BOOK REVIEW

COLLECTIVE BARGAINING COMES TO THE CAMPUS.

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The distinguished political scientist and former President of Oberlin College, Robert Carr, and his associate Daniel Van Eyck, have made a critical examination of collective bargaining by four-year college and university faculties. They write largely from the perspective of the nation's elite institutions which have enjoyed a tradition of faculty influence in institutional affairs. Thus it is not surprising that they are troubled by what they encounter. Like the Arcadians who while wandering in a grove happen upon the tomb in Poussin's second Et in Arcadia Ego, the work conjures up "the retrospective vision of an unsurpassable happiness, enjoyed in the past, unattainable ever after, yet enduringly alive in the memory . . . ."¹ It is perhaps characteristic of the elegiac tradition that while contemporary affairs are viewed with a healthy skepticism, the remembrance of what appear to be better days obscures the evaluation of novel, if makeshift, remedies for the ills accurately perceived.

Accordingly, this discussion will suggest, without denying some of the evils suggested by Carr and Van Eyck, that collective bargaining may provide the means by which a troubled profession can ameliorate at least some of its current malaise. To do this, attention should be devoted first to the circumstances conducing toward the increasing acceptance of collective bargaining.

I. CAUSES OF FACULTY COLLECTIVE BARGAINING

The authors propose three conditions for a faculty's engagement in collective bargaining: faculty dissatisfaction, an applicable collective bargaining law, and organizational efforts

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¹ E. PANOFSKY, MEANING IN THE VISUAL ARTS 296 (1955).

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by “outside” organizations. To be sure, collective bargaining here as elsewhere has been encouraged by a statute which allows employees to select a collective representative and which requires the employer to bargain with the agent so selected. But the authors' heavy reliance on “outside” organizational activity does not square with my experience, nor does it seem consistent with their own assumption of faculty dissatisfaction as a necessary precondition to faculty collective bargaining. It is well to note that collective bargaining came to institutions as diverse as the University of Rhode Island, the University of Bridgeport (Conn.), Boston State College, and the State University of New York (SUNY) on the affirmative recommendation of their respective faculty governments. Indeed at Boston State the faculty senate ran as a candidate, and in SUNY the senate withdrew its candidacy in favor of a senate-sponsored membership organization. At Bard College (N.Y.) the faculty urged the board of trustees to recognize a bargaining agent by resolution of the faculty meeting. Even the Berkeley division of the academic senate of the University of California has engendered an affiliate now preparing to offer itself as a bargaining agent for that faculty, once appropriate legislation is enacted.

One can discern at least four highly interrelated factors, wholly apart from the availability of legislation and the attendant efforts of would-be collective bargaining agents, which have produced a sufficient sense of anxiety to render collective bargaining acceptable to otherwise nonunion oriented faculty majorities. They are the declining economic status of the profession, the shift in the labor market, an increased concern for job security, and an erosion in institutional, and hence faculty, autonomy.

Economic Decline: As the authors observe, AAUP figures for 1970-71, aptly titled At the Brink, revealed a profession which was at a virtual economic standstill—professorial compensation (salary and fringe benefits) had increased 6.2 percent over the previous year, while the consumer price index had

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2 The class of “outside” organizations would include all membership organizations outside of the official internal faculty governing structure, including particularly affiliates of the three national organizations competing to represent the professoriate—the American Federation of Teachers (AFT, AFL-CIO), the National Education Association (NEA), and the American Association of University Professors (AAUP).

3 See, e.g., Graham, Effects of NLRB Jurisdictional Change on Union Organizing Activity in the Proprietary Health Care Sector, in 1971 IRRA PROCEEDINGS 273 (1972).

4 R. Carr & D. Van Eyck, Collective Bargaining Comes to the Campus 50 (1973) (hereinafter cited as Carr).

5 57 AAUP BULL. 223 (1971).
risen just under 6.0 percent. Thus the purchasing power of the average faculty salary had decreased 0.6 percent. The story is now more complete. Figures for 1971-72, this time entitled *Coping with Adversity*, reported an increase in CPI of 4.3 percent and increases in average faculty compensation and salary of 4.3 percent and 3.6 percent respectively—yielding an additional decrease in purchasing power of 0.7 percent. Although a slight increase in purchasing power was recorded for 1972-73, it was predicated on a 3.3 percent increase in the CPI. The report for that period, *Surviving the Seventies*, makes clear, “The real (constant dollar) value of the average faculty salary remains below what it was three years ago, and the prospect of greater reduction in the years ahead is unmistakable.” That prospect was realized in academic year 1973-74 where, due to inflation, the average professor lost about 1.5 percent in purchasing power despite general salary increases. As the report, *Hard Times*, pointed out, the average professor fared slightly worse than the average worker.

*Buyer’s Labor Market:* The “tightness” of the academic job market, while varying according to discipline, has become an accepted fact of contemporary academic life. Alan Cartter’s estimates, not the most alarming of those available, project a serious and increasing labor market imbalance. Zero growth in teaching faculty in the 1980’s will, he suggests, be accompanied by a substantial oversupply of Ph.D.’s. Even those taking a critical view of some of the projections in this area have concluded that a likely consequence of Ph.D. production will be a considerably lowered income for Ph.D.’s relative to other workers.

*Threats to Job Security:* According to Cartter, the foregoing changes in the labor market will result in “loosened” tenure provisions later on “so that bright younger faculty can more easily displace senior faculty whose teaching or scholarly performance is relatively ineffective.” Indeed, attacks on the tenure system have become sufficiently acute to warrant the creation of an independent national Commission on Academic Tenure in Higher Education, funded by the Ford Foundation. The Commission’s report, while reaffirming the basic tenets of the tenure system, seems also to have endorsed the notion of

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6 58 AAUP Bull. 178 (1972).
7 59 AAUP Bull. 188, 189 (1973).
11 Cartter, *supra* note 9, at 123.
tenure “quotas” which may contribute further to faculty anxiety particularly in the junior ranks.12

Erosion of Autonomy: Although in their introductory chapter the authors mention the erosion of institutional autonomy,13 they nowhere develop that threat as itself contributing to the acceptability of collective bargaining by university faculty. On the contrary, they suggest that legislative interference in the institution’s internal affairs may be encouraged by resort to collective bargaining, seemingly as an argument against that engagement. I suggest a more comprehensive scrutiny of the situation which, the authors’ survey data reveal, has made collective bargaining increasingly acceptable to academics.

The present situation may be illuminated by comparing it to a previous era of economic distress. Of the 931 four-year institutions existing in 1931, more than half enrolled less than 500 students and only about nine percent enrolled more than 2500.14 Public institutions accounted for only twenty-eight percent of the total.15 Four decades later, less than twenty-five percent of 2,606 universities, colleges and junior colleges enrolled fewer than 500 students, and almost a third enrolled more than 2,500.16 Some thirty institutions alone enrolled more than 30,000 students each. Moreover, about half the institutions in the country are now publicly operated.17 Income from federal sources rose from twenty-one million dollars in 1930 to about 3.5 billion in 1970.18 Income from state and local government rose from 152 million to better than 6.5 billion in the same period.19 In 1968 the public and private sectors accounted for 452,872 and 262,077 faculty and professional staff respectively, that is, sixty-three percent of all such employees were engaged in the public sector.20 In sum, to a considerable extent the profession now finds itself employed by a large, impersonal bureaucracy, administrated by cadres of professional administrators over whose decisions it has no control and little influence. Even those components of the educational structure which

13 Carr, supra note 4, at 11.
15 Id.
17 Id.
19 Id.
have been able to resist the tendency find themselves increasingly "coordinated" by statewide masterplanning agencies or "superboards." It is hardly surprising that professors, like other highly trained professionals employed by public institutions to provide service to clients, would want to assert some influence over the policies governing their professional lives.

In response to these conditions, it is instructive to note the alternative posed, perhaps rhetorically, by Carr and Van Eyck:

"Cannot a university president, as spokesman for an academic community that has worked out a statement of its needs and expectations internally through a well-conceived structure of institutional governance, make a more persuasive and productive presentation of his institution's case at the state capital or in Washington than do or will the dual agents of management and labor defending the requirements of a contract reached through collective bargaining?"

A short answer is supplied by the President of one organized university—"The faculty, I am confident, did much better than I could have done on its behalf." A more detailed reply would point out that collective bargaining whatever its drawbacks, provides the hope, at least, of a partial remedy for the profession's ills. It mandates participation by the faculty in at least some decisions before they are made, and the resulting agreement is enforceable. The former palliates the anxieties caused by the increasing remoteness of decisionmaking, while the latter assuages the profession's sensed insecurity.

A fuller analysis, however, may require a separate view of the public and private sectors. The passage of a state public employment bargaining law may be taken, as I suggest it clearly was in Rhode Island, Hawaii and, to an extent, New York, as a signal to faculty members in public institutions of the way the state intends to deal with them. The authors, however, cite the overwhelming "no agent" vote at Michigan State University to indicate that it is too early to base firm predictions of the trend in faculty collective bargaining. On the other hand, they ob-

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22 Carr, supra note 4, at 288.

23 Baum, A President's Experiences, in R. Hewitt, supra note 9, at 19.

24 Carr, supra note 4, at 64-65.
serve that public institution bargaining in Michigan has been a rather piecemeal affair with each institution having independent access to the legislature for its appropriation. Assuming a more coherent bargaining structure, should the gains made by other segments of organized state workers exceed those of the unorganized (elite) public institutions and, indeed, should the legislature view those funds as "soft" relative to the "hard" dollars bargained for by public employee unions, I little doubt the reversal of the Michigan State vote.

In sum, I disagree that the record in the public sector is too slender "to support generalizations in which confidence can be placed."25 Indeed, the growth of faculty collective bargaining has been most dramatic in the public sector.26 Unless the legislative and executive branches assure equitable treatment of unorganized public university faculties, those branches must understand that collective bargaining is not an option, but rather a necessity. I do not anticipate that most state governments will be so equitable or restrained, or that the faculties of major state institutions will be so imbued with a spirit of self-sacrifice as to eschew collective representation when the result of that eschewal will seem to them to mean their subsidization not of the university but, say, of the state police.

Moreover, the authors' rhetorical question perforce assumes that existing internal provisions for faculty participation in budgetary and other decisions are satisfactory to the faculty; this suggests in turn the key to the growth of collective bargaining in the private sector. Here we may discern three broad categories of institution, in two of which collective bargaining should not generally be expected to secure majority support. They are strange bedfellows, for on the one hand is the elite university whose faculty may have faith that it is being treated as well as it can reasonably expect under the circumstances, and on the other is the autocratic institution whose faculty is simply too timorous to support a union. It is in the vast middle ground made up of institutions whose faculties have both the will to speak up and the desire to check administrative discretion, that collective bargaining may be expected to take hold. For example, the faculty of Rider College (N.J.) chose a bargaining agent only after the administration refused to accept the affirmative recommendation of five faculty committees and the faculty as a

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25 Id. 62-65.
26 As of June, 1974, 96 public four-year campuses had selected bargaining agents and only four had voted for no agent in representation elections. On the other hand, 37 private four-year institutions had selected agents while 22 had rejected collective bargaining. The Chronicle of Higher Education, June 10, 1974, at 24.
whole on a tenure decision. The Ashland College (Ohio) faculty chose a bargaining agent only after the administration terminated over forty members of the faculty for an alleged "financial exigency." The Bloomfield College (N.J.) faculty chose an agent only after the board of trustees abolished the college's tenure system, placed the entire faculty on one year's notice of termination, and actually terminated more than a dozen faculty many of whom had been previously awarded tenure.

Unlike the public sector, there may be an alternative to collective bargaining in private colleges where the faculty participates in effect as fully in institutional decisions as it would in collective bargaining. The authors fail, however, to give credit to the availability of the selection of an agent under the federal Act as a prod to more responsive administration. On the contrary, the authors resurrect the argument that faculties should be held to be of a "managerial" or "supervisory" character and deprived thereby of any right to bargain—an argument which was pressed before the NLRB with some vigor, but no success, by several institutional administrations. I have argued elsewhere for the soundness of the NLRB's decisions. Suffice it to say here that in order to avoid the possible detrimental consequences of bargaining, Carr and Van Eyck would deprive faculties of both the possible advantages such bargaining could bring, and, in the private sector particularly, of stronger faculty participation should collective bargaining be rejected. Thus the evils of bargaining perceived by Carr and Van Eyck must be compelling indeed to demand so Draconian a result.

II. THE EVILS PERCEIVED

First, Carr and Van Eyck lament the loss of institutional autonomy by the intrusion of labor boards called on to decide bargaining units, supervise elections and determine unfair practice charges. Relatedly, they regret that autonomy will be further eroded as outsiders are brought in to resolve bargaining impasses and to arbitrate grievances. Second, they expect the

29 See Academic Freedom and Tenure: Bloomfield College (New Jersey), 60 AAUP BULL. 50 (1974). The tenured faculty were later ordered reinstated after a judicial finding of the absence of a sufficient financial exigency to warrant their termination. AAUP, Bloomfield College Chapter v. Bloomfield College, No. C-4241-72 (N.J. Super. Ct., June 26, 1974).
30 CARR, supra note 4, at 36-37.
adversary attitudes imported by the process of collective bargaining and the exclusive representative status accorded the bargaining agent by law to strain collegial relations between faculty and administration independent of collective bargaining. Thus, they anticipate an erosion of the faculty’s role in educational decisionmaking. Third, they expect, in view of the majoritarian character of collective representation, that egalitarianism will supplant meritocracy particularly, for example, in salary matters. Fourth, they fear the contract focus of collective representation will foster an attitude of “going by the book” which may dampen flexibility for educational innovation. Finally, the authors fear that academic freedom may be threatened.

Of interest here is the role of law in militating toward or mitigating these consequences. Before proceeding to that question, however, some additional comment is required. First, the assertion that the probable loss of autonomy militates per se against collective bargaining compels us to determine when external intervention into institutional affairs is justified. It ill-serves us to invoke “institutional autonomy” for its incantatory value in the face of every threatened intervention. It cannot be contended seriously, for example, that the first amendment should not apply to faculty members because judicial review of decisions challenged under it is inherently erosive of autonomy. Thus not every such intrusion, through erosive by definition, is necessarily infelicitous. The real issue is whether the applicable labor legislation, as interpreted by the appropriate administrative agencies and courts, is in fact responsive to the faculty’s needs or injurious to its sound functioning. For example, the NLRB has attempted rather successfully to accommodate the academic milieu fully in keeping with its charge under the Act. Thus, as matters currently stand in the private sector, I do not believe that, solely because the machinery of the Board is now available, one is justified in concluding that the benefits of extending the Act are outweighed by the threat of “external intervention.”

32 Carr and Van Eyck are by no means alone in the failure to make such a distinction. See J. Perkins, The University and Due Process (1967) (address reprinted by the American Council on Education); Cleveland, The Muscle-Bound Academy, 7 The College Counsel 1 (1972); Wilson, Campus Freedom and Order, 45 Denver L.J. 502 (1968). But see Byse, The University and Due Process: A Somewhat Different View, 54 AAUP Bull. 143 (1968).

33 The authors express alarm on the basis of two unfair practice cases decided by the NLRB, in neither of which were the faculty member’s allegations sustained:

... institutional and faculty autonomy are subjected to a new and powerful external intrusion when decisions on faculty reappointments and ten-
Turning to the role of outsiders in contract disputes, it is clear that faculty are resorting increasingly, indeed exponentially, to the courts in disputes concerning nonrenewal or terminations of appointment—the matters of highest concern to Carr and Van Eyck. The choice for many institutions is not autonomy _vel non_, but rather of the forum in which these grievances may be resolved. From this perspective, the use of arbitration has a decided advantage; the parties jointly select the arbitrator and establish standards to guide his decision. In fact, to the extent the parties fashion the collective agreement to protect the integrity of internal institutional affairs, the arbitrator may actually serve to stave off unwanted intrusion by other external agencies.

Second, dealing with collegial relations, Carr and Van Eyck pose two rhetorical alternatives. On the one hand they posit a faculty cooperating with the administration in decisionmaking, that is, collegial "shared authority," and perforce sharing the risks of "bold and enterprising policy decisions," and on the other a faculty which stresses "the adversary relationship between themselves as employees and the organization's managers, not only using whatever bargaining power they can muster to compel the managers to increase their salaries but also conceding to management the entrepreneurial functions of assuming risks and deciding basic policies."

While the reconciliation of the role of exclusive bargaining representative with that of the faculty _qua_ faculty in educational decisions is a complex and difficult problem, the assumption on which the alternatives are put obscures the issues. The abnegation by the faculty of participation in educational decisionmaking will not result in decisions riskless to it. This is particularly applicable in the private sector, where institutions must find new constituencies, develop strong specializations, or simply produce a higher quality product if they are to survive competition with the cheaper mass education offered by public

ure . . . can finally be controlled partly by the way a government official views the demeanor, as witnesses before him, of an institution's administrators and faculty members who have participated in actions under review. Carr, _supra_ note 4, at 286. While their concern may extend more profoundly to our system of adjudication it seems to me that the labor boards have been performing quite competently in this area. See Fashion Institute of Technology, 4 N.Y. PERB 4525 (1971); Donald Leon, 1 N.Y. PERB 800 (1968) (per Sovern, hearing officer). See also Mid-Plains Educ. Ass'n v. Mid-Plains Nebraska Technical College, 80 LRRM 3407 (Neb. Sup. Ct. 1972) (affirming the decision of the Nebraska Court of Industrial Relations).


See _Arbitration of Faculty Grievances_, 59 AAUP BULL. 168 (1973).

Carr, _supra_ note 4, at 292.

_Id._ 292-93 (emphasis in original).
institutions. An ostensibly "bold and enterprising" decision here may close an institution far more readily than an inflated salary demand. As have other commentators who argue that collective bargaining will reduce the faculty's role in educational decisions, Carr and Van Eyck tend to ignore the fact that a prime stimulus for resort to bargaining is the sensed inadequacy of current faculty participation in those decisions.\textsuperscript{38} Bargaining has become attractive because faculty want more participation rather than less.

Having questioned their blanket character, it nevertheless cannot be gainsaid that there is considerable validity in many of the authors' fears. The question is whether the consequences envisaged by Carr and Van Eyck are in fact inexorable in those institutions which are both likely to engage in bargaining and where these consequences would represent a retreat from existing conditions of administration-faculty relations—that is, relatively elite public institutions compelled to engage in bargaining by the dynamics of public employment representation, and troubled but relatively mature private institutions. I have suggested elsewhere that these consequences need not follow, and that their realization depends on the interplay of several variables: the nature and traditions of the institution, the character and policies of the bargaining agent, the employer's attitude toward bargaining and contract administration, the composition of the bargaining unit, and the scope of bargaining.\textsuperscript{39} The first three factors are essentially sociological or political, rather than legal, save in the case of the third, where relevant state legislation may restrict flexibility. While a number of legal issues remain to be resolved, the experience thus far indicates that the most influential role played by law and legal institutions in shaping the consequences of bargaining lies in the determination of the bargaining unit and of the scope of bargaining.

III. THE APPROPRIATE BARGAINING UNIT

The authors devote considerable attention to the issues of unit determination in a chapter subheaded, "What Happens to 'the Faculty'?"\textsuperscript{40} The question is posed in two contexts. One discusses the implications of the unit decision to the interest of the "core" faculty, the full-time members of the teaching and re-


\textsuperscript{40} Carr, supra note 4, at 66.
search staff. The other treats the role of the faculty, independent of petitioning or intervening labor organizations, in the process of unit determination itself.

In the private sector the NLRB has, albeit haltingly, attempted to configure units composed essentially of full-time teaching and research faculty and those few supportive professionals most closely associated with the educational mission. In the public sector, however, the decisions dealing with geographic scope and occupational inclusion, display a wide divergence in approach. For example, although the Massachusetts state college system and all three public institutions in Rhode Island are under single governing boards respectively, some separate campus units have been deemed appropriate, as they were in Michigan where each institution is governed by its own board. The Pennsylvania state colleges and the City University of New York (CUNY) comprise a single unit respectively, and the New Jersey Public Employment Relations Commission (PERC) has recently reversed its original unit determination, for that state's state colleges, to hold a single unit appropriate although each campus has its own board of trustees. In the State University of New York (SUNY) separate units were sought and denied. The resulting single unit included four university centers, two separate medical centers, ten four-year colleges, six two-year agricultural and technical schools and a maritime college.

Unlike the private sector, public higher education tends to be operated in large multicampus university and college systems. Thus the status of entire institutions presents in rather bold terms the problem of shaping a bargaining structure that is manageable from the state's perspective while remaining responsive to the faculty. Moreover, it has become almost conventional wisdom that larger units are required in the public sector. First, it is argued that the diffusion of managerial authority in public employment requires that the unit be shaped most proximate to that level of government having the power to agree or make effective recommendations on negotiable matters; the scope of bargaining itself plays a role in unit determination. Second, larger units avoid whipsawing and thereby

41 Id. 78.
42 Id.
43 Id. 75-78.
conduce toward more rational and stable labor relations. Finally, in practical terms larger units reduce the burdens of negotiation and impasse resolution. Thus commentators concerned particularly with multicampus systems have concluded that only system-wide units are appropriate.\(^{45}\) I disagree.

Simply because an agent is certified for a single campus does not require that its authority extends no further than the local campus administrator. In fact, there is a degree of inconsistency in the arguments just noted. If the scope of the agent’s authority were constricted according to unit determination, smaller units would not produce whipsawing and irrationality unless each unit were dealing separately with centralized authority, which assumes that the agent’s authority to bargain goes beyond the local administrative unit. Thus the arguments against “fragmentation” or unit “proliferation” depend essentially on these practical considerations. On that question, however, Clyde Summers has recently pointed out that the manageability of bargaining may in fact be better served by centralized coordinated bargaining with a number of bargaining units, than by dealing with a single unit.\(^ {46}\) Given the diversity of groups included in large single units, Summers concludes that the cost to the public employer in dealing with multiple units may in fact be less than that of “negotiating with a conglomerate union which is trying to represent greater diversity than its internal processes can reconcile.”\(^ {47}\)

Finally, inasmuch as we are concerned with institutions of higher learning, arguments going to the employer’s ease of bargaining obscure consideration of the relevant, if not critical, question of the educational implications of unit structure. Accordingly, two additional considerations come into play. First, there is a public interest in maintaining educational diversity within a system. Bargaining, even if restricted to hardcore economic and related matters, will of necessity affect educational policies. Hence the lumping together of diverse institutions, such as universities and former teacher colleges, in a single unit will be destructive of that diversity and, over time, become educationally harmful. Some state agencies have been particularly sensitive to this consideration. The Oregon Public Employee Relations Board (PERB), for example, established a


\(^{47}\) Id. 1190.
separate unit for Southern Oregon College, one of nine institutions under the control of the state board of higher education. In so doing it explicitly relied on the different "educational missions" of these institutions.

The educational interest in diversity alone may not be dispositive, where, for example, all the institutions share a common mission or where, as in the case of the Pennsylvania State University, the entire system's educational administration is highly integrated. However, even where institutions share in general a common mission there may be an interest in retaining a degree of autonomy and uniqueness for each campus, if homogenization is to be avoided. For both reasons the Minnesota and Kansas Public Employment Boards recently and rightly ordered separate campus units for their respective state systems.

The foregoing may illustrate the need for greater sensitivity and perception on the part of relevant labor boards in distinguishing the bargaining unit from the election district. Although they ostensibly determine the appropriate "bargaining unit," the actual bargaining structure may be quite different from the unit ordered by the board. The decision of the New Jersey PERC finding a single unit of all the state colleges to be appropriate is instructive. In the period subsequent to the first decision (ordering six separate units), affiliates of the NEA were selected on each campus and negotiated a single system-wide agreement. Prior to decertification, however, two new state colleges were created. At the time of the second unit decision both were small, neither shared the history of teacher-training common throughout the system and at least one viewed itself as somewhat experimental. The special needs of these insti-

49 Pennsylvania State University No. PERA-R-801-C (Pa. PERB 1973). The difficulty here was that the branch campuses lacked any community of interest with one another but had extensive interrelationships with the main campus; for example the sub-branch faculty members had to be passed on by the appropriate academic department at the main campus. The decision acknowledges that either a single unit or separate units would be mandated—rejecting the argument for a single unit of the branch campuses. While it opts for a single unit based on the effect of "over-fragmentation" the decision can be justified by the high degree of integration with the main campus especially the apparent day-to-day control the latter retained in the internal affairs of the branches.
51 No. 72 (N.J. PERC 1972).

Conspicuous by its absence from this list of degrees offered is a program in teacher preparation.

"I tell people who want that to go to one of the other state colleges," said Woodworth G. Thrombley, vice president for academic affairs. "They
tions and their educational constituency may be ill-served by the bargaining goals of the majority, which share a background of teacher-training.

While six or eight election districts may not prove so burdensome in practical terms as to outweigh these educational considerations, it is in the unusually large and highly diverse systems such as SUNY that the problems of proliferation become acute. Here greater ingenuity and perhaps a willingness to experiment may be called for. A clustering of campuses according to educational mission could have produced a four-unit (medical schools, universities, state colleges, agricultural and technical colleges) or two-unit (medical schools and universities, state colleges and agricultural and technical colleges) structure which, while remaining entirely manageable from the employer's perspective, would have been more serviceable to educational interests.

On the other hand, the proponents of larger units point out that local autonomy can be provided for or accommodated in a single state-wide collective agreement.\(^5\) This ignores the political implications of the election district decision. Under a separate campus or clustered campus election unit structure, the agents selected owe a direct obligation to their local constituencies. As a practical matter, however, they may labor under considerable pressure to form a joint negotiating council to deal with centralized authority. In any event, as Summers points out, a centralized administration can rationalize its bargaining program while each agent retains independent authority over local and perhaps unique bargaining subjects.\(^5\) An agent certified for a local campus has greater bargaining power in reaching an accommodation with other agents than has a minority faculty group in dealing with a single organization certified to represent the whole. Should, for example, the numerically superior teacher college faculties decline to support the university faculty desire for a merit salary system, the latter has simply no alternative in a single election district structure. Moreover, the creation of a statewide union bureaucracy, and the removal of later stages of the grievance machinery from the hands of locally accountable faculty officers, may contribute to further centralization, homogenization and a lessening of autonomy. Inasmuch as these may be the very maladies which caused the faculty to seek succor in collective bargaining, the failure to

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\(^5\) McHugh, supra note 45, at 82-83.

\(^5\) Summers, supra note 46, at 1191-92.

create an educationally sound election district structure will only further exacerbate the profession’s ills.

Many of the same arguments urged on behalf of system-wide units are mustered in support of the inclusion of ancillary professional, and semiprofessional, positions with the core faculty. Note the reasoning of the hearing officer for the New Jersey PERC when the issue was first presented in the New Jersey state colleges:

It is my opinion that the appropriate unit should not be so narrow as to include only the teaching staff. The administrative staff and the educational support staff have parallel interests which do not conflict with and are not adverse to the interests of the teaching faculty. If the unit is determined only by the narrowest of congruent interests, the result may be so many separate units that organization would become a practical impossibility for some groups. *It would be better to lump all professional groups at each college excluding those whose interests are fundamentally conflicting.*

This approach ignores the fact that while interests may not conflict, they may be highly divergent and specialized—particularly for professionals. Moreover, as several observers, including Carr and Van Eyck, point out, the reconciliation of bargaining with faculty governance is a subtle and difficult matter. Thus it seems almost axiomatic that the essential academic focus not be diluted by the inclusion of nonacademics in the unit.

Contrary to this view, the Director of Representation of New York's PERB recently reaffirmed his earlier decision to include nonfaculty in the SUNY bargaining unit, thereby continuing the addition of over 3,000 nonteachers to a core faculty of 11,000. Unlike the first proceeding, where all parties save one sought an overall unit, a petition was filed in this case solely for the nonfaculty. Moreover, the public employer took no position, and an intervenor sought a separate faculty unit. Nevertheless the Director refused to recognize a separate nonfaculty unit. He reasoned that in view of the Board's policy in favor of larger units, the nonacademics would be separated out only if a conflict between the two groups could

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55 Gee, *supra* note 44, at 267; McHugh, *supra* note 44, at 76.
be proved. Accordingly he reviewed the evidence of the disputes between the two groups in establishing negotiating goals and in the conduct of bargaining, and concluded that a "commendable spirit of compromise" prevailed.

Understandably, in order to ascertain whether there was a sufficient conflict the decision attends almost entirely to whether the interests of the nonfaculty minority were dealt with roughly. Thus it misses the point. Given divisions within the faculty, the nonacademics represented a key "swing vote" in the election, which they used to secure greater representation than their members would otherwise dictate. More important, it appears from the decision that the nonacademics bargained with factions in the academic group in order to achieve a bargaining consensus. On issues of job security or tenure, for example, it appears that the nonacademics allied themselves with a faction of nontenured faculty thereby outvoting tenured faculty on that bargaining demand. Thus the inclusion of nonacademics gave them an important, if not dispositive, voice over academically critical matters in which they had no valid interest.

Carr and Van Eyck are concerned that the faculty "in an institutional sense" is not entitled to be heard in the unit determination, which is decided by the appropriate administrative agency on the basis of the positions of the administration and interested labor organizations. They criticize the latter for basing their positions on estimates of voter support in various constituencies, and indeed suggest that some institutional "managements" have been far more faithful in representing the "faculty's" interests than have the labor organizations. The degree of faithfulness depends on the authors' position of what constitutes a desirable bargaining unit and they make it abundantly clear what they conceive the "faculty" position to be:

... the faculty could argue the case that there is such a thing as "the academic profession," with everything therein implied with respect to training, certification, work standards, service ideals, and measurement of individual performance. The faculty might claim that such professional goals and ideals can be fulfilled only where the cohesion and integrity of the academic group of employees is protected against the addition of other employees who are not properly viewed as part of the academic profession or against the subtraction of still other employees who are most assuredly part of the company of teacher-scholars.

58 CARR, supra note 4, at 71-72.
59 Id.
60 CARR, supra note 4, at 71.
While I believe this to be the most educationally defensible unit position, the authors have overstated the procedural issue, for they perceive "the faculty" perhaps a bit too idealistically. It is well to note that both the medical and dental faculties of Temple University selected representatives who were allowed to participate in that unit determination solely for the purpose of urging the exclusion of those faculties from any proposed university-wide bargaining unit; a position with which it would not appear the authors would concur. Moreover, in the SUNY case, the university faculty senate (the "faculty" in precisely the institutional sense the authors employ) acted to expand its constituency to include nonteaching professionals (nonfaculty) and then sought a unit determination conforming to its revised electorate while an "outside" organization pressed for a unit along the lines proposed by the authors.

As noted earlier, it is possible that a majority of the core faculty could be outvoted by a significant minority of faculty who chose to align itself with a "swing" vote of nonfaculty. This could be determinative of whether to select an agent, as well as the character of the agent selected. In cases of so sharply divided a faculty, however, the authors do not enlighten us as to what the "faculty" position would be. In such cases there may well be no faculty position, in an institutional sense, to be advanced independent of the positions of the parties.

This is not to gainsay that different organizations have taken unit positions based on pragmatic grounds. But if a lack of appreciation for the academic significance of the issues must be assigned, it ought to be settled on the tribunals determining the bargaining units, rather than in the organizations presenting the issues for their determination. Moreover, decisions which seem aberrational from the authors' perspective may be justified by the institution's own practices. Thus in their critical view of the City University of New York unit, the authors fail to note that a large number of the nonteaching personnel there

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62 Professor Alice Cook of the School of Industrial and Labor Relations at Cornell University, then a member of the SUNY Senate, made it abundantly clear in the debate on the measure just what that body was doing.

In labor relations what we are going through now is a process which is rather looked down upon and is referred to as "blanketing in". We are trying to make an arrangement in advance of consulting the persons we would like to represent and sort of overwhelming the situation in advance rather than deriving a representation from the will of the persons who would be represented.

included, whose very professional status the authors question, are considered "voting faculty" by institutional regulation and are accorded academic tenure. Inasmuch as the university was itself responsible for a most irregular institutional bed, I cannot fault the New York PERB as Procrustean if it conformed the unit to those dimensions.

A concluding comment must be reserved for the authors' proposed remedy of a different kind of representation election—one in which the faculty votes first on collective bargaining in principle, and only if a majority are so in favor does the selection of the actual organization take place.63 I fail to see how the proposed two-stage election has anything to do with the determination of the unit, a decision which must logically precede any election. Curiously, the authors do not propose an electoral determination by the core faculty of the composition of the unit, though such a suggestion might well be experimented with, at least on certain key issues. For example, both academics and nonacademics could vote independently on whether they desired a single unit. Such a ballot would produce the clearest possible indication of "felt community of interest."

A proposal similar to Carr and Van Eyck's was made to the California Assembly Advisory Council on Public Employee Relations,65 and was heavily criticized by the faculty association of the University of California at Berkeley—an off-shoot of the academic senate.66 The Berkeley faculty pointed out that there is no such thing as "collective bargaining" in the abstract, but only as it is represented in a particular agent at a particular institution. It is true that where several organizations compete, the "no agent" faction may be placed in something of a dilemma since they may divide the votes of their second choice, eliminating it from the run-off and leaving only less preferred candidates. Those conscientiously opposed to collective bargaining may feel compromised. Under the authors' scheme, however,

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63 Carr, supra note 4, at 70. As the authors point out such an election was voluntarily arranged by all parties at Youngstown State University (Ohio). More recently the Vermont State Employees Labor Relations Board ordered a similar election for the faculties of the Vermont State Colleges. Not only is there a "yes or no" first ballot but write-in candidates and "no agent" will apparently be allowed in the follow-up ballot. Orders Establishing Terms of Election, (Vt. SELRB 1973). The recent comprehensive bargaining law in Oregon provides for the two-stage election in higher education. 2 CCH LAB. L. REP., Ore. ¶ 47,108 (1973).

64 Indeed, after the merger of AFT and NEA in CUNY, such an election was held as a result of which the two bargaining units were consolidated.


66 Feller, supplemental statement to the California Assembly Advisory Council on Public Employee Relations, August 24, 1972, on file with reviewer.
those conscientiously committed to collective bargaining who happen not to favor any of the contenders may feel equally compromised. Thus I share the conclusion of the Berkeley faculty association that "the only meaningful election is one in which the voters choose between real alternatives, not abstractions."

IV. Scope of Bargaining

After reviewing several collective agreements, including those at St. John's University (N.Y.) and Oakland University (Mich.), Carr and Van Eyck speculate that the dearth of attention to matters of institutional governance contained in them may be the result of an unconscious acceptance of what I have termed a "managerialist" conception of collective bargaining, one which argues that both the law and theory of collective bargaining reserve to management the right to manage and to the union the right to challenge.67 I have attempted to show that this theory, while generally valid, is not an absolute, and that it is inapplicable in a university setting.68 Moreover, I disagree that the agreements noted by Carr and Van Eyck tacitly accept the theory. The St. John's and Oakland agreements in particular attempt to guarantee and strengthen the faculty's role in institutional governance independent of collective bargaining.69 However, Donald Wollett, who considers the elimination of faculty governance to be a desirable goal, argues that the lawful scope of bargaining may preclude agreement of the St. John's or Oakland type.70 Again a separate view of the public and private sectors is required.

In the private sector the determination of what is a mandatory bargaining subject under the federal Act is governed by Fibreboard Paper Products Corp. v. NLRB,71 which provides two tests: is the subject matter of such vital concern that it is likely

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67 CARR, supra note 4, at 253. They also assert that "... no contract at a four-year institution creates a faculty senate or similar basic agency of faculty governance where none had existed." Id. The observation can be explained in large measure by the prevalence of some form of faculty government at most institutions especially those likely to engage in collective bargaining. It should be noted, however, that the initial collective agreements for Ashland College (Ohio) and the New York Institute of Technology do revise considerably if not in fact create entire faculty governments, independent of the bargaining agent, by their initial collective agreements.

68 See Finkin, supra note 38.

69 Id.


to lead to conflict between management and labor and, if so, is collective bargaining the appropriate means of resolving the issue? Experience in collective bargaining provides the prime source to guide the determination whether the matter is amenable to the collective bargaining process.

Accordingly, *Fibreboard* standards fully contemplate the negotiability of the faculty's role in setting educational policy. First, the faculty's role in educational decisions such as curriculum, admissions, selection and retention of deans and other key educational officers, selection, retention and promotion of colleagues, research policies, calendar, grading policies, and the like, is a matter of vital concern to the faculty. As noted earlier, disputes concerning the weight to be accorded by the governing board to faculty views on such matters are frequently quite heated and the faculty's desire to protect its role in decision-making is a major factor militating toward faculty use of collective bargaining. Second, a review of collective agreements indicates that such matters are commonly bargained about both directly, as in setting the standards and procedures for faculty personnel decisions, and indirectly, by incorporating into the agreement the faculty handbook, institutional policies and past practices.

In public employment the situation is more complicated. State legislation must be looked to and, as Wollett points out, several states appear to place substantial legislative restrictions on the scope of bargaining. Moreover, there is significant support for the proposition that the exigencies of public employment require a narrower scope of bargaining than in the private sector. Thus even where a general “terms and conditions of employment” definition of the scope of bargaining is adopted from the federal Act, state judicial construction has often sought support in Justice Stewart's concurrence in *Fibreboard* rather than in the majority's conclusion. While his opinion has been criticized for supplying a merely “visceral

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74 Wollett, *supra* note 70.


the vague notion that "terms and conditions" were meant as "words of limitation" allows the courts to rationalize a narrowed scope of bargaining.

I have suggested that Fibreboard standards can properly apply to professional employees in the public sector. The threshold inquiry is the employee interests sought to be represented. On this, the highly trained professional such as an attorney, physician or professor, has a range of employment-related interests which, for the blue-collar worker, would trench on "management rights," but which may be critical to the job performance and satisfaction of the professional. The test then becomes "whether the process of bargaining, entailing trade-offs and the tacit threat of coercion, but looking toward a mutually acceptable agreement, is the appropriate means of dealing with the discrete issues." On this point, the bargaining process does not seem ill-suited to resolve questions of the manner and extent of participation of publicly employed professionals in their agency's policy development.

However, Summers has recently supplied a more refined analysis, which accepts the position that the public sector requires a different determination of the scope of bargaining. Viewing collective bargaining as a political process, he would limit bargaining to those matters in which the massed resistance of the public (taxpayers and users of public service) demands a larger voice on the part of employees than is otherwise available to them. Thus he proposes as a standard a decided imbalance in bargaining power on the issue as well as real adversariness between the parties. For example, the public school curriculum would not be negotiable, because there is no reason to believe that either teachers or their employers have a unified position on it. In addition, bilateral bargaining precludes the full airing of all views. Thus curriculum is simply not the kind of issue in which there is that degree of bilateral adversariness requisite for bargaining, for "the decision is not made solely on the merits of the issue, but as part of a package which results from trading off unrelated items. Because of its structure and function, collective bargaining does not provide an appropriate political process for making such decisions." On the other hand, Summers agrees that teacher participation in non-negotiable

77 Summers, supra note 72, at 61. For a further critique of Mr. Justice Stewart's opinion, see H. Wellington, Labor and the Legal Process 70-72 (1968).
79 Id. 100.
80 Summers, supra note 46.
81 Id. 1195.
educational matters is desirable. Accordingly, "the school board can properly be authorized or even required, to consult with them before making a decision. But no 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."\(^8\)

To be sure, one can distinguish the situation of the school teacher from that of the university professor simply on the sharp variance in the degree of professionalism. The latter has an established tradition of faculty participation which he is seeking to protect through the collective agreement. The former is attempting to use the collective agreement as a bootstrap means of achieving recognition of a right to participate at all. That distinction may not be essential, for the "procedural agreement"\(^8\) of the kind I have been discussing would meet the Summers test of negotiability; collective bargaining can provide the "authorizing" machinery pursuant to which teachers participate in policy formulation. First, it must be assumed that, as in matters of personnel administration which lack budgetary implications, demands for more secure protection of faculty participation in policy matters will meet employer resistance. "In negotiations, the competing claims are between efficiency and fairness, discretion and equal treatment, flexibility and regulation by established rule. Private sector experience has demonstrated that these issues are best worked out by face-to-face discussions between unions and management across the bargaining table."\(^8\) Second, while individual faculty members may disagree over details, there is a general consensus in the faculty for participation in policy formulation. Even under a scope of bargaining more restrictive than in the private sector, the faculty should be allowed to negotiate its future role in governance. A procedural agreement produced by this process differs from traditional governance in that the faculty enjoys the right to participate, not at the suffrancer of the governing board and presumably revocable at its will,\(^8\) but as the result of a bilateral and enforceable agreement. Thus even where the scope of bargaining is held rightly to preclude negotiations on "basic educational policy," the reasoning which

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\(^8\) Id.

\(^8\) For a fuller explanation of the notion of a "procedural agreement," see Stevens, The Professors and Collective Action—Which Kind? (paper presented at the 25th Anniversary of the University of Minnesota Industrial Relations Center (1971)).

\(^8\) Summers, supra note 46, at 1183.

\(^8\) For an astonishing example, see, Searle v. Regents, 23 Cal. App. 3d. 448, 100 Cal. Rptr. 194 (1st Dist. 1972).
supports that distinction should not apply to the procedural questions attendant to the formulation of the policy.

One difficulty with this approach is that a scope of bargaining so defined could conceivably allow the agent to demand unilateral control for, or place undue limitations on, certain "management" matters by operating under the rubric of bargaining for the procedures governing their determination. By the same token, however, the public employer could seek far-reaching "management rights" and "zipper" clauses, the effect of which would be to nullify faculty governance. However, it should be remembered that merely because the demands could be made does not render the subject matter nonbargainable, for it is highly unlikely that either alternative would be effectively realized. A related and perhaps more serious difficulty is that the agent could also bargain to restrict the participation of other groups, such as students, and would permit the agent to negotiate a role for itself in such decisions, ostensibly as the faculty's "representative," in addition to or in lieu of an internal faculty governing body. One corrective could be legislative, as in the recent Montana higher education collective bargaining act which limits the agent's right of exclusive representation by providing that the act shall not interfere "with the right of the faculty senate or similar representative bodies of faculty, or the committees thereof from consulting with and advising any unit administration concerning matters of policy."\footnote{H.B. 1032, Montana Laws of 1974, 4A BNA LAB. REL. REP., MONT. SLL 36:218a, 218f (1974).}

A similar effort to protect the rights of collegial bodies in the absence of explicit legislation can be seen in a recent decision by the New York PERB, holding the union's demand to exclude students from faculty personnel committees in the City University to be a nonmandatory bargaining subject.\footnote{Board of Higher Educ. of the City of N.Y., No. U-0904 (N.Y. PERB 1974) (Member Crowley, dissenting).} Relying on decisions in public school cases and on Justice Stewart's concurrence in \textit{Fibreboard}, the Board reiterated that although evaluation procedures are negotiable the composition of evaluation committees under those procedures is a management prerogative not mandatorily bargainable. In response to Member Crowley's criticism that such a distinction is anomalous where intra-unit peer evaluation is involved, the two member majority went to some length to state its support for faculty participation.

The right of the faculty to negotiate over terms and conditions of employment does not enlarge or contract
the traditional prerogatives of collegiality; neither does it subsume them. These prerogatives may continue to be exercised through the traditional channels of academic committees and faculty senates and may be altered in the same manner as was available prior to the enactment of the Taylor Law. We note with approval the observation that "faculty must continue to manage, even if that is an anomaly. They will, in a sense, be on both sides of the bargaining table." We would qualify this observation, however; faculty may be on both sides of the table, but not their union.\footnote{Id. at 8 (slip opinion).}

The Board concluded that collective bargaining "is not designed to resolve policy questions regarding the structure of governance"\footnote{Id.} inasmuch as other interest groups may be disabled from participation in that decision by bilateral agreement.

The decision simply is put too broadly. It would logically prevent the collective agreement from incorporating existing governance provisions, inasmuch as any such bargaining demand would perforce "subsume" traditional prerogatives. Moreover, the issue was not whether the "composition of committees that evaluate employees" is negotiable—on that general question Member Crowley's dissent is compelling—but whether a demand is negotiable which prohibits local faculty governing bodies from allowing student participation on such committees. Phrased more precisely, a strong argument would be made, along the lines sketched out by Summers, that the discrete issue does not lend itself to the bargaining process. This is distinguishable, however, from seeking a contractual commitment that the administration adhere to a system of faculty governance.

The PERB decision is valuable for recognizing, contrary to the "managerialist" view, that the faculty does not abnegate its responsibilities in institutional decisions by the selection of a collective representative.\footnote{Id.} But, in essence, the PERB has attempted to separate bargaining and governance entirely, preserving the respective roles of faculty and union and preventing them from interfering with one another. As the PERB recognizes, however, the scope of bargaining cannot be narrowed solely to economic matters. Once bargaining extends to ques-

\footnote{The California Assembly Advisory Council, for example, assumes, wrongly, that collective bargaining must be an alternative to existing faculty governance arrangements. \textit{CALIFORNIA ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT} 39 (1973).}
tions of personnel policy, it perforce confronts its relationship to institutional governance. Thus, while the PERB may have been correct on the discrete issue it was given to decide, the far broader distinction it drew is simply unworkable and hinders the parties from achieving a satisfactory combination of bargaining and governance. Given a sufficiently flexible scope of bargaining, the evidence thus far indicates that such an accommodation is achievable.

V. Conclusion

In the absence of an alternative, collective bargaining holds the promise of at least a partial remission of the ills of a depressed and increasingly bureaucratized profession. Whether it will prove a satisfactory instrument will depend on a number of variables, including the operation of legal institutions. Insofar as the latter is concerned, however, I am far more sanguine than Carr and Van Eyck about the consequences of the legal relationships created or reinforced as a result of collective bargaining. Indeed, the university experience may well set the model to be emulated by other of the learned professions which find themselves employed by institutions to serve clients. Like professors, organized lawyers and physicians will want to secure economic benefits and a voice in agency policy. As these services come to be viewed as rights rather than privileges, much as higher education, appeals to the image of a bygone independent practitioner relationship will become increasingly out of touch with reality. Carr and Van Eyck's Elegy, doubtless doomed to be replicated by others as Collective Bargaining Comes to the Hospital or Collective Bargaining Comes to the Public Defender's (or District Attorney's) Office, makes piquant but ultimately dissatisfying reading.