachers Ass'n, 1977 Mass. Adv. Sh. 428, 360 N.E.2d 883 (1977) (nonrenewal of nontenured teacher contract not arbitrable though failure to follow contractual obligations involving evaluations and teacher's files is arbitrable); School Comm. of W. Bridgewater v. West Bridgewater Teachers' Ass'n, 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886 (1977) (reinstatement without tenure for one year and back pay is appropriate award for failure to follow contractual procedures before making nonarbitrable nonrenewal decision). The Supreme Judicial Court expressly referred to the New York cases of *Cohoes* and *Bellmore-Merrick* in reaching these results.

[116] *See* Superintending School Comm. v. Winslow Educ. Ass'n, 363 A.2d 229 (Me. 1976).

[117] *Id.* at 234. The court actually held only that the just cause provision was not a proper subject of compulsory interest arbitration. But the court applied a *Huntington*-type analysis to determine if existing enactments would limit the scope of mandatory negotiation. The ease with which the court found existing statutory procedures sufficiently comprehensive to limit the scope of interest arbitration is more reminiscent of *Dunellen* than of *Huntington*. In fact, the court cited in support of its position an Illinois decision denying the enforceability of a just cause provision. *See* Special Educ. Cooperative v. Special Educ. Cooperative Ass'n, 33 Ill. App. 3d 789, 338 N.E.2d 463 (1973). Illinois has no legislation mandating any collective bargaining so the scope of permissible bargaining is necessarily much narrower. See note 99 *supra*.

[118] *See Clark, supra* note 33, at 92.

statute.[119] The revision effectively overturned the application in Nevada of the expansive significant relationship standard for determining the mandatory negotiability of an issue. The bargaining statute now limits mandatory bargaining to a list of specifically enumerated items.[120] Notable for its absence from the legislated list is the issue of class size, one of the key issues previously held to be mandatory.[121] The statutory revision evidences a wide-ranging reappraisal of initial attempts to define the scope of the duty to bargain. Of particular note is the tightening of the management rights clause so as to exclude proposals concerning workload factors and staffing levels from the scope of mandatory bargaining.[122] The legislature expressly sought to preserve policy decisions concerning the level and quality of governmental services for unilateral decision, when so desired by the public employer. In so doing Nevada has pulled back from the more expansive significant relationship standard to the general area outlined in other jurisdictions by the application of the balancing standard.

In the same year the Pennsylvania Supreme Court swung to the balancing standard from the opposite direction which previously had greatly restricted mandatory bargaining. In *Pennsylvania Labor Relations Board v. State College Area School District*,[123] hailed as a landmark decision in the mandatory/permissive area,[124] the court overturned a lower court decision that the statutory management rights clause required the exclusion from mandatory bargaining of any matter which to any degree involved inherent managerial policy.[125] The court remanded the case to the state labor relations board to strike a balance between the competing interests of employees and managerial or public policy:

> Thus we hold that where an item of dispute is a matter of fundamental concern to the employees' interests in wages, hours, and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining . . . simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.[126]

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[119] NEV. REV. STAT. §§ 288.010 *et seq.* (1975).

[120] NEV. REV. STAT. § 288.150(2) (1975).

[121] *See* Washoe County Teachers Ass'n v. Washoe County School Dist., 90 Nev. 442, 530 P.2d 114 (1974). See also text at note 81 *supra*.

[122] The new management rights clause preserves the right to hire, direct or transfer employees; to lay off any employee because of staff reductions; to determine staffing levels, work performance standards, workload factors, the quality and quantity of services offered, and the means and methods of offering those services. NEV. REV. STAT. § 288.150(3) (1975).

[123] 461 Pa. 494, 337 A.2d 262 (1975), *rev'g* 9 Pa. Com. 229, 306 A.2d 404 (1973), and *remanding* to Labor Board.

[124] *Clark, supra* note 33, at 93-94. The decision is important partly because it maintains a moderately expansive scope of mandatory subjects even though Pennsylvania allows strikes over mandatory subjects. See text at notes 123-25.

[125] 461 Pa. at 507, 337 A.2d at 268. In the same decision the court adopted a *Huntington*-like standard for determining negotiability. *Id.* at 509, 337 A.2d at 269. See note 92 *supra*.

[126] *Id.*

The Oregon appellate court has also adopted a balancing standard in the wake of an extensive legislative revision of the bargaining framework.[127] Similarly, the Supreme Court of Wisconsin took a fresh look at the scope of bargaining for public employees in that state and announced a very close fascimile to a balancing standard.[128] Most recently a balancing standard has been adopted by the Massachusetts Labor Relations Commission in a wide ranging review of scope of bargaining following extensive revision of the Massachusetts bargaining statute.[129]

Thus, from legislative, administrative and judicial bodies, a trend favoring the use of the balancing standard is emerging. This movement toward a balancing standard reflects the operation of two opposite trends in public sector bargaining: a recognition on the one hand that the scope of bargaining need not be limited severely when the right to strike is granted, and on the other hand that public policy issues must be preserved for an accountable decision maker. That courts in Pennsylvania and Oregon have adhered to a standard which is relatively expansive of the scope of mandatory bargaining is particularly significant. Both states allow public employees, except those in "essential" services, to strike over unresolved mandatory issues. The approval of the balancing standard thus represents the developing attitude that the right to strike does not cause such a severe dislocation of the "normal" political process that the scope of bargaining must be limited severely. Yet a standard balancing governmental and public interest with employee interests also reflects growing awareness that public policy issues must be preserved for an accountable decision by the employer either to resolve the issue unilaterally or to agree to permissive bargaining.[130]

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[127] *See* Sutherlin Educ. Ass'n v. Sutherlin School Dist. No. 30, 25 Or. App. 85, 548 P.2d 204, 205 (1976), balancing "the element of educational policy involved against the effect that the subject has on a teacher's employment." *See also* Springfield Educ. Ass'n v. School Dist. No. 19, 24 Or. App. 751, 547 P.2d 647 (1976), upholding the decision of the Oregon Employee Relations Board that class size, transfer procedures, school calendar, and use of substitute teachers and teacher's aides are merely permissive while teaching load, preparation periods, and a just cause standard for review of disciplinary action are mandatory subjects.

OR. REV. STAT. §§ 342.150 and 342.170, which limited bargaining with educational employees to salaries and related educational policies, was repealed. (1973 Or. Laws ch. 536, § 39). Employees of school districts, together with other public employees, are entitled to require bargaining over "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures, and other conditions of employment." OR. REV. STAT. § 243.650(7) (1975).

[128] *See* Beloit v. Wisconsin Emp. Rel. Comm'n, 73 Wis.2d 43, 242 N.W.2d 231 (1976), upholding the determination of WERC that bargaining be required over ". . . matters primarily relating to wages, hours, and conditions of employment" as well as over the impact of policy decisions on conditions of employment. Bargaining over class size and proposals to establish reading programs and a summer school were held to be permissive, although the impact of class size and any new services on wages and hours was held to be mandatory. Also mandatory were evaluation procedures, staff reduction procedures, school calendar, and student disciplinary procedures.

[129] "In adopting [the mandatory/permissive doctrine] the Commission balances the interests of employees in bargaining over a particular subject with the interest of the public employer in maintaining its managerial prerogatives." Town of Danvers and Local 3038, 3 MASS. LAB. CAS. 1559, 1577 (M.L.R.C. 1977). The MLRC announced in holding minimum manning requirements to be merely permissive and promotion procedures to be mandatory that it would consider how direct an impact a topic has on conditions of employment and whether the issue "involves a core governmental decision." *Id.* at 1577.

[130] The move to reasonable facsimiles of the balancing standard in recent reappraisals

IV. APPRAISAL OF SCOPE OF BARGAINING TRENDS

Over the past fifteen years the underlying trend of granting collective bargaining rights to public employees indicates growing acceptance of the view that public employees need a special advantage in influencing decisions affecting working conditions. The mere extension of a duty to bargain to previously uncovered public employees evidences recognition of the need to grant public employees a more effective voice in the governmental decision-making process. Recent experience demonstrates the continuing validity of such an observation as more jurisdictions extend collective bargaining to more of their public employees.[131] The initial expansive approach to negotiability and enforceability together with the adoption of the moderately expansive balancing standard in states which allow strikes over mandatory subjects also lends support to that view. But the tendency of courts to speak in terms of a balancing standard in conjunction with proliferating management rights reservations which are being written into statutes and which delineate the scope of the mandatory duty to bargain reflects a perception that public policy concerns must be given greater weight in designing public sector bargaining frameworks. The balancing standard rejects the expansive private sector approach personified by the significant relationship standard by factoring in management or public policy interests which tend to restrict the scope of bargaining.

Some jurisdictions have not been satisfied with the results of the attempt to sensitize the mandatory/permissive distinction to managerial policy interests. Indeed, the recent trend toward reintroducing public policy considerations at the contract enforcement stage may reflect a growing feeling in those jurisdictions that merely allowing the public employer not to bargain over managerial policy and prerogatives might not protect fundamental policy decisions. Public employers struggling to respond to a changing economic and political climate by reducing the level of services find their efforts restricted by existing agreements. Judicial restrictions of enforceable agreements crystallize into legal rules political resistance to the intrusion of collective bargaining on sensitive policy choices—in opinions which either assert independent policy considerations, or read such considerations into ambiguous or conflicting statutes. This redefinitional undercurrent may well become the dominant form of change over the next several years.

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of the scope of bargaining in Nevada, Wisconsin and Massachusetts evidences the response of the legislative and judicial process to growing political resistance to the range of issues over which public employees are allowed to bargain and thereby effectively exclude other groups from participation. One recent exception to the trend toward a balancing standard is in North Dakota, where the Supreme Court indicated, but did not hold, that the scope of bargaining probably should be wider than that initially adopted in Nevada pursuant to the significant relationship standard, because the statutory duty to bargain in North Dakota is expressed in even broader terms than in the original Nevada formulation. Fargo Educ. Ass'n v. Paulsen, 239 N.W.2d 842 (N.D. 1976).

[131] For instance, the duty to bargain was extended to state employees in Massachusetts in 1974, MASS. GEN. LAWS ANN. ch. 150E, §§ 1 *et seq.* (West 1974); in Iowa, to local employees in 1975 and to state employees in 1976, IOWA CODE ANN. § 20 (West Supp. 1976); and to public employees in Florida in 1975, FLA. STAT. ANN. § 447.203 (West 1976). *But see* Hermiston v. Employment Relations Board, 27 Or. App. 755, 557 P.2d 681 (1976) (barred the extension of the duty to bargain to employees of home rule cities); Virginia v. County Board, 217 Va. 558, 232 S.E.2d 30 (1977) (barred any bargaining in absence of authorizing statute).

Unfortunately the developing trends of analysis fail to confront the significant issue: is the permissive category appropriate in the public sector? Rather than increasing the opportunity for broader political participation, the permissive category may actually limit the political accountability of bargaining decisions by the public employer. Determinations of negotiability by reference to articulated statutory prohibitions or policy determinations may fall either too short of the mark or too long.

A. *Problems with the Mandatory/Permissive Dichotomy*

Use of the permissive category, part of the baggage of the years of private sector bargaining experience, is not justifiable in public sector bargaining. In the private sector, if the union or employer decides to relinquish control over its own internal decision-making processes, the public is concerned only as consumer with the availability and price of the product or service. Individual consumers decide for themselves whether to buy a particular product or service at the price or quality offered. Thus, private choice governs production, consumption, and employment decisions, within the parameters of survival and profit.

In the public sector, government provides the service. In contrast to private sector services, choices about public services are not individual but collective. The recipient disappointed in the level of services or the taxpayer disappointed in the cost of that level of service has no choice but to follow the collective decision. The taxpayer cannot decide not to pay taxes. The recipient cannot usually go elsewhere for the service. Government services are often provided precisely because substitutes are unavailable or are prohibitively expensive. Therefore, decisions directly determining the nature, level or existence of a service must remain open to political forms of input or resolution. Decisions allocating governmental resources and determining the nature of governmental services reflect significant ideological differences about the political objectives of government spending.

The need to have fundamental policy decisions resolved in a manner responsive to political input and change is not satisfied merely because both the decision to bargain and the ultimate agreement are acquiesced in by politically accountable, appointive or elective officials. In the early period of public sector bargaining, public employee unions were able to force inexperienced government negotiators to bargain over issues about which the public officials may not even have known they could refuse to bargain. Parties to bargaining then and now do not always make any practical distinction between mandatory and permissive subjects while bargaining.[132] The practical political accountability of the public official for permissive bargaining decisions is not nearly as great as the practical accountability of the management negotiator in the private sector.

Several factors may serve to limit the theoretical political accountability of the public official. First, the allegiances of elected public officials are not always to the public at large but often to particular constituencies which

[132] One commentator reported that one year after the New York PERB held class size to be merely permissive, about half of the administrators and half of the teachers responsible for negotiations in the state had not even read the decision or a summary. J. WEITZMAN, THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT 304 (1975).

may support public employee demands. Second, it is not always clear to public officials that their agreement to a costly or inappropriate bargaining provision will adversely affect them in the polls or in their appointive position. Third, it may be difficult or impossible to identify the person responsible for the result. Fourth, the effect of the concession may not be visible to the public until much later. Fifth, the public at large may not really understand the particular point. In any event, the public interest is difficult to find and assess, especially in the short run bargaining situation when the public official is under great stress from many directions.

Moreover, even if the public official were accountable for exercising poor judgment, the agreement reached is not at all accountable. The political process cannot work quickly enough to undo the politically unacceptable consequences of collective bargaining. Agreement as to a permissive issue is binding and enforceable for the term of the agreement. The dynamics of the bargaining process are such that bargaining for a new contract will start from the previous provisions, thus effectively perpetuating the results of permissive bargaining. As a result of the binding nature of agreement, permissive bargaining can lead to irrevocable decisions on fundamental questions of public policy.

Furthermore, in the present economic climate, more than ever before, public employees are bargaining over the ultimate distribution of public resources. As one commentator has noted, to satisfy the demands of one group of public employees means to sacrifice the interests of other public employees and political interest groups.[133]

Given both the binding nature of agreement as to permissive issues and the obstacles to political accountability for unwise bargaining decisions, the use of the permissive category to allow the scope of bargaining ultimately to be defined at the bargaining table is unacceptable. Determinations of the scope of bargaining must focus on whether and when policy considerations require that the resolution of an issue be left open to political methods of balancing competing interests. When political balancing is not required then collective bargaining ought to be.[134]

B. *Problems With Determinations of Negotiability and Enforceability*

In addition to problems with the political accountability of public employees utilizing the permissive category in collective bargaining, there are also difficulties inherent in the analytical frameworks used to determine whether an issue is negotiable or whether a negotiated agreement is enforceable. These frameworks recognize only in a backhanded manner the need to preserve certain issues for political forms of influence, resolution or change. *Huntington* and its progeny allow the presumption of negotiability to be rebutted only by specific, clear prohibitions. In a sense, the search for bargaining prohibitions implicit in or made explicit by legislative, municipal and administrative enactments is the search for evidence of an intention that an issue be resolved politically. The easiest means of determining that an issue ought to be resolved politically is to ask whether the

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[133] *See* Lewin, *supra* note 31.

[134] Two jurisdictions, Hawaii and California, have reached the argued-for result and eliminated the permissive category. *See* HAW. REV. STAT. § 89-9(d) (1975), *supra* note 53; CAL. GOV'T CODE § 3543.2 (West 1976), *supra* note 53. Indiana may have. See note 53 *supra*.

issue already has been so resolved. Existing political determinations—legislative, administrative or municipal—expressed so broadly and clearly as to rise to the level of a prohibition of bargaining, have understandably been granted great evidentiary weight, whether at the intial insistence of the legislature or by judicial inference. Mere public policy concerns of uncertain source of definition usually have received a cooler welcome.

But evidence as to whether an issue was resolved politically before the advent of collective bargaining does not confront the possibility that collective bargaining may either obviate the need for the preexisting political determination or create political distortions despite the absence of a preexisting political expression. Just because an issue has not yet been resolved politically does not mean that collective bargaining ought to be able to close off determination of the issue from political forms of resolution or change. The absence of an articulated policy expression may indicate only the desire to leave an issue open to changing political currents at a level closer to the issue itself—such as with a municipal government or administrative agency. The increasing concern at the contract enforcement stage with public policy concerns restrictive of permissible bargaining reflects that perception. On the other hand, just because an issue may have been resolved politically before the advent of collective bargaining does not mean that collective bargaining is an inappropriate means of resolving the issue. The proper question is not whether an existing prohibition or implicit policy concern precludes bargaining over an issue but whether collective bargaining is an appropriate or necessary means of resolving the issue.

The results in New York and in Massachusetts of the judicial attempt to reintroduce considerations of public policy concerns restrictive of permissible agreement at the contract enforcement stage illustrate the problems inherent in relying only on articulated policy expressions to delimit the scope of permissible agreement. Issues which are negotiable because existing enactments neither clearly prohibit bargaining nor express a policy that the issue be resolved outside of bargaining become non-negotiable or unenforceable once public policy is articulated. Yet the political process consideration existed before the policy was articulated. The issue either never should have been negotiable or still should be negotiable despite the change in circumstances.

The New York Court of Appeals upheld the enforceability of bargaining provisions freezing staff size in *Susquehanna*[135] and in *Yonkers.*[136] The job security provision preventing the abolition of any position in *Yonkers* was upheld despite the existence of a legislatively declared financial emergency since the provision had been negotiated before the emergency. Had the provision been negotiated after the emergency was declared the court would not have allowed enforcement because of the public policy expressed in the Financial Emergency Act. It is submitted therefore that the important issue should have been whether collective bargaining was an appropriate means of resolving the issue, not whether the agreement preceded the legislative declaration.

Subsequently, in *New York City School Boards Association v. Board of Edu-*

[135] See text at note 101 *supra.*

[136] See text at note 105 *supra.*

cation of New York,[137] the Court of Appeals upheld the power of the school board to negotiate a reduction in students' hours of instruction.[138] The court, applying *Huntington* and *Susquehanna,* found that no statute or applicable public policy prohibited bargaining resulting in reductions in the hours of instruction to a level above minimum standards mandated by any higher authority. Following the agreement for the school year in issue, however, the State Commissioner of Education promulgated regulations establishing minimum hours of instruction. The Board was free to negotiate the reduction but only until the Commissioner's regulations became effective. Again, it is submitted that the crucial issue should have been the appropriateness of collective bargaining to resolve the controversy, not the timing of the regulation.

The Supreme Judicial Court of Massachusetts faced a similar problem with as yet unarticulated policy concerns in *Boston Teachers Union, Local 66, American Federation of Teachers v. School Committee of Boston.*[139] The court reached the relatively straightforward conclusion that provisions of the contract mandating the use of substitute teachers and establishing class size and teacher load limits were enforceable. Therefore, the school committee's refusal to hire substitute teachers, resulting in an increase in class size and teaching load, was arbitrable. Continuing its reliance on the *Huntington-Susquehanna* analytic framework, the court declared that ". . . enforcement will neither infringe on the school committee's prerogative to determine policy nor contravene statutory limitations."[140] The straightforward approach then gave way to the confusion engendered by the failure to resolve from the beginning whether policy concerns predominated to such an extent that binding agreement should be barred. The court announced that the provisions were enforceable because the school committee had sufficient funds to hire substitute teachers, appropriated for that purpose, and had not changed its policy determination that the class size and teaching load limits were educationally desirable:

> A school committee is entitled to maintain its own position on these subjects as matters of fiscal management and educational policy. When, however, an agreement is made on these subjects consistent with the committee's view of fiscal management and educational policy, the terms of that agreement may be enforced *where there has been no change in educational policy and funds are available to implement the terms of the agreement.*[141]

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[137] 39 N.Y.2d 111, 347 N.E.2d 568, 383 N.Y.S.2d 208 (1976).

[138] *Id.* In return for the Board's agreement to reduce students' hours of instruction ninety minutes per week the teachers waived an equal amount of preparation time. The arrangement enabled savings estimated to be anywhere from $25 to $50 million. 347 N.E.2d at 574.

[139] 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707.

[140] 1976 Mass. Adv. Sh. at 1526-28, 350 N.E.2d at 714.

[141] 1976 Mass. Adv. Sh. at 1528, 350 N.E.2d at 714 (emphasis added) (footnote omitted).

The court appealed to the legislature for guidance which it will need and which should be provided in any event, since the balancing of policy interests is a legislative function:

> The Legislature can remove considerable uncertainty concerning which subjects are proper matters for collective bargaining between teachers and school committees. It might define those subjects which can or cannot be incorporated in a binding collective bargaining agreement. It might state that, to the extent certain

Thus, apparently in Massachusetts, as in New York, as yet unarticulated policy concerns may limit enforceable agreements once articulated, and the public employer may negotiate about matters of policy or fiscal management. But if the employer's fiscal position or policy determination changes, *Boston Teachers Union* and *New York City School Boards Association* suggest that any agreement reached might not be binding.[142]

The decisions in *Yonkers, New York City School Boards Association,* and *Boston Teachers Union* illustrate a major failing of the *Huntington-Susquehanna* approach. The insistence even under *Susquehanna* on articulated expressions of public policy before limiting bargaining fails to account for a wide range of situations in which public policy concerns predominate but have not yet been articulated. The courts can only recognize public policy concerns once the legislature or a public official speaks on an entirely separate issue from that of the bargaining process versus the political process. The real negotiability issue, whether the item is appropriately determined in the bargaining agreement or in the political arena, is never really confronted.[143]

Approaches such as in New York and Massachusetts which rely on existing political pronouncements as evidence that an issue should be resolved politically do not properly locate and define public policy interests which should preclude bargaining. Reliance on existing pronouncements of public policy allows later shifts in the political and economic situation to change not only the policy outlook but also the scope of bargaining and enforceable agreement. This should not be the case. In areas where it is necessary to preserve the ability of the political process to make necessary tradeoffs between the costs and the level or existence of a service there never should be bargaining. Where binding agreement over an issue such as staff size or students' hours of instruction hinders the ability of the public employer to respond to changing priorities by lowering or raising the level of services, the issue should never be bargained.[144] The policy protecting political tradeoffs is always present even though no particular tradeoff has been expressed.

On the other hand, the modified *Huntington* approach—presumption of negotiability until after policy expression or unless previous legislative

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> matters are made a part of the collective bargaining agreement, the school committee has lost its prerogative during the term of the bargaining agreement to exercise its otherwise exclusive control over matters of educational policy, except perhaps in certain circumstances. In the absence of further statutory definition, the subject of the scope of permissible, binding collective bargaining and the enforceability of such agreement will have to be dealt with on a case by case basis.

1976 Mass. Adv. Sh. at 1528, 350 N.E.2d at 714.

[142] The Massachusetts Court reaffirmed its confusing approach by holding recently that, although a school committee cannot bargain away its authority to make tenure decisions, it may, "as a matter of educational policy," submit particular tenure questions to arbitration. School Comm. of Danvers v. Tyman, 1977 Mass. Adv. Sh. 415, 423 n.5, 360 N.E.2d 877, 881 n.5. The court appears to be creating some sort of hybrid permissive/illegal category of bargaining subjects.

[143] The unwillingness or inability to confront the underlying question is highlighted by the opinion of the New York Court of Appeals in School Crossing Guard Union v. Yonkers, 39 N.Y.2d 964, 354 N.E.2d 846, 387 N.Y.S.2d 106 (1976). The court held the bargaining provision in issue not to be arbitrable as not a bona fide job security provision in the same sense as in *Yonkers*. Yet the court did not explain why the provision as characterized so violated public policy as to be unenforceable.

[144] See text at notes 153-59 *infra*.

intention discovered—may give too much weight to legislative frameworks or policy expressions conflicting with collective bargaining outcomes. If binding agreement about an issue like class size does not itself restrict political balancing then the issue should always be bargained and agreement always enforceable.[145] In addition, not all statutory frameworks need be preserved once collective bargaining has resolved a particular area of concern. The New Jersey legislature recognized this fact by declaring in response to *Dunellen* that contractual grievance procedures may replace existing statutory procedures for review.[146] The Maine legislature also recognized this fact in declaring just cause provisions to be negotiable before the Supreme Judicial Court could decide otherwise.[147] Yet many jurisdictions continue to grant blind deference to existing expressions of policy.[148] In the final analysis, it is necessary to develop a method of determining when an item must and must not be negotiated. This method must be sensitive to the delicate balance between the protection of the political process and the proper functioning of the bargaining process. The intermediate permissive category must not be allowed to interfere with this method by granting the public employer discretion to bargain over the item.

V. A Model for Negotiability Determinations in the Absence of a Permissive Category

This final section will suggest a model for making appropriate negotiability determinations in light of criticisms made of existing systems in the preceding section. The model does not contain a permissive category.

It must first be recognized that collective bargaining grants public employees special access to and influence over governmental decisions concerning those issues bargained.[149] Second, it must be noted that collective bargaining is intended to be a bilateral process. Other interest groups are excluded from formal presentation of their concerns, and their concerns need not even be considered in reaching an accomodation. Third, collective bargaining statutes mandate good faith bargaining, generally understood to include a sincere desire to reach agreement. The public employer has no such obligation to attempt to reach agreement with other interest groups. Fourth, collective bargaining takes place with an exclusive representative of the public employer who sharpens the presentation of demands by presenting a unified position and focusing the issues. Finally, the agreement

[145] See text at notes 153-54 *infra*.

[146] See text at notes 88-89 *supra*.

[147] See text at notes 116-17 *supra*.

[148] The just cause standard for review of disciplinary decisions is not yet a mandatory subject open to compulsory interest arbitration in Maine because of the educational policy found by the court in existing enactments. See text at notes 116-17 *supra*. In Minnesota, the statutory conflict provision in the public sector bargaining statute has been interpreted to allow municipal charter provisions to overrride negotiated grievance procedures. *See* Teamsters Local 320 v. Minneapolis, 302 Minn. 410, 225 N.W.2d 254 (1975). The Minnesota legislature, evidently recognizing the unnecessary intrusion of the municipal charter provision on collective bargaining, legislated a reduction in the discretion of city officials to suspend subordinates for disciplinary purposes from a ninety day period to a thirty day period.

[149] *See* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L. J. 1156, 1164-65 (1974) [hereinafter Summers].

reached is binding. The decision made cannot be reconsidered during the term of the agreement. Other interest groups are effectively excluded from the decision-making process at least for the life of the agreement.

When is special access to a governmental decision appropriate? The relative advantage granted to public employees is warranted in areas of decision-making which primarily determine only the labor costs of a service. In those areas public employees are directly competing in the budget-making process with taxpayers and users of services:

> . . . [P]ublic employees are at a unique disadvantage in the complex political bargaining process of budget-making. They are not one interest group among many in multilateral bargaining, but rather stand alone confronting the combined opposition of all the other interest groups. They must contend with both those groups opposing increased taxes and those seeking increased services. Because labor costs make up such a large portion of the budget, the employees' claims are highly visible to the other interest groups and thus vulnerable to their concerted attack.
>
> In the absence of collective bargaining, the budget-making process . . . leaves public employees unable to protect their interests adequately against those whose interests are opposed.[150]

Additionally, collective bargaining is both necessary and trustworthy over issues which essentially determine how much service at what pay each employee will provide, from which can be calculated how many employees at what total cost will be necessary to provide any given level or quality of service. The labor costs which public employees will be able to impose will depend ultimately upon the level and quality of services for which the public is willing to pay. The public, or the public employer responding to broad expressions of public desire, must remain free to choose the desired level and nature of a service given what the total cost of that level of service will be. The choice of budgetary priorities and the nature of the service reflect significant ideological differences about the social and political objectives toward which governmental resources should be directed. Such fundamental public policy choices, basic issues of political power, should not be isolated in the bilateral process of collective bargaining from participation by affected individuals or groups necessarily excluded from the bargaining process. Nor should fundamental policy choices be incorporated into a binding agreement not subject to reconsideration in the light of changing allocational priorities.

Contrary to the initial assumptions of commentators such as Wellington and Winter,[151] the public and public officials have proved themselves capable of making necessary tradeoffs between the costs of bargaining demands and the desired costs and levels of services. Reductions in levels of services and resulting layoffs are no longer a rare occurrence in the public sector of employment. The increasingly unified taxpayer opposition to any cost increases and the sensitized reactions of recipients of already reduced services have altered the assumption that tradeoffs cannot be made because the identity of the resisting group changes from one un-

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[150] *Id.* at 1167-68 (footnote omitted).

[151] See text at note 11 *supra.*

ion's demands to the next.[152] It is not to be assumed that the hard-learned lessons of fiscal crisis will be unlearned easily. It is necessary only to preserve the ability of public employers to balance broad political expressions of what total cost of services may be tolerable and what level of services will be acceptable.

A comparison of several possible subjects of bargaining may sharpen the analysis. Issues of class size, manning requirements, and staff size guarantees or job security provisions are usually considered to be at least but no more than permissive subjects of bargaining, in those jurisdictions which have a permissive category.[153] Such provisions as they now exist illustrate a helpful distinction between binding agreement, which yet allows the public employer to reduce total costs by reducing the level of services, and bargaining, which restricts the public employer's ability to do so. Often, a legislature, PERB, or court will attempt to decide if such issues should be excluded from mandatory bargaining because they involve determinations of inherent managerial policy or prerogative. It is submitted that the only legitimate concern is to protect political tradeoffs and public policy choices. Accordingly, this proposed model labels subjects of bargaining either mandatory or illegal.

Applying this criteria to class size, it becomes apparent that a bargained agreement fixing class size, in itself, only determines the varying costs of varying levels of services. Class size limits only determine how much of the service will be provided by one employee, and therefore how many employees will be required, at a bargained cost per employee, to provide a given level of service chosen by the public employer. Class size provisions do not themselves fix total costs or impede the ability of the public employer to respond to changing public priorities by reducing the level of services so as to reduce costs. Rather, class size tends to fix total costs and staff size only because of the preexisting political determination to provide a certain level of services. Thus, the argument that bargaining over class size restricts political tradeoffs is actually based on the fact that political tradeoffs have already been made. The problem is the nature of commitment in the area of education to a relatively fixed level of services. Class size may seem to have a great impact on the system as a whole, in the language of the balancing standard, only because of that *a priori* political commitment. Caseload limits for social workers, for instance, may seem to have less of an impact on governmental operations only because the political commitment to serve all poor people is softer than the commitment to teach all children. The public cannot have it both ways. In the field of education, the political process has already exercised its collective political

[152] Recent experience in Swampscott, Massachusetts illustrates the point. Voting on a special petition instituted by members of the school committee, the town turned down the selectmen's request to appropriate funds for negotiated police and firefighter agreements. The school committee members thereby successfully interposed themselves as an interest group resisting every union's bargaining demands and forcing tradeoffs. Budget rejections such as in Swampscott are not a rare occurrence. See note 14 *supra*. Public employers have been forced to effect tradeoffs between the cost and the level of services by layoffs, as in New York City where 4000 teachers were laid off in the fall of 1976, GERR No. 679, at B-11 (Oct. 18, 1976), or by sheer hard bargaining, provoking strikes by teachers in Buffalo for the first time in 29 years, *see Helsby, supra* note 28, at F-2, and by state employees in Massachusetts in 1976, see note 35 *supra*. Other examples are too numerous to mention.

[153] See notes 154, 156, and 161 *infra*.

choice of the desired level of services depite the costs. In limiting managerial prerogatives regarding the most efficient use of personnel, facilities and technology, class size provisions tend only to restrict the ability of the public employer to reduce costs without reducing the level of services. Accordingly, since class size limits do not fix total costs or impede the ability of the public employer to reduce services and costs, class size should be a mandatory subject of bargaining, not excluded from bargaining.[154]

Indeed, negotiability considerations should focus on the ability of the political process to make necessary tradeoffs rather than on managerial prerogatives and policy used to delineate the mandatory/permissive dichotomy. An issue may involve managerial or educational policy concerns which do not implicate fundamental public policy choices. Bargaining over class size may involve educational policy considerations about the best way to teach children or it may interfere with the traditional managerial prerogatives to direct the work force in the interests of the efficiency and quality of the service. The public is of course deeply concerned with the outcome of bargaining. The quality and cost of education are at stake. But the public retains the fundamental policy choice of the level of services given its quality and cost. Class size is simply one of the costs of the service. Both the educational policy favoring lower class size and the managerial interest in maintaining efficiency will never change. Only the public policy choice of a certain level or quality of services given its total cost may change. Only that choice need be preserved.[155]

Compare to class size provisions the effect of provisions preventing reductions in staff size even as a result of the elimination of programs or positions. Staff size and job security guarantees restrict the ability of the employer to effect budgetary savings by reducing the level of services offered. In so doing staff size provisons hamper the ability of the political process to effect trade-offs between the cost and level of services. Thus, staff size and job security provisions should be excluded from negotiations.[156] The public employer should remain free generally to abolish posi-

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[154] *See* CAL. GOV'T CODE § 3543.2 (West 1976) (class size mandatory). *But see* Dept. of Education, Haw. PERB Dec. No. 26 (1973), *reprinted in* SMITH, EDWARDS & CLARK, *supra* note 25, at 446 (class size excluded from bargaining as interfering with managerial responsibility to maintain efficiency; statewide average class size mandatory, however).

In jurisdictions with permissive categories, class size has been held to be mandatory. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972); Washoe County Teachers Ass'n v. Washoe County School Dist., 90 Nev. 442, 530 P.2d 114 (1974) (overturned in Nevada by statute). *See* NEV. REV. STAT. § 288.150(2) (1975) (class size not in list of mandatory subjects). Class size has more often been held to be merely permissive. *See, e.g.* Nat'l Educ. Ass'n v. Board of Educ., 212 Kan. 741, 512 P.2d 426 (1973); Biddeford v. Biddeford Teaehers Ass'n, 304 A.2d 387 (Me. 1973); Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972); W. Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 51, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974); Springfield Educ. Ass'n v. School Dist. No. 19, 24 Or. App. 751, 547 P.2d 647 (1976); Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., —S.D.—, 215 N.W.2d 837 (1974); Beloit v. Wisconsin Emp. Rel. Comm'n, 73 Wis. 2d 43, 343 N.W.2d 321 (1976). *See also* IND. CODE ANN. § 20.7-5-1-5 (Burns 1973) (class size permissive).

[155] *Cf.* Department of Education, Haw. PERB Dec. No. 26 (1973), *reprinted in* SMITH, EDWARDS & CLARK, *supra* note 25, at 446 (PERB barred bargaining over class size and scheduling of preparation periods to enable the employer to maintain efficiency; i.e., to be able to reduce costs without reducing the level of services). Such exclusions are unnecessary to protect political tradeoffs and only intrude on proper bargaining tradeoffs.

[156] *See* Crossing Guard Union v. Yonkers, 39 N.Y.2d 964, 354 N.E.2d 846, 387

tions or programs and streamline services,[157] although procedures to be followed in the event of the abolition of a position and reductions in force should be negotiated because of the impact on conditions of employment[158] The effect of bargaining should never be such as to require the establishment or continued existence of a service, but only the conditions of employment involved in performing the new or existing service.[159]

Bargaining over manning requirements presents a more complicated problem. Manning requirements may range from fixing the number of police officers in a patrol car or fire fighters manning an engine to the number assigned to each station. Manning requirements of the former variety seem to express more of a concern with workload and safety. In this sense, manning requirements, like class size limits, tend to fix costs and staff size only because the public has made the initial policy determination to provide a given level of service. To the extent that manning requirements fix staff size without regard to workload factors, they should

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N.Y.S.2d 105 (1976) (job security provision unenforceable). The Boston Police Department, in an effort to trim the budget, reduced the number of crossing guards in the city. Boston parents and teachers protested by performing the duty themselves. Boston Globe, March 10, 1977, at 3. Binding agreement on staff size would prevent any such interplay between public and public employer over the cost and the level of services. *But see* Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers Ass'n, 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975) (staff size provision enforceable); Matter of Burke v. Bowen, 40 N.Y.2d 264, 353 N.E.2d 567, 386 N.Y.S.2d 654 (1976) (job security provision enforceable); Board of Educ. v. Yonkers Fed. of Teachers, 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976) (same); Beloit v. Wisconsin Emp. Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1976) (provision tying reductions in staff size to reductions in pupil population mandatory subject). Nevada excluded staffing levels from mandatory bargaining but not from permissive bargaining. NEV. REV. STAT. § 288.150(3) (1975).

Tenure decisions have a curious affinity to staff size and job security provisions. The public policy decision to allow teachers with tenure a degree of job security that differs markedly in quality than that granted most other public employees probably should not be negotiable. In that the decision to grant tenure may have an effect tending practically to freeze staff size and prevent reductions in the levels of service, the substantive decision itself should not be reviewable by an arbitration panel or court. *See* City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976); Board of Educ. v. Bellmore-Merrick United Secondary Teachers, 39 N.Y.2d 167, 347 N.E.2d 603, 383 N.Y.S.2d 242 (1976); School Comm. of Danvers v. Tyman, 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877; Reg'l School Comm. v. Dennis Teachers Ass'n, 1977 Mass. Adv. Sh. 428, 360 N.E.2d 883; School Comm. of W. Bridgewater v. West Bridgewater Teachers Ass'n, 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886. *But see* Central Point School Dist. v. Employment Rel. Bd., 27 Or. App. 285, 555 P.2d 1269 (1976); Kaleva-Norman-Dickson School Dist. v. Kaleva-Norman-Dickson Teachers Ass'n, 393 Mich. 583, 227 N.W.2d 500 (1975).

[157] *See* Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973) (elimination of chairmanship not arbitrable); School Comm. of Hanover v. Curry, 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144 (abolition of position not arbitrable).

[158] *See* Beloit v. Wisconsin Empl. Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 321 (1976) (staff reduction procedures mandatory); Plainfield Bd. of Educ. and Plainfield Educ. Ass'n, Docket No. SN-76-3 (N.J. PERC 1976), GERR No. 680, at C-5; NEV. REV. STAT. § 288.150(2) (1975). *Cf.* School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145 (arbitrator could not order reinstatement to position abolished but can order compensation for violation of contractual procedures regarding resulting demotion or dismissal).

[159] *Cf.* West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526, 537 (1972) (board of education alone empowered to determine whether there shall be extracurricular activities; however, assignment of teachers to and compensation for extra duty mandatory); Beloit v. Wisconsin Emp. Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231, 241-42 (1976) (bargaining over establishment of summer school and reading program merely permissive although impact on wages and hours is mandatory).

not be negotiable.[160] But a properly defined manning requirement may be mandatorily negotiable especially where safety considerations are real.[161] As with the educational policy involved in class size, the managerial policy elements in manning levels do not themselves make the issue nonnegotiable.[162] Fire and crime prevention policy will always favor higher manning levels. The concern is the ability to balance the public interest in higher levels and quality of service and the employee interest in safety and lighter workload against other budgetary demands. Allowing bargaining over manning requirements only where safety is a significant issue preserves this political trade-off.

Under the proposed model, a helpful means of determining negotiability is to examine the impact of an issue on conditions of employment. Public employees should never be bargaining about matters which do not directly touch the employment relationship. For instance, students' hours of instruction should never be negotiated[163] while teaching load, hours of teaching and the related subject of preparation periods should be mandatory subjects of negotiation.[164] Although time spent teaching involves con-

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[160] *But see* Alpena v. Alpena Fire Fighters Ass'n, 56 Mich. App. 568, 224 N.W.2d 672 (1974) (manning requirements mandatory).

In Town of Danvers and Local 2038, IAFF, MUP-2292, 2299, 3 MASS. LAB. CAS. 1559, 1573 (M.L.R.C. 1977), the commission held that a proposal requiring a minimum number of personnel to be on duty in a fire house at all times was merely permissive:

> Agreement on minimum manning per shift in essence would lock the town into a certain level of firefighting service for the duration of the collective bargaining agreement. Accordingly, it represents an intrusion into that type of governmental decision which should be reserved for the sole discretion of the elected representatives of all the citizens of the Town, rather than one which must be subjected to the bargaining process . . . .

This is precisely the sort of issue which should be excluded from bargaining altogether for the reasons stated by the MLRC rather than negotiable at the will of the public employer. The permissive category does not adequately serve the stated concerns.

[161] An arbitrator recently required the Boston Police Department to institute two-man patrols. Boston Sunday Globe, July 17, 1977, at 4. Such a provision allows the Department to reduce the level of services if necessary to reduce costs by reducing the number of patrols. Minimum manning proposals do not allow such reductions in force. It remains to be seen if the courts will uphold the arbitral award. *Cf.* Firefighters Local 1186 v. Vallejo, 13 Cal.3d 608, 618-21, 526 P.2d 971, 978-80, 116 Cal. Rptr. 507, 514-16 (1974) (dictum) (manning level negotiable only to extent it determines workload and safety).

[162] *But see* Firefighters Local 1186 v. Vallejo, 12 Cal.3d 608, 618-21, 526 P.2d 971, 978-80, 116 Cal. Rptr. 507, 514-16 (1974) (changes in fire prevention policy permit reductions in manning levels). *See also* Boston Teachers Union v. School Comm., 1976 Mass. Adv. Sh. 1515, 1526-27, 350 N.E.2d 707, 714 (changes in educational policy permit changes in class size despite the collective bargaining agreement). See text at notes 139-41 *supra*.

[163] *But see* New York City School Boards Ass'n v. Board of Educ., 39 N.Y.2d 111, 347 N.E.2d 568, 383 N.Y.S.2d 208 (1976) (bargaining over reduction in student hours permissible).

[164] *See* NEV. REV. STAT. § 288.150(2) (1975) (preparation time and hours of work mandatory); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972) (teaching load and preparation periods mandatory); Department of Educ., Haw. PERB, Dec. No. 26 (1973), *reprinted in* SMITH, EDWARDS & CLARK, *supra* note 25, at 446 (preparation periods mandatory); Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387, 422 (Me. 1973) (required presence when not teaching a mandatory subject); Springfield Educ. Ass'n v. School Dist. No. 19, 24 Or. App. 751, 547 P.2d 647 (1976) (teaching load and preparation periods mandatory). *But see* NEV. REV. STAT. § 288.150(3) (1975) (workload factors merely permissive); West Hartford Educ. Ass'n v. DeCourcy, *supra* (length of school day merely permissive); Dept. of Educ., *supra* (bargaining over scheduling of preparation periods within teaching hours excluded altogether); Biddeford v. Biddeford Teachers Ass'n, 304 A.2d at 421 (length of

ditions of employment, time spent in class by students does not. Since hours of instruction directly determine the level of services received by students, its determination involves a fundamental policy choice balancing the desire for more educational service against the costs of higher levels. Especially since class size should be negotiated, hours of instruction should not, so that the public employer can reduce costs by reducing the level of services. Thus, questions whether conditions of employment were implicated in students' hours of instruction and provisions freezing staff size should have alerted the New York Court of Appeals to as yet unarticulated policy concerns precluding bargaining.[165] Recognition of this would have led the court to conclude that those were not proper subjects for collective bargaining. On the other hand when the impact of an issue such as class size on conditions of employment is so great that the issue easily might be translated into wage demands it makes little sense to allow the intrusion of less important managerial prerogatives on bargaining tradeoffs. Such an issue directly affects conditions of employment and bargaining over it does not prevent the public employer from reducing costs by reducing levels of service. Thus, bargaining over class size should be allowed where it preserves the ability to trade off a reduction on wage demands.

In this framework, "managerial prerogative" becomes more than simply a question-begging catch phrase. Where relinquishing managerial prerogatives over an issue hampers political balancing of the cost and of the need for the service then that issue must not be subject to bargaining. An area of managerial exclusivity serves to protect voter input into the budgetary process at a fundamental level.[166] At the same time the political perspective recognizes an area of concern in which bargaining is appropriate and necessary. By protecting political input where essential, careful definition of the scope of bargaining eliminates the excuse for the intrusion of managerial prerogatives when such intrusion would hamper the ability of the collective bargaining process to strike its own balances.

The framework limiting the restrictive effect of elements of managerial policy and prerogatives to situations in which fundamental policy

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teaching day merely permissive); Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., —— S.D. ——, 215 N.W.2d 837 (1974). See also note 67 *supra*.

[165] *See Yonkers, supra* note 105; *School Boards Association, supra* note 137.

[166] In fact, the proposed framework recognizes an area of exclusivity protecting political tradeoffs in the budget-making process even where concern with managerial prerogatives is non-existent. For example, pay parity provisions should never be negotiable, since they hamper both political tradeoffs and bargaining tradeoffs, although managerial prerogatives are of no moment. *See, e.g.*, Local 1219 v. Conn. Labor Rel. Bd., 93 L.R.R.M. 2098 (Conn. Sup. Ct. 1976); Lewiston Firefighters Ass'n v. Lewiston, 354 A.2d 154 (Me. 1976); New York and Patrolmen's Benevolent Ass'n, N.Y. PERB, Cas. No. U-1496 (1976), GERR No. 694, at 42 (Feb. 7, 1977) (barring negotiations over parity clauses as violative of public policy under *Susquehanna*); Medford School Comm., 3 MASS. LAB. CAS. 1413, 3 M.L.R.R. 1106 (M.L.R.C. 1977).

Many jurisdictions preclude or limit bargaining over pension benefits, not because of concern with managerial prerogatives, but because of the difficulty of striking proper tradeoffs. *See, e.g.*, HAW. REV. STAT. § 89-9(d) (1975) (excluding retirement benefits from bargaining); 26 ME. REV. STAT. ANN. § 965(4) (1973) (barring pension benefits from binding interest arbitration); N.J. STAT. ANN. 34:13a-8.1 (1965) (precluding bargaining over pensions in conflict with existing statutes); N.Y. CIV. SERV. LAW § 201(4) (McKinney Supp. 1977) (barring bargaining over pension). Apparently, since pension benefits represent costs to be borne in the future and pension plans are too complicated for the public or even public officials to understand, the fear is that tradeoffs involving the costs of present services will not be properly made.

choices are implicated and limiting bargaining to the area of the employment relationship is equally applicable to decisions not primarily involving budgetary concerns. For instance, personnel decisions involving the selection, direction, promotion, transfer or discipline of personnel involve managerial concerns with the quality and efficiency of a service. In certain situations where the decision may strongly affect conditions of employment, the public interest in the quality of governmental services must be balanced against the impact on individual employees in determining what can and cannot be bargained. Obviously, bargaining over procedures for the selection of personnel should not be allowed since the issue does not affect conditions of employment until the employee is hired. The public and groups served by the public employer still have more of a direct interest in the selection process.[167] The policy behind preserving the public employer's nonreviewable discretion to make promotions or transfers is equally strong,[168] but because of the generalized impact on all employees interested in or affected by promotion or transfer, evaluation procedures and the criteria for the decision ought to be bargained.[169] When the issue of concern is discipline or dismissal of a public employee, the public interest no longer outweighs the employees' interest in bargaining over procedures for substantive review of the decision pursuant to a just cause standard.[170] The effect on the individual employee is substantial, and existing statutory procedures should not bar contractual procedures for review.[171]

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[167] *See* Board of Higher Educ., 7 PERB 3028 (1974), *quoted in* Clark, *supra* note 33, at 29. PERB argued that a proposal to bar or limit student membership on a faculty hiring committee was an issue of social concern to many groups in the community. However, PERB only held that the Board could not be required to bargain. The proposal should not even be negotiable. The university's ultimate determination may be to exclude students but the decision should be accountable and open to influence from all groups.

[168] *Cf.* Clifton Teachers Ass'n v. Board of Educ., 136 N.J. Super. 336, 346 A.2d 107 (1975) (school board has exclusive, non-negotiable right, to assess quality of teacher performance); Board of Educ. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97, 357 A.2d 302 (App. Div. 1976) (school board has exclusive nonarbitrable right to select candidates for promotion from within or without bargaining unit). *But cf.* IND. CODE ANN. § 20.7-5-1-5 (Burns 1973) (bargaining over selection, assignment or promotion of personnel permissive); NEV. REV. STAT. § 288.150(3) (1975) (right to assign or transfer personnel reserved to employer but bargaining permissive); Milberry v. Board of Educ., 467 Pa. 79, 354 A.2d 559 (1976) (unsatisfactory performance rating arbitrable though a basis of dismissal proceedings).

[169] *Cf.* Board of Educ. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97, 357 A.2d 302 (App. Div. 1976) (though promotion decision not arbitrable, criteria and procedures are mandatory subjects); Fargo Educ. Ass'n v. Paulsen, 239 N.W.2d 842 (N.D. 1976) (dictum) (bargaining over transfer procedures probably mandatory); Beloit v. Wisconsin Emp. Rel. Comm'n, 73 Wis.2d 243, 242 N.W.2d 231 (1976) (bargaining over evaluation procedures and files mandatory); IOWA CODE ANN. § 20.9 (1974) (evaluation procedures mandatory). *But cf.* Springfield Educ. Ass'n v. School Dist. No. 19, 24 Or. App. 751, 547 P.2d 647 (1976) (transfer procedures merely permissive); Ill. Educ. Ass'n v. Board of Educ., 62 Ill.2d 127, 340 N.E.2d 7 (1975) (evaluation procedures neither negotiable nor arbitrable).

[170] *See, e.g.*, N.J. STAT. ANN. 34:13A-5.3 (West 1965), *supra* note 88.

[171] *See, e.g.*, Pontiac Police Officers Ass'n v. Pontiac, 397 Mich. 674, 246 N.W.2d 831 (1976) (bargained grievance procedures prevail over city's civilian review board); Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972) (school board can bargain over grievance procedure for review of dismissal despite Tenure Law procedures); Danville Bd. of School Directors v. Fifield, 132 Vt. 271, 275-76, 315 A.2d 473 (1974). *But see, e.g.*, Superintending School Comm. v. Winslow Educ. Ass'n, 363 A.2d 229 (Me. 1976) (just cause provision merely permissive because of policy expressed in existing statutory procedures); Local 1905, AFCSME v. Recorder's Court Judges, 94 L.R.R.M. 2392 (Mich. Sup. Ct. 1976) (statute establishing dismissal procedures for court employees prevails

In addition, negotiations should never be allowed over issues which determine the nature of the service provided.[172] The nature of the service is an issue of political power at the core of public concern about the political objectives toward which government resources will be committed. While public employees may and should be consulted,[173] binding, bilateral agreements should not be allowed to preclude collective expressions about the nature of the service paid for and received, since individual choice is not possible.[174] Curriculum, for example, can be a subject of intense political conflict. Subjects such as abortion or sex education arouse furious political controversy.[175] The interests of the taxpayers in the use of their taxes and of parents in the education of their children demand that decisions about such sensitive issues not be resolved in collective bargaining.[176]

The public policy concern with the nature of the service provided includes an interest in the relationship between public employees and those to whom they provide the service. It might be better that teachers not bargain about procedures for discipline of students[177] nor police about civilian

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over bargained grievance procedure); Teamsters Local 320 v. Minneapolis, 302 Minn. 410, 225 N.W.2d 254 (Minn. 1975) (municipal charter provision prevails).

However, the decision to grant or to deny tenure should not be reviewable, although violations of contractual evaluation procedures precedent to dismissal should be arbitrable. See note 156 and cases cited therein.

[172] "The issue is not a threshold one of whether professional public employees should participate in decisions about the nature of the services they provide . . . . The issue rather is the method of that participation." *Wellington & Winter, supra* note 8, at 859.

[173] *See, e.g.*, Port Washington Union Free School Dist. v. Teachers Ass'n, 54 App. Div.2d 984, 389 N.Y.S.2d 113 (1976) (violation of agreement that joint committee of teachers and administrators shall make advisory recommendations concerning curriculum changes is arbitrable); CAL. GOV'T CODE § 3543.2 (West 1976) (allows consultation but not bargaining over curriculum).

[174] To say that curriculum content is not a proper subject of bargaining does not mean that teachers have no legitimate interest in that subject nor that they should not participate in curriculum decisions. It means only that the bargaining table is the wrong forum and the collective agreement is the wrong instrument . . . . [N]o organization should purport to act as an exclusive representative; the discussions should not be closed; and the decision should not be bargained for or solidified as an agreement. In addition, all of the ordinary political processes should remain open for individuals or groups of teachers to make their views known to the politically responsible officials and thus to influence the decision.

Summers, *supra* note 149, at 1195 (footnote omitted).

[175] For instance, the superintendent of schools in Framingham, Massachusetts was fighting for his job as a result of his advocacy of sex education. *See* The Boston Evening Globe, Dec. 20, 1976 at 3, col. 3. *See also* Board of Educ. v. Rockaway Township Educ. Ass'n, 120 N.J. Super. 564, 295 A.2d 380 (1972) (bargaining agreement cannot allow teacher to discuss abortion if Board directs otherwise).

[176] *Cf.* CAL. GOV'T CODE § 3543.2 (West 1976) (allowing consultation but barring bargaining over definition of educational objectives, determination of course content and curriculum, and textbook selection); Board of Educ. v. Rockaway Township Educ. Ass'n, 120 N.J. Super. 564, 295 A.2d 380 (1972) (collective bargaining agreement cannot delegate to teachers the selection of courses of study). *But cf.* National Educ. Ass'n v. Board of Educ., 212 Kan. 741, 512 P.2d 426 (1973) (bargaining over curriculum permissible, though not mandatory); Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972) (dictum) (same); Fargo Educ. Ass'n v. Paulsen, 239 N.W.2d 842, 848 (N.D. 1976) (dictum) (curriculum probably mandatory); IND. CODE ANN. § 20.7-5-1-5 (Burns 1973) (permissive).

[177] *But see* IND. CODE ANN. § 20.7-5-1-5 (Burns 1973) (student discipline a permissive subject of bargaining); Washoe County Teachers Ass'n v. Washoe County School Dist., 90 Nev. 447, 530 P.2d 114 (1974) (mandatory); Sutherline Educ. Ass'n v. School Dist. No. 30, 25 Or. App. 85, 548 P.2d 204 (1976) (student disciplinary and referral procedures at least permissive,

review boards which investigate allegations of police misconduct, because such negotiations relate closely to the nature of the service provided, which is at the core of the public concern.[178] Safety may be an important condition of employment over which bargaining should take place. Beyond the concern with safety the impact of bargaining on the nature of the service provided may outweigh any employee interests. In a sense the concern is to prevent public employees from bargaining over who is eligible to receive the service. Public employees should not be bargaining about whether they will deliver a service, where they will perform the service, or who will get the benefit of the service.

Collective bargaining should not be used to make it harder for interested groups to affect politically decisions of public interest whose major impact extends beyond the employment relationship. Bilateral bargaining necessarily excludes the concerns of other interest groups except as the public employer is able and willing to represent or consider those concerns in its bargaining decisions. The proposed model for negotiability determinations, without the interference of the permissive category, is sensitive to the need to protect the ability of the political process to strike its own balances. The public must be left free to determine the direction in which governmental resources should be channeled. Of course, in decisions about the level or nature of services where binding agreement is inappropriate, the public employer should be encouraged or required to consult with its employees, if only to take advantage of available resources. That the decision reached thereby may be the same as would have been reached in bargaining does not militate against consultation, since the decision is open to influence and reconsideration by all members of the public, including public employees.

In the end, assessments of the degree to which binding agreement over any issue restricts the necessary tradeoffs between cost and level of services will differ from jurisdiction to jurisdiction. The degree to which restrictions to whatever extent perceived will be politically acceptable will also vary. That each jurisdiction has to make a choice and that the choice may differ does not militate against the model proposed. The choice between the interests of the public and the interests of public employees is a political choice, subject to shifting currents of political power. At the very least, scope of bargaining determinations should confront the political conflict directly.

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may be mandatory); Beloit v. Wisconsin Emp. Rel. Comm'n, 73 Wis.2d 243, 242 N.W.2d 231 (1976) (mandatory bargaining over procedures to follow if misbehavior threatens physical safety; permissive otherwise).

Unlike an issue like class size where the teachers are bargaining for a result which furthers student interests, teachers and school boards alike have no incentive to protect the interests of a student alleged to be a disciplinary problem. The threat to the interest of students arising from disciplinary action is serious enough to be of constitutional proportions, requiring due process protections of notice and hearing. *See* Goss v. Lopez, 419 U.S. 565 (1975). *See also* Kilberg, *Appropriate Subjects for Bargaining in Local Government Relations*, 30 MD. L. REV. 179, 195 (1970).

[178] *See generally* Pontiac Police Officers Ass'n v. Pontiac, 397 Mich. 674, 246 N.W.2d 831 (1976) (existence of a civilian review board in a home rule city did not violate the public policy favoring bargaining but could not preclude the operation of a negotiated grievance procedure for review of disciplinary action).

CONCLUSION

A continuing political conflict underlies public sector bargaining. Public employees seek a meaningful voice in decisions affecting their conditions of employment. But collective bargaining grants public employees a relative advantage over other interest groups in affecting the governmental decison-making process, particularly those decisions allocating governmental resources. As a result, many of those jurisdictions that granted bargaining rights sought to resolve the conflict by prohibiting strikes and limiting those decisions subject to bargaining. Efforts to preserve a core area of policy concern focused, as in the private sector, on limiting those issues subject to mandatory bargaining. It was thought that the public employer's discretionary decision whether to bargain over issues involving elements of public policy and managerial prerogative would protect the political process because the responsible public official would be politically accountable.

The poor economic climate of the past few years, however, created an often hostile reaction to the results of collective bargaining. Recently, the initial resolutions of the underlying conflict have been undergoing extensive reappraisal. For instance, recent experience questions the legitimacy of the strike prohibition. Moreover, in those jurisdictions which continue to ban strikes, the need for some form of binding impasse resolution is heightened, not only to improve the functioning of collective bargaining but also to reduce the incentive to strike. But the intensity of political opposition to strikes and interest arbitration suggests that the parallel attempt to resolve the political conflict by limiting the range of bargainable issues may not be working well either. Recent judicial decisions in New York and Massachusetts, reintroducing policy concerns restrictive of permissible bargaining at the contract enforcement stage, may reflect a growing feeling that a permissive category of issues does not adequately protect fundamental public policy choices.

Use of the permissive category in public sector bargaining fails adequately to protect the political process and, under the cover of policy concerns, intrudes too heavily upon the appropriate subjects of bargaining. The political accountability of public officials for permissive bargaining is overstated. Furthermore, even if the public official is accountable, the agreement made is not, since agreement as to permissive issues is binding. If agreement is declared to be unenforceable, the tradeoffs made in bargaining are severely disrupted. Since collective bargaining is essentially a bilateral process, other interest groups may be effectively excluded from the decision-making process at least for the life of the agreement.

Reliance on existing enactments as evidence that an issue ought to be resolved politically recognizes the underlying political conflict only in a backhand manner. The existing standards for negotiability must be revised to enhance their sensitivity both to necessary political tradeoffs and appropriate bargaining tradeoffs. Collective bargaining is appropriate and necessary in areas which determine only the labor cost of services at the level chosen by the public employer or by the public itself. The public or public employer must remain free to determine the desired level or nature of a service given its total cost. These choices reflect significant ideological differences about the social and political priorities and objectives to which governmental resources must be directed. But managerial policy and pre-

rogative become important only where necessary to protect fundamental policy choices.

The permissive category should be eliminated, legislatures, courts and PERBs can no longer avoid hard choices by declaring that an issue involves policy considerations but leaving to the employer the decision whether to bargain. Legislative bodies in particular must be sensitive to the need to confront the difficult issues despite the pressure to compromise by leaving politically distasteful choices to be resolved by judicial or administrative bodies.

The scope of bargaining in the public sector must be defined in a way that directly confronts the underlying political conflict. Perhaps even the overdetermined political opposition to the strike and binding forms of impasse resolution could be partially defused if the scope of bargaining were so defined. In areas of decision-making where bargaining is appropriate, it might be possible to see the strike and interest arbitration merely as additional structural incidents of a duty to bargain which by itself grants public employees a relative advantage in the political process. In any event, the proposed standard for determining negotiability in the absence of a permissive category attempts to protect the developing ability of the political process to effect necessary tradeoffs. Where fundamental policy choices are left open to broad political participation, appropriate bargaining tradeoffs may be more readily acceptable. Freeing political tradeoffs from the intrusion of collective bargaining may ultimately leave the bargaining process freer from unnecessary intrusion.

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