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The Limits of Majority Rule in Collective Bargaining

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The Limits of Majority Rule in Collective Bargaining

Matthew W. Finkin*

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I. INTRODUCTION

There have been several decades of experience with the system of exclusive representation by majority rule in the private sector under the National Labor Relations Act (NLRA).[1] In addition, a number of states have recently adopted public sector collective bargaining legislation largely modeled on the federal Act. A question common to both the private and public environments concerns the limits that should be imposed on the terms of the collective bargain.

In the private sector, the primary goal is facilitation of collective bargaining.[2] A vexing problem results from the tension between the statutory system of private ordering by majority rule, a system that precludes government from setting the terms of the collective agreement, and the need to impose an external limit on the resulting bargain in order to protect individuals and minorities from abuses of majority power. Traditionally, the most important limit has been found in the judicially created duty of fair representation, although Congress has increasingly enacted direct limits in the form of antidiscrimination laws. Part II of this Article explores the conflict between majority rule and minority rights in the private sector. It examines the various theories of fair representation, especially the emerging notion that the union adhere to rational decisionmaking processes in the formulation of the collective agreement. It then proposes an approach to fair representation that candidly recognizes the majoritarian basis of collective bargaining. Accordingly, the Article suggests some "rules of thumb" to accommodate the tension between minority rights and majority rule.

In the public sector, the fundamental concern is less with

1. 29 U.S.C. §§ 151-169 (1976).
2. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 CIN. L. REV. 669, 670-71 (1975).

the limits that should be imposed upon the political processes of the employees' representative than with the constitutional limits that flow simply because of the governmental character of the employer. Part III of this Article explores the confusion that has attended the advent of collective bargaining in the public sector, with particular emphasis on requirements of the first and fourteenth amendments and the contract clause. It suggests that although the duty of fair representation should be adopted as a necessary concomitant of collective bargaining in the public sector, the Constitution should be understood to act independent of that duty to limit what a governmental employer may accomplish by collective agreement.

II. THE PRIVATE SECTOR

A. THE SYSTEM OF MAJORITY RULE

In Colonial America, the law of the employment relationship developed from the English law of master and servant. Under the colonial system, labor was afforded many protections. For example, the master was obligated to provide care for his servants, including medical treatment for injuries sustained while in his employ. In addition, workmen could not be dismissed without reason.[3] Much of this approach to the employment relationship continued into the nineteenth century. The rule then was that, unless agreed to the contrary, employment could be terminated only after a period of notice.[4] By the latter part of the century, however, the law had completely changed. All employment, unless agreed to the contrary, was a hiring at will; the employer was free to discharge an employee for arbitrary reasons and without notice.[5] The employer was also free to reduce wage rates or make other changes in terms and conditions of employment. By continuing in employment, the employee was assumed to have assented to the change and therefore to have modified his employment "contract."[6] It was

3. R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 17-18 (1946).

4. The period of notice was determined by the custom of the trade or by a standard of reasonableness. The history of the law is reviewed (and criticized) in Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974). *See also* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

5. For a Marxian analysis of this development, see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

6. *See, e.g.*, Gebhard v. Royce Aluminum Corp., 296 F.2d 17 (1st Cir. 1961); Green v. Dingman, 234 F.2d 547 (8th Cir. 1956); Weiss v. Duro Chrome Corp., 207 F.2d 298 (8th Cir. 1953); Summers v. Ralston Purina Co., 260 Ala. 166, 69 So. 2d 858 (1954); Hauser v. Watson, 60 A.2d 698 (D.C. 1948).

within this legal environment that the modern notion of collective bargaining developed.

The keystone of the American system of collective bargaining is exclusive representation by a union selected by a majority of the employees in the bargaining unit.[7] Once a union is selected, the individual's ability to bargain for himself—usually more theoretical than real—and the employer's ability to deal separately with employees are lost. By operation of law, the agent selected by the majority becomes the representative of each individual, irrespective of the individual's personal will.

Prior to enactment of the National Labor Relations Act (and occasionally even after its passage), courts conceived of the relationship between employee and union as a wholly consensual agency relationship. Accordingly, the terms of such a "trade agreement"[8] bound the employer with respect to an individual employee only if it was determined that the employee consented to be bound as, for example, by belonging to the union or by ratifying the collective agreement.[9] That pre-NLRA approach, however, is at odds with the statutory system of exclusive representation by majority rule, under which the member and nonmember, the union supporter and the antiunion dissident, are all bound by the terms of the collective agreement.

The sweep of the principle of majority rule was made clear by the Supreme Court's 1944 decision in *J.I. Case Co. v. NLRB.*[10] After enactment of the NLRA in 1935,[11] some employers resorted to uniform, individually executed employment con-

7. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1976), provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

For the historical background of the principle of majority rule, see Schreiber, *The Origin of the Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 RUTGERS L. REV. 237 (1971). The background of the provision for majority rule under the Labor Act is discussed in I. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950).

8. *See, e.g.*, F. SAYRE, A SELECTION OF CASES AND OTHER AUTHORITIES ON LABOR LAW 644-71 (1922) (ch. XIII, "Trade Agreements"). *See generally* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 724-36 (1973) ("The Trade Agreement").

9. *See, e.g.*, Shelley v. Portland Tug & Barge Co., 158 Ore. 377, 76 P.2d 477 (1938); Clark v. Claremont Apartment Hotel Co., 19 Wash. 2d 115, 141 P.2d 403 (1943).

10. 321 U.S. 332 (1944).

11. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)).

tracts that, in return for stated benefits, purported to "waive" rights guaranteed by the Act. In *National Licorice Co. v. NLRB*,[12] the Court had no difficulty in holding such a "waiver" of statutory rights ineffective.[13] In *J.I. Case*, however, although the company had entered into individual one-year written contracts[14] governing wage rates and conditions of employment, none of the provisions in the form contract were independently offensive to the Act. The company had merely refused to bargain with the union as to those terms and conditions of employment currently governed by individual contracts. The company did offer to bargain on matters not so governed and to expand the bargaining agenda upon the expiration of those contracts.

The Court held that individual contracts of employment could not bar collective bargaining for employees covered by them.[15] In stating that the "very purpose" of the Act was to "supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group,"[16] the Court also made it clear that a majority representative could negotiate terms that deprive the individual of an existing contractual advantage.[17]

12. 309 U.S. 350 (1940).

13. *See id.* at 360-62. *See generally* Hoeniger, *The Individual Employment Contract Under the Wagner Act: I*, 10 FORDHAM L. REV. 14 (1941).

14. One member of the National Labor Relations Board was dubious that a short form that included no commitment to job security constituted a "contract" at all. J.I. Case Co., 42 N.L.R.B. 85, 100-01 (1942) (member Reilly, concurring).

15. 321 U.S. at 339. If the Court had agreed with the company, a more subtle device to combat unionization than that involved in *National Licorice* would have been permitted. An employer could merely embody its existing wage rates, rules, and working conditions in a standard form to be executed by his employees, and refuse to discuss these matters with a union until the contracts had expired. By that time, the union's strength would probably have been dissipated or sufficient doubt would have been cast on the union's representative status to warrant a refusal to bargain further until a new representation election.

16. *Id.* at 338.

17. The Court further explained:

> The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. . . . [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. . . . [I]ncreased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.

Id. at 338-39.

The late John R. Commons explained how, as a college student earning money as a printer, he learned the "practice and philosophy" to which the Court adverts by participating in the printers' practice of auctioning the specially compensated "fat" work among themselves:

Just as the contractual waiver of statutory rights was ineffective, so too would be any other individual contractual provision inconsistent with the rules established by the collective agreement.[18]

B. LIMITATIONS ON THE SYSTEM OF MAJORITY RULE

The subsumption of individual to collective interests does not imply that there are no limitations on what the collective may do. Congress has increasingly placed statutory limits on employment policy, limits that bind unions as well as employers. Indeed, portions of the NLRA insulate the individual from the reach of the collective. In addition to explicit statutory protections of minority interests, there are indirect statutory safeguards, the most important of which is the duty of fair representation.

1. *Explicit Statutory Limitations on Employment Policy*

The subject matter of a collective bargain is limited by existing statutes and regulations. Federal law may establish minimum standards, which the parties cannot waive by collective agreement. Such minimum standards are imposed, for exam-

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The "fat" was the advertising, baseball scores, and anything that paid more than the regular rate. My first bid on the baseball scores was ten per cent of my gross receipts on that work. This amount was distributed by the "father" [of the union "chapel"] to the other printers. But I made several labor-saving, or rather labor-enlarging, devices. I went to the saloons before working hours and took off the ball-scores which did not usually get to us from the editorial room before eleven o'clock at night. So the boys put up a job on me at the next auction. They, too, thought I was earning too much money and was not a real workingman anyhow. They forced me, by a set-up bidding against me, to put up my bid to forty-two per cent. This, I found, took all or more of the fat, and I had my extra saloon-work and overtime ball-scores for nothing. Yet, by this distribution of all the fat in the office, each of us got one to three dollars per week above our earnings at regular rates.

Thus I learned what was the meaning of collective action in control of individual action. . . . To me it has always been something vivid, even painful; but I learned to look upon it philosophically as the way in which rights, duties, liberties and exposures are created in the relations of the individual to society. My only rights and liberties in typesetting were created by that little society of printers and had been administered, since the gilds of the Middle Ages, by the "father of the chapel."

J. COMMONS, MYSELF 18-19 (1934).

18. As a contemporary observer put it, "[L]ike the legislative branch of government, effecting changes in the law, the union and the employer, by changing from time to time the rules governing hours, wages and conditions of employment, bind the employee to each change effected irrespective of the employee's intent in the matter." Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 561 (1945).

ple, by the Fair Labor Standards Act,[19] the Occupational Safety and Health Act,[20] and Title VII of the Civil Rights Act of 1964.[21] Similarly, the Labor Act itself places a limit on the reach of collective agreements; for example, by proscribing the "hot cargo" clause,[22] the closed shop,[23] and provisions tying job rights too closely to organizational affiliation.[24]

More subtle are questions that concern the power of the collective when confronting rights guaranteed to employees under section 7 of the Labor Act—the right to form or assist labor organizations, the right to engage in collective bargaining or other concerted activities for mutual aid or protection, and the right to refrain from any or all of these activities.[25] Collective rights conferred by the Labor Act, unlike individual rights, can be waived by the collective.[26] The right to bargain, for example, is a collective right; there is no doubt that the collective can prospectively waive its right to prevent unilateral employer adoption of a term not previously bargained about.[27] Similarly, the waivability of the right to strike[28] is supported by a policy that favors industrial peace and stability. Nevertheless, some section 7 rights are individual rather than collective, and therefore may not be infringed by collective agreement. Unfortunately, there is often no bright line that distinguishes waivable collective rights from nonwaivable individual rights.[29]

This was the issue in *NLRB v. Magnavox*,[30] in which the

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19. 29 U.S.C. §§ 201-219 (1976 & Supp. I 1977).
20. 29 U.S.C. §§ 651-678 (1976).
21. 42 U.S.C. §§ 2000e, 2000e-1 to -17 (1976).
22. 29 U.S.C. § 158(e) (1976).
23. *Id.* § 158(a)(3).
24. *Id.* § 158. *See* Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).
25. 29 U.S.C. § 157 (1976).
26. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court distinguished title VII rights from collective rights conferred by the Labor Act:

> It is true . . . that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.

Id. at 51 (citations omitted).

27. *See, e.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).
28. *See, e.g.*, Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 283 (1956).
29. *See* Finkin, *The Truncation of* Laidlaw *Rights by Collective Agreement*, 3 INDUS. REL. L.J. (1979) (in press). I am indebted to my colleague, Robert Brousseau, for sharing his thoughts on this subject.
30. 415 U.S. 322 (1974).

Supreme Court held that the right to distribute literature in the plant, relevant to the selection or retention of a union, could not be waived by a collective agreement. The majority concluded that a waiver of the right of dissident employees to circulate literature critical of the incumbent union or its leadership would permit entrenchment of the incumbent in contravention of the statutory policy of employee free choice in selecting a bargaining representative. The dissenting Justices argued that although the union could not, consistent with section 7, waive the rights of dissidents, it could waive the rights of its own "supporters."[31] In so arguing, Mr. Justice Stewart pointed out that presumably no one doubted that the union could waive its right to distribute its own institutional literature.[32] Although the dissent does draw attention to an apparent inconsistency between the majority's rationale and the result, some members of the bargaining unit would, under the dissent's reasoning, be bound by the terms of the collective agreement and others would not; thus, the dissent's reasoning is inconsistent with the statutory system of exclusive majority representation. The better view is to consider *Magnavox* as holding that the expression, by in-plant dissemination of literature, of opinion concerning the retention or displacement of a union is an individual right conferred by the Labor Act, a right that a collective agreement cannot abrogate despite countervailing considerations of industrial stability and irrespective of whether the individual favors an incumbent.

If this view of *Magnavox* is sound, the reason must be found in the policy of the Act. It is possible that the dissemination of spontaneous, supportive and semi-supportive literature, as well as literature that is blatantly critical, may give the union a more evenhanded sense of its strengths and weaknesses. Limiting the expression of views at the workplace to those of one persuasion would skew the impact of such expression. Open, robust debate may conceivably help make the union more balanced as well as more responsive. Therefore, implicit in *Magnavox* is the assumption that employee free choice in the selection or retention of collective representation necessitates the freedom to speak out at the workplace on the merits of an incumbent.

In sum, external law, including relevant portions of the Labor Act, may constrain employment policy. Such provisions

31. *Id.* at 327-32.
32. *Id.* at 329 n.*.

are insulated from disposition by a majority. As *Magnavox* evidences, however, the determination of what rights under the Labor Act are insulated often involves a choice between conflicting policies in the Act itself. But where employment policy is unconstrained by external law, the Labor Act requires that the majority have the exclusive voice in the fashioning of the rules governing the workplace. As *J.I. Case* made clear, the Act necessarily contemplates that the majority may advantage itself at the expense of individuals who might be better off without collectivization.[33]

2. *Statutory Safeguards for Minority Interests*

In adopting a system of majority rule, Congress did not "authorize a tyranny of the majority over minority interests."[34] In so stating, the Supreme Court adverted to three safeguards against abuse of majority power, two of which seem of questionable utility. First, the representative's power governs only a "unit appropriate for the purposes of collective bargaining," that is, a "group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment."[35] Second, the Landrum-Griffin Act[36] ensures that minority voices can be heard in union affairs. Finally, the statutory duty of fair representation imposes a limit on the majority's treatment of individuals and minorities.

The first safeguard would be significant if the bargaining unit under section 9(a) of the Labor Act[37] actually conformed to the Court's characterization—that is, if the union were elected by, negotiated for, and accountable solely to the narrowest group of employees with congruent interests. This characterization, however, is often inaccurate. In reality, a unit determination reflects, for the most part, the structure of the employer's business and the wishes of the petitioning labor organization.[38] Moreover, the "appropriate bargaining unit" is often no more than the district in which the representation

33. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). *See* text accompanying notes 10-18 *supra*.

34. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 64 (1975).

35. *Id.* (citing Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 171 (1971)).

36. 29 U.S.C. §§ 411-415 (1976).

37. *Id.* § 159(a).

38. *See* Schatzki, *Majority Rule, Exclusive Representation, and the Inter-*

election is conducted. The bargaining structure actually worked out by the union and management may far transcend the individual election districts in which the union initially achieved majority status.[39] For example, although the union may have been elected on a plant-by-plant basis, it may nevertheless conduct negotiations on a company-wide or even a multi-employer basis. The unit actually represented in bargaining may therefore contain groups with highly divergent, if not conflicting, interests.[40] Moreover, although *Magnavox* assures union critics a fair opportunity to campaign against an incumbent or its policies,[41] the union and the employer may bargain to consolidate the election districts,[42] thereby insulating the union from the likelihood of being successfully challenged in the larger unit.[43] Given these realities, it is questionable that minority interests are routinely afforded any significant protection by the requirement of an appropriate unit.

The second safeguard may protect the minority, but only indirectly. The Landrum-Griffin Act ensures that union members have the right to speak, vote, and participate in the affairs of the union, subject to such reasonable rules as the union may adopt.[44] If a minority within the union decides to form a caucus to pressure the union to achieve minority goals, the Act ensures that the minority may have a fair opportunity to do so. The Act, however, does not ensure that the majority will accede, even partially, to minority interests. Moreover, the Act does not provide for the adoption of any particular process for the negotiation and ratification of collective agreements. Thus, unless a union has adopted rules ensuring special participation by a minority whose interests are being disposed of by collective agreement, there is scant protection under the Landrum-

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ests of Individual Workers: Should Exclusivity be Abolished?, 123 U. PA. L. REV. 897, 898 (1975).

39. *See generally* THE STRUCTURE OF COLLECTIVE BARGAINING (A. Weber ed. 1961).

40. Even in smaller, more homogeneous units, the union may be compelled to make choices that will inevitably have adverse effects on some individual or group within the units.

41. NLRB v. Magnavox, 415 U.S. 322 (1974). *See* text accompanying notes 30-32 *supra*.

42. *See, e.g.*, Chase Brass & Copper Co., 123 N.L.R.B. 1032, 1036 (1959); General Motors Corp., 120 N.L.R.B. 1215, 1220 (1958).

43. The Board's approach has been criticized in Brooks & Thompson, *Multi-Plant Units: The NLRB's Withdrawal of Free Choice*, 20 INDUS. & LAB. REL. REV. 363 (1967).

44. 29 U.S.C. § 411 (1976).

Griffin Act for the minority when its interests may be most directly affected.[45] Accordingly, the only direct legal safeguard of minority interests in a regime of majority rule is the duty of fair representation.[46]

C. The Duty of Fair Representation in Contract Making

1. *The Judicial Roots and the Search for Standards*

The duty of fair representation was created in *Steele v. Louisville & Nashville Railroad*,[47] a case decided in the same year as *J.I. Case*.[48] In *Steele*, the Brotherhood of Locomotive Firemen and Enginemen, in its capacity as the exclusive bargaining agent for the railroad's firemen, negotiated to restrict and ultimately to exclude black firemen from employment. Inasmuch as the union's authority derived from the Railway Labor Act, the challenge to these racially restrictive provisions was predicated upon constitutional grounds; the Court, however, obviated the constitutional issue by abstracting from the

45. Bok and Dunlop suggest that internal union politicking, while imperfect, nevertheless does provide a significant protection for minority interests. D. Bok & J. Dunlop, Labor and the American Community 114-16 (1970).

46. It ought to be observed that the duty applies only after it has been determined that the matter is properly subject to disposition by the majority. Outright statutory limits upon the bargain have been noted previously. *See* text accompanying notes 19-24 *supra*. But even though *J. I. Case* makes plain that existing contract rights may be negotiable, *see* text accompanying notes 16-18 *supra*, the Court has implied that some contract rights may be insulated from the reach of the collective. In Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), the Court held that the subject of retirement benefits for retirees was a permissive bargaining subject—that is, a matter which is not subject to the statutory duty to bargain but about which the parties may agree to bargain. The Court noted that retirees are not unprotected if a union does bargain with their former employer about existing retirement benefits. In cases where retirement benefits under a separate pension plan have vested as a matter of contract law, they "may not be altered without the pensioner's consent." *Id.* at 181 n.20 (citing Note, *Pension Plans and the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 916-20 (1970)). It suffices to say here that inasmuch as collective agreements invariably contemplate periodic renegotiation, antecedent provisions of a collective agreement cannot be considered to "vest" rights in the sense of totally insulating employees from subsequent alteration or abrogation. Whether the collective may so reduce or abrogate is governed by the duty of fair representation.

47. 323 U.S. 192, 202-03 (1944). The duty applies under the National Labor Relations Act as well as under the Railway Labor Act. Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955) (per curiam). Moreover, breach of the duty has been held to be an unfair labor practice under the National Labor Relations Act, remediable through an action before the National Labor Relations Board (NLRB). NLRB v. Miranda Fuel Co., 140 N.L.R.B. 181, 188 (1962), *enforcement denied on other grounds*, 326 F.2d 172, 180 (2d Cir. 1963). For a full discussion of the Board's role with respect to the duty of fair representation, see Fanning, *The Duty of Fair Representation*, 19 B.C. L. Rev. 813, 820-37 (1978).

48. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

Railway Labor Act a statutory duty of fair representation arrived at only by analogy to the equal protection clause rather than by constitutional command.[49] Relying on *J.I. Case*, the Court observed that although the union was given the power "both to create and restrict" rights,[50] there was also a corresponding obligation to act "without hostile discrimination":

> This does not mean that the statutory representative . . . is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit.[51]

Racial discrimination was found not to be based on such "relevant differences," and was thus held to violate the duty of fair representation.[52]

Two aspects of the duty of fair representation concerning, respectively, the consequences and content of the duty were discussed in *Steele*. The Court made it clear that the effect of finding that a provision of a collective agreement violates the duty of fair representation is the excision of the offensive term.[53] In addition, the Court noted that blacks, who were ineligible for membership in the union, had been given no opportunity to be heard by the union prior to the negotiation of the collective agreement that discriminated against them. The Court stated that, when necessary to fulfill the duty to represent "non-union members" fairly in collective bargaining, the union should give them "notice of and opportunity for hearing upon its proposed action."[54] This language suggests that the duty of fair representation might encompass a procedural duty owed to those otherwise prohibited from participating in the union's internal decisionmaking processes.

The duty of fair representation in contract making was ex-

49. "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." 323 U.S. at 202.

50. *Id.*

51. *Id.* at 203.

52. *Id.*

53. The Court stated: "No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making." *Id.* at 203-04.

54. *Id.* at 204.

plored more fully in *Ford Motor Co. v. Huffman*.[55] In that case, the union had negotiated a seniority provision under which preemployment military service was computed as part of company seniority. This provision had the effect of lowering the seniority rankings of a number of employees who had more company service than some veterans. In sustaining the provision against a fair representation challenge, the Court emphasized the need for negotiators to exercise discretion and to make concessions that, in the light of all relevant considerations, they believe would best serve the interests of all:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[56]

The Court then cataloged, as it had in *Steele*,[57] permissible factors that a union could reasonably take into account in negotiating differential treatment.[58] In so doing, it cited a Michigan case, *Hartley v. Brotherhood of Railway & Steamship Clerks*,[59] as illustrative of an acceptable differentiation. In *Hartley*, the railroad served notice upon the union to renegotiate the rules governing seniority and employment in light of employee protests that males, who were presumably heads of households, were being laid off while married women, albeit with greater seniority, were being retained. At a subsequent union meeting, the majority approved a policy to dismiss all married women from employ, subject to exceptions for extenuating circumstances. As a result of this agreement, the plaintiff lost her job. The Michigan Supreme Court observed that the modification was not the result of "bad faith, arbitrary action, or fraud."[60] In a time of retrenchment, seniority rules, even if long-standing, might permissibly be jettisoned in favor of a policy ensuring

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55. 345 U.S. 330 (1953).
56. *Id.* at 338.
57. *See* text accompanying note 51 *supra*.
58. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in the course of service, and the time of labor devoted to related public service, whether civil or military, voluntary or involuntary.

Id. at 338-39.

59. 283 Mich. 201, 277 N.W. 885 (1938).
60. *Id.* at 207, 277 N.W. at 887.

that work is distributed among heads of households. The policy adopted—aside from the stereotypical assumption that married women are not heads of households—cannot be said to have been unreasonable, in light of prevailing economic circumstances. Thus, in evaluating differential treatment, both the Michigan court in *Hartley* and the Supreme Court in *Ford Motor Co. v. Huffman*[61] looked to larger social policies to sustain the ground upon which the union acted.

In *Humphrey v. Moore*,[62] a union was presented with the problem of determining the seniority rights of truck drivers after one trucking company absorbed the business of another company. Under the collective agreement, such disputes were to be resolved by a joint board consisting of an equal number of employer and union representatives from the multi-employer, multi-local unit. Although the Court chose to treat the question as one involving the union's responsibility in the administration of the grievance procedure, the case actually concerned the extension of collective bargaining to an unresolved problem.[63] The joint board adopted the local's proposal that the two groups of truck drivers should be dovetailed according to their respective seniority. Thus, the union took a position adverse to the interests of those drivers of the acquiring company who would be disadvantaged by the seniority awarded the acquired employees. The Court held that there was no breach of the duty of fair representation:

> Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.
>
> . . . [T]he union took its position honestly, in good faith and without hostility or arbitrary discrimination. . . . Inevitably the absorption would hurt someone. By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors.[64]

These decisions pose a vexing problem. It is difficult to reconcile external review of the terms of the collective agreement, in order to protect individuals and minorities, with the purpose of the Labor Act—the establishment of a system of private ordering by majority rule, which system ordinarily excludes gov-

61. *See* text accompanying notes 55-56 *supra*.
62. 375 U.S. 335 (1964).
63. For a full discussion of the politics and uses of the Teamsters' "open-end grievance procedure," see R. JAMES & E. JAMES, HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER 167-85 (1965) (ch. 11, "Manipulating the Open-End Grievance Procedure").
64. 375 U.S. at 349-50.

ernment from setting the terms of the collective agreement.[65] It has been argued, for example, that the allocation of jobs in merger situations according to the ratio of job opportunities provided by each respective employer "is the most equitable and rational standard by which a court can judge the substantive fairness of a merger of seniority lists."[66] The necessary institutional consequence of the argument, however, is that a court should first determine what fairness requires and compel the union either to adhere to that or show valid business reasons for deviation. In effect, the argument would narrow the range of private ordering and eliminate any consideration of majority rule by having a court dictate the substance of the arrangement.[67] Although there is a general consensus that the inquiry should be less intense when the terms of a collective agreement are challenged than when the union's conduct of the grievance and arbitration procedure is involved,[68] the identifi-

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65.
> If the collective interest is to prevail, individual interest can no more defeat the power of the exclusive representative to make changes than individual contracts can defeat the power of the collective representative to negotiate a binding agreement superceding all individual arrangements in the first place. . . . Unfettered power in the exclusive representative to appraise the collective interest is the *sine qua non* of its vindication.

Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260, 261-63 (1964) (footnotes omitted).

66. Note, *Seniority and Business Mergers: The Union's Duty of Fair Representation*, 35 U. CHI. L. REV. 342, 358 (1968).

67. The Fourth Circuit has, in dictum, come close to adopting this view. *See* Ekas v. Carling Nat'l Breweries, Inc., 602 F.2d 664, 667 (4th Cir. 1979) ("Since over half of the combined production at the Beltway plant was expected to consist of Dillon Street products, an endtailing provision putting Dillon Street employees after the Beltway employees in seniority would have been patently unfair.").

68.
> In practical terms, the union's need for flexibility in negotiating collective agreements is of a different dimension from its need for flexibility in interpreting and applying collective agreements. The collective agreement is a complex package of provisions and benefits. In negotiating an agreement, the union must accommodate the overlapping and competing demands of varied interest groups, surrendering or compromising some demands to achieve others. Relative advantages and disadvantages of different proposals to the various groups must be weighed both singly and in combination. The package put together represents not only a bilateral compromise between the union and the employer, but also a multilateral compromise among interest groups within the union.

Summers, *The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?*, in THE DUTY OF FAIR REPRESENTATION 60, 64 (J. McKelvey ed. 1977). *See also* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1475-76 (1963); Walther, *The Board's Place at the Bargaining Table*, 28 LAB. L.J. 131, 136 (1977). *But see* Hanslowe, *The Collective Agreement and the Duty of Fair Representation*, 14 LAB. L.J. 1052, 1069 (1963).

cation of suitable standards to refine the duty of fair representation in contract making continues to prove troublesome.[69]

2. *Three Approaches to Fair Representation in Contract Making*

In addition to the elemental notion of good faith, two generalized theories of fair representation have been offered. Under the first theory, the union is considered a "fiduciary" for those it represents. The second theory is framed in terms of procedural fairness. After examining these theories, this Article proposes a more particularized, functional approach.

a. The Theory of Fiduciary Responsibility

A separate taproot of the duty of fair representation is derived from analogy to the law of agency.[70] As the Court observed in *Steele*, "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the

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69. Because the *Steele* Court proceeded by analogy to the Constitution, the equal protection clause has been suggested as one source of guidance. Note, *Duty of Union to Minority Groups in the Bargaining Unit*, 65 HARV. L. REV. 490, 491-92 (1952). However, it has been argued that the use of the constitutional analogy is misleading because it unduly accords collective agreements the same presumptive weight as acts of the legislature. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1339-40 (1958). In any event, it has been suggested that the analogy of the bargaining agent to the legislature cannot be pressed very far. *See* Schatzki, *supra* note 38, at 902.

Other suggested sources of standards include collective bargaining and industrial practice, the expectations of employees, and the moral precepts of the community and the industrial world. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 168 (1957). It has been argued, however, that the duty of fair representation in contract making "should allow the union, in good faith, to negotiate changes in conditions of employment as to all matters except seniority rights." Blumrosen, *supra* note 68, at 1482. By this analysis, the good faith test would satisfy the duty of fair representation in the making of collective agreements for all employee interests other than seniority rights, the moral precepts of the community and the degree of contrary employee expectation notwithstanding. Even scrutiny of the "expectations of the employee community," Wellington, *supra*, at 1357-61, is troublesome, at least insofar as it rests on collective bargaining practice in the industry. Consideration of industrial practice is, necessarily, a significant element in developing a body of law sensitive to the system of collective bargaining. Where a bargaining agent departs from the "moral standards of the industrial world," Cox, *supra*, at 168, a clear-cut case of breach of the duty of fair representation would surely be presented. However, to allow a finding of breach of the duty only where there is a departure from industrial practice would undermine the notion that the duty is an external limit imposed upon the system of majority rule. An excess of the system of majority rule is no less an excess just because it is widely practiced.

70. Summers, *supra* note 68, at 61.

power in their interest and behalf . . . ."[71] Courts have frequently referred to the "fiduciary" nature of the union's responsibility toward all members of the unit it represents.[72]

A union is, however, an odd type of fiduciary. Judge Leventhal recently compared the union's responsibility to that of a "parent who must resolve a quarrel between brothers."[73] Like the parent, the union does not derive its authority from the personal consent of each of those who are governed by its decisions. Also, like the parent, the union must decide what is best for the entire unit despite conflicts between individuals in the unit. Unlike the parent, however, the union is a candidly majoritarian political body that may provide advantages for the majority at the expense of a minority for no reason other than the majority's desire to do so.[74]

The practical difficulty with the theory of the union as a fiduciary lies in the very amorphousness of that standard. As Mr. Justice Frankfurter observed, "[T]o say that a man is a fiduciary only begins analysis . . . ."[75] The fiduciary theory may supply a tone with which to approach fair representation questions,[76] but it does not provide a workable standard.

b. The Theory of a Rational Decisionmaking Process

One commentator has argued that the purpose of the duty of fair representation is to compensate employees for their

71. Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944).

72. *See, e.g.*, Smith v. Hussmann Refrigerator Co., 100 L.R.R.M. 2238, 2246 (8th Cir. 1979) ("The union is the agent of all employees in the unit and owes a fiduciary duty to represent their interests . . . ."); Deboles v. TWA, 552 F.2d 1005, 1014 (3d Cir. 1977) ("Thus, seniority differences disadvantageous to a segment of a collective bargaining unit have been upheld . . . where the distinctions were found to fall within the range of reasonableness which governs the union's fiduciary responsibility to its members.") (citations omitted); Waiters Local 781 v. Hotel Ass'n, 498 F.2d 998, 1000 (D.C. Cir. 1974) ("The fiduciary principle precludes arbitrary conduct . . . .").

73. Waiters Local 781 v. Hotel Ass'n, 498 F.2d 998, 1000 (D.C. Cir. 1974).

74. One court has suggested that a conflict of interest within the union "dispels [the notion of] a true agency" relationship between the affected members and the union. Nichols v. National Tube Co., 122 F. Supp. 726, 729 (N.D. Ohio 1954), *rev'd sub nom.* United States Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir.), *cert. denied*, 351 U.S. 950 (1956). The agency relationship created by the Labor Act has been read to "repudiate common law agency concepts—to subordinate individual and group interests within the bargaining unit to the common interest of the entire class." Ratner, *supra* note 65, at 264.

75. SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943). The difficulties of the fiduciary concept in the more traditional business setting are discussed in *Fiduciary Responsibilities Symposium*, 9 LOY. CHI. L.J. 525 (1978).

76. *See* Summers, *supra* note 68, at 61.

"lost opportunity to bargain for themselves."[77] As a result, the union must "give fair consideration to minority interests."[78] This standard, the commentator concludes, demands that unions "adhere to rational decisionmaking processes."[79] The Labor Board has reserved the question of "whether to adopt [it] full-blown."[80] The Ninth Circuit, however, has recently adopted this formulation,[81] and the Seventh Circuit has approved it.[82] Other circuits have declined to construe the duty of fair representation as imposing any particular decisionmaking process upon the union.[83]

The theory of a "rational decisionmaking processes" requirement proceeds from the assumption that existing law, although adequately protective of large factions, is "inadequate to protect invisible minorities."[84] If the union is required to give fair consideration to the interests of "invisible minorities," however, the union should first be required to ascertain what those interests are.[85] Accordingly, the theory of a "rational decisionmaking processes" requirement necessarily imposes external standards on the union's internal decisionmaking processes.

The potential reach of this theory is amply illustrated in the District of Columbia Circuit's decision in *Branch 6000, National Association of Letter Carriers v. NLRB*.[86] This case involved the postal workers' national agreement, which allowed the union's locals to determine whether the schedule of days off would be fixed or rotating. A local held a referendum to decide that question and, by a one-vote margin, the membership indicated a preference for a fixed schedule. The Labor Board

77. Comment, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1131 (1973).

78. *Id.*

79. *Id.*

80. Rhodes & Jamieson, 217 N.L.R.B. at 618 n.9.

81. *See* NLRB v. Truck Drivers Local 315 (Rhodes & Jamieson), 545 F.2d 1173 (9th Cir. 1976), *enforcing* 217 N.L.R.B. 616 (1975).

82. Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976).

83. *See, e.g.*, Waiters Local 781 v. Hotel Ass'n, 498 F.2d 998 (D.C. Cir. 1974); McMullans v. Kansas, Okla. & G. Ry., 229 F.2d 50 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956). *Cf.* Confederated Independent Unions v. Rockwell-Standard Co., 465 F.2d 1137 (3d Cir. 1972) (holding no statutory obligation to submit contract for membership ratification); Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians, 303 F.2d 229 (6th Cir. 1962) (holding no statutory obligation to submit contract for membership ratification).

84. Comment, *supra* note 77, at 1158.

85. This is especially true if the minority is so invisible to the union that it will not have its distinctive interests represented in the union's decisionmaking apparatus.

86. 595 F.2d 808 (D.C. Cir. 1979).

held that the failure to include nonunion members in the vote violated the Labor Act by establishing working conditions in a manner that encouraged employees to join the union.[87] The court of appeals enforced the Board's order, but based its conclusion on the theory that, because the views of nonmembers were not reflected in the vote, the referendum procedure breached the duty of fair representation owed to nonmembers. The court suggested that, although a union could decide scheduling questions by negotiation and contract ratification that is limited to union members,[88] a decision by direct referendum must permit nonmember participation.

To the extent that the decision rests on the formalism of a referendum, it produces a bizarre result. Under the imposed remedy, the local must conduct a new referendum of the entire unit, including nonunion members. Given the almost even division among union members, that term of employment will be determined, in effect, by those who have chosen not to participate in the affairs of the collective representative.

The opinion goes on, however, to speak more broadly in terms that fully contemplate a judicially imposed special obligation toward some employees who may also be union members.

> In most cases a general familiarity with the working environment may allow a representative of some experience to appreciate adequately the perspective of all employees. There must be communication access for *employees with a divergent view*, although there is no requirement of formal procedures. Where, as here, it appears to the Board that as a practical matter one segment of the bargaining unit has been excluded from consideration, it may find a breach of the duty of fair representation.[89]

Thus, *Branch 6000* holds open the possibility of judicial review of the adequacy of the union's internal channels of communication to specially situated groups, whether members or nonmembers.

The theory that the duty of fair representation requires "rational decisionmaking processes" suffers from four infirmities. First, the sole historical support for any procedural com-

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87. Branch 6000, National Ass'n of Letter Carriers, 232 N.L.R.B. 263 (1977) (citing Radio Officers' Union v. NLRB, 347 U.S. 17 (1954)).

88. The court indicated that a system of negotiation and contract ratification, although limited to union members, would still hold open the possibility that the views of nonmembers could be filtered through the union's decisionmaking process. In such a case, there is a "general presumption . . . that the representative obligation has been performed in good faith." 595 F.2d at 812.

89. *Id.* at 813 (emphasis added).

ponent to the duty of fair representation is that set forth in *Steele*:

> While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of *non-union members* of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.[90]

The language reflects considerable care in distinguishing the narrower procedural obligation from the general obligation owed both to nonmembers and minority union members. It is apparent that the Court was prepared to impose on the union special procedural obligations only toward those persons who were not eligible to participate in the union's internal decision-making processes.[91] Thus, *Branch 6000* completely inverts the logic of *Steele*. In essence, the District of Columbia Circuit has held that, by opting out of the channels of communication provided by membership, an individual may trigger a judicially imposed obligation for a union to provide the means of entertaining his views.

Second, the imposition of a requirement that the union's channels of communication be fair to "invisible minorities" who may nevertheless be union members creates the potential for substantial and essentially unfettered governmental intrusion into the internal processes of labor organizations. Congress has, in fact, considered and rejected a provision that would produce much the same result. The House version of the Labor Management Relations Act of 1947 would have amended the National Labor Relations Act to declare it a basic employee right "to have the affairs of the [labor] organization conducted in a manner that is fair to its members and in conformity with the free will of a majority of the members."[92] In opposing the amendment, the minority House report argued that it would create "an open invitation to complete and unlimited control by the Federal Government of the internal affairs"[93] of labor organizations. The Senate had adopted no

90. Steele v. Louisville & N.R.R. 323 U.S. 192, 204 (1944) (emphasis added).

91. *See also* pleadings noted in Williams v. Pacific Maritime Ass'n, 384 F.2d 935, 938 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968).

92. H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 31, 50 (1948) [hereinafter cited as LEGISLATIVE HISTORY].

93. H.R. REP. No. 245, 80th Cong., 1st Sess. (1947) (Minority Report), *reprinted in* LEGISLATIVE HISTORY, *supra* note 92, at 355, 368.

similar provision, and the conference committee deleted the requirement.[94] Consequently, it is highly questionable whether the duty of fair representation should be extended by judicial action to require a result that Congress has clearly rejected both in terms and effect.

Third, as a practical matter, contract negotiations are often conducted on a multi-plant or even a multi-employer basis. As a result, the collective agreement may affect local customs or plant practices not known to the negotiators. The imposition of special obligations on the union to inform itself of such conditions as a part of the duty of fair representation would surely burden the bargaining process and might inhibit the conduct of industry-wide or multiple-party bargaining.[95]

Finally, and perhaps most importantly, fair representation cases ordinarily result from a union's confrontation with varying or conflicting interests within the unit. The requirement of "rational decisionmaking processes," to the extent that it imposes an obligation on the union to inform itself fully of the desires of each individual it represents, would merely clarify the division and differences that the union is called upon to reconcile. Furthermore, it would be scant recompense for the individual's loss of the ability to bargain if a union were free to disregard his interests after merely providing him with some opportunity to be heard. Accordingly, there must be a substantive component to the seemingly procedural requirement that the union "adhere to rational decisionmaking processes."[96] In

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94. H.R. REP. NO. 510, 80th Cong., 1st Sess. (1947) (Conference Report), *reprinted in* LEGISLATIVE HISTORY, *supra* note 92, at 505, 543-44. The Conference Committee did approve provisions to create the section 7 right to refrain from union activity and to make it an unfair labor practice for a union to coerce or restrain employees in the exercise of section 7 rights.

95. The implications may be illustrated in Brotherhood of Maintenance of Way Employees v. Butte, A. & Pac. Ry., 201 F. Supp. 703 (D. Mont. 1962). The carriers and railway unions conducted nationwide, multi-employer, multi-union bargaining. The resulting agreement provided, *inter alia*, for life insurance of $4,000 to be paid by the employers. The employees of one carrier, however, had long been entitled under Company policy to $6,000 of life insurance and they sued the carrier to compel it to maintain the antecedent benefit. The court adverted to the case as demonstrating "dangers . . . particularly [to] employees, inherent in the practice of permitting local rates of pay, rules and working conditions to be settled on the basis of national negotiations." *Id.* at 709. Nevertheless, the court stated that "whether they realized it or not, or whether they so intended [the unions] have bargained away" the previous insurance package. *Id.* The case would be extremely troublesome if the duty of fair representation required the union to have informed itself of the effect of acceptance of the carriers' proposal on these specially situated employees—employees who, although members, clearly constituted an "invisible minority" in bargaining.

96. Although the Texas Comment suggests that procedural rigor will mini-

other words, after ascertaining the views of the minority, the union must either accommodate the minority's interests or satisfy an external tribunal with substantive reasons, irrespective of union politics, that explain why such minority accommodation was not reasonable.

This element is reflected in *Red Ball Motor Freight*.[97] In that case, a company that operated a terminal with fifty employees, represented by the Union of Transportation Employees (UTE), acquired a terminal with thirty employees, represented by the Teamsters. When the company subsequently announced its intention to close the teamsters' terminal and move all operations to the other terminal, the Board ordered an election to determine which union would represent the employees of the merged entity. During the campaign, the UTE took the position that, if chosen as the bargaining representative, it would not agree to a dovetailing of seniority lists, as would be the case if the Teamsters won. The Board concluded that this campaign conduct amounted to an announcement of intention to breach the duty of fair representation. The District of Columbia Circuit agreed:

> UTE has renounced any good faith effort to reconcile the interests of the [two groups]. It raised no questions with respect to the merits of dovetailing, such as that some jobs are more difficult of execution or require more training than others. . . . UTE has, in sum, failed to come forward with any reason at all for preferring the [favored] employees other than the purely political motive of winning an election by a promise of preferential representation to the numerically larger number of voters.[98]

This reasoning simply ignores both the political nature of the union[99] and the candidly majoritarian character of collec-

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mize the intensity of judicial review of the substance of the decision, the Comment also recognizes the conundrum: "[I]nstead of reviewing the union's choice of alternatives for reasonableness or fairness, courts should review the union's decisionmaking process. If the union gave fair consideration to the complaining employees' interests *and based its decision on rational factors*, the court should not interfere." Comment, *supra* note 77, at 1132 (emphasis added).

97. Truck Drivers Local 568 v. NLRB (Red Ball Motor Freight, Inc.), 379 F.2d 137 (D.C. Cir. 1967). *Branch 6000*, in turn, relied on *Red Ball Motor Freight*. *See* Branch 6000, National Ass'n of Letter Carriers v. NLRB, 595 F.2d 808, 813 & n.20 (D.C. Cir. 1979); text accompanying notes 86-89 *supra*.

98. *Id.* at 142-43.

99. On the political nature of the union, Arthur Ross has observed:

> A trade union is never a homogeneous group. The ordinary "craft" union includes a number of skilled occupations as well as apprentice and helper categories, and the occupational composition of an industrial union, is, of course, even more heterogeneous. . . . Even within a single industry, there are the employees of profitable and unprofitable firms, and the employees residing in high-wage and low-wage areas. Moreover, there are young and old workers, fast and slow workers,

tive bargaining. Regarding the latter, the Court in *J.I. Case* took special note of the "practice and philosophy of collective bargaining."[100] A statement about the practice of collective bargaining, made roughly contemporaneously with *J.I. Case*, speaks to the issue in *Red Ball Motor Freight*:

> In many situations the union ranks are split on what kind of seniority rules should be in force, as one set of workers will get better job protection through departmental seniority, or even job seniority, than through plant-wide seniority, which another set of men prefers. Here the rule of the majority is the only solution, for all a union can hope to do is serve the best interests of the greatest number of its members. . . . [O]f necessity, the union's approach to seniority rules is frankly opportunistic; it is job protection the union members want, and they fit seniority rules into this desire and not job protection into seniority rules.[101]

The court in *Red Ball Motor Freight*, however, perceived its institutional role as compelling the union to come to grips with the problem on the merits irrespective of the desires of the majority. In so doing, the court ignored the teaching of *J.I. Case*: it is part-and-parcel of the concept of collective bargaining for a majority, at times, to benefit itself at the expense of a minority. The vexing problem, unattended by the Court in *Red Ball Mo-*

> male and female workers, married and single workers, employed and unemployed workers.
>
> Nonhomogeneity of membership often gives rise to conflicts of interest; it is one of the most delicate political tasks of the union leadership to reconcile these conflicts in formulating its wage program. The ultimate resolution depends upon (1) the effective political pressure generated by the various interest groups and (2) the political skill of the leadership.

A. ROSS, TRADE UNION WAGE POLICY 31-32 (1948). *See also* A. Weber, Union Decision-Making in Collective Bargaining; A Case Study on the Local Level 149 (Institute of Labor and Industrial Relations, University of Illinois, Urbana 1951), *quoted in* note 188 *infra*.

100. J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

101. C. GOLDEN & H. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 127 (1942). A recent illustration is supplied in Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir. 1975). The collective agreement provided for dovetailing in cases of merger subject to alteration by the Change of Operations Committee. The Committee ordered the dovetailing of some of the acquired employees and the endtailing of others. The representative of the local union testified to the circumstances surrounding the change:

> I had quite a lot of trouble with the Yellow Freight drivers * * *. Everybody knew that Watson drivers had a lot of seniority, Watson was an old line * * * and they didn't want any of them down there. * * * [T]hey felt that they had no reason to be there * * *. And there was a lot of dissatisfaction amongst the drivers, and well, it got pretty bad. They was about ready to throw me out of the hall, and the president of our local, too, because they absolutely didn't want to lose any of their work.

Id. at 453 (omissions are in case report).

tor Freight, is to provide some means for deciding what those times are.[102]

In sum, the theory of a "rational decisionmaking processes" requirement rests on the faulty assumption that a union is comparable to an administrative agency with power to issue rules governing the workplace. By that analogy, an appropriate judicial function is to ensure the agency's (the union's) adherence to procedures that maximize the participation of affected groups and to ensure that the resulting rules are not arbitrary. The assumption, however, is inconsistent with the Labor Act.

c. A Functional Analysis: Some "Rules of Thumb"

The gravamen of the duty of fair representation in contract making is the protection of the minority from an abuse of majority power in the context of a system which fully contemplates that the majority may, at times, permissibly advantage itself at the expense of the minority. The function of the duty of fair representation is simply to limit how far the majority may go in advantaging itself at the expense of the minority.

Courts have identified several elements of the duty—to act without hostility, malice, dishonesty, or bad faith, or upon arbitrary,[103] irrational, or irrelevant grounds[104]—and have treated these elements as uniformly applicable in cases of both con-

102. In *Branch 6000* as well, the court, relying upon *Red Ball Motor Freight*, stated:

> If a representative's negotiating decisions are motivated solely by self-interest, then there is a breach of the duty of fair representation. The same result obtains when the decisionmaking function is delegated to a group of employees with the understanding that their actions will be motivated solely by their own personal considerations.

595 F.2d at 812. The court recognized that this was not a situation of members advantaging themselves at the expense of nonmembers. The defect was entirely procedural. If the court's observation is correct, it should not have made a difference that nonmembers were excluded from the referendum. Any system of decisionmaking that rests solely upon the sum of individual preferences will produce a majority and minority. Under the court's reasoning, whatever result the "swing vote" of nonmembers produced would rest on nothing but the self-interest of the majority of that group, and so would breach the duty to represent the minority fairly. *See also* text accompanying note 220 *infra*.

103. The Third, Seventh, Ninth, and District of Columbia Circuits have said that arbitrariness is a distinct element of breach of the duty of fair representation in contract making. Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747 (3d Cir. 1977); NLRB v. Truck Drivers Local 315, 545 F.2d 1173 (9th Cir. 1976); Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976); Waiters Local 781 v. Hotel Ass'n, 498 F.2d 998 (D.C. Cir. 1974). In 1972, the Second Circuit required "[s]omething akin to factual malice," Jackson v. TWA, 457 F.2d 202, 204 (2d Cir. 1972), but later held, without reference to *Jackson*, that arbitrariness is sufficient to breach the duty. Jones v. TWA, 495 F.2d 790, 798 (2d Cir. 1974). The Eighth Circuit, however, seems to have adhered to a test of bad faith or hostil-

tract negotiation and contract administration. They have done so because of the language employed by the Supreme Court.[105] However, each of the Supreme Court cases treating the duty in contract negotiation concerned the drawing of a contractual distinction that advantaged some at the expense of others. Thus, it remains to be seen whether each element of the duty of fair representation is necessarily applicable every time the union acts or declines to act. On the one hand, the proscription against a union decision based on bad faith or hostility lies at the core of the duty and should be equally applicable to a refusal to act as to action affirmatively taken. Such a proscription results in minimal intrusion into the system of collective bargaining and presents little difficulty to the legal process, apart from the practical problems inherent in any standard requiring a determination of intent. On the other hand, it is questionable whether the proscription against arbitrariness or irrationality should have similar uniform applicability.

The union is a focal point for employee disgruntlement and aspiration; it must accommodate varying and often conflicting desires. Although responsible union officials may view some of

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ity. Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853 (8th Cir. 1975).

104. Note, for example, the prefatory remarks of a district court in a recent case:

> [A] union must conform its behavior to each of three separate standards: first, it must treat all factions and segments of its membership without hostility or discrimination; next, the broad discretion of the union . . . must be exercised in complete good faith and honesty; finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation . . . .

Farmer v. Hotel Workers Local 1064, 99 L.R.R.M. 2166, 2185 (E.D. Mich. 1978). The notion that each of these elements "represents a distinct and separate obligation" was stated by Judge Sobeloff in Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972), a case concerning the union's handling of the grievance procedure. The district court above made a wholesale translation of that reasoning into the negotiation of a collective agreement.

105. In *Steele*, the Court held that the union is obliged to act "without hostile discrimination." 323 U.S. at 204. The Court also observed, however, that the union may act upon relevant differences even if the effects upon some are unfavorable. *Id.* at 203. In *Ford Motor Co. v. Huffman*, the test seemed to be "good faith and honesty of purpose," but the Court stressed as well the "wide range of reasonableness" that a bargaining agent must have. 345 U.S. at 338. A "wide range of reasonableness," as one commentator has noted, implies a correspondingly "narrow margin of intolerable unreasonableness, bringing into the judicial calculus a different level of consideration than was previously implied in terms like good faith and honesty." Jones, *The Origins of the Concept of the Duty of Fair Representation*, in THE DUTY OF FAIR REPRESENTATION 25, 34 (J. McKelvey ed. 1977). The Court in *Humphrey v. Moore* also spoke in terms of honesty, "good faith," and "hostility or arbitrary discrimination," but stressed as well that the union "acted upon wholly relevant considerations." 375 U.S. 350 (1964).

these complaints and demands as unreasonable or even arbitrary,[106] the extent to which members or influential groups tenaciously hold to them is a political fact that the union must recognize and accommodate.[107] For this reason, it may not be appropriate to speak of the "irrationality" or "arbitrariness" of a collective agreement.[108] The white unionists in *Steele*,[109] for example, were not acting upon an arbitrary factor. They were acting upon racial assumptions, common to their class and region at the time, which maximized their "psychic satisfaction" by maintaining blacks as a permanent underclass.[110] It cannot

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106. *See, e.g.*, A. Weber, *supra* note 99; note 188 *infra*. As Bok and Dunlop observe, "Although this [bargaining] process is hardly perfect, it tends, on the whole, to make union strategy conform to the intensity of feeling among different groups of members and to the relative merits of the claims they have advanced." D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 114 (1970).

107. We must begin by reviewing the role of the trade union official. He is the leader of a political instrumentality which has the same institutional drives as any political instrumentality: survival and growth. To facilitate the survival and growth of the organization and promote his personal advancement, he endeavors to reconcile the political pressures which are focused upon him in the bargaining process. These pressures emanate from the rank and file, from the employers, from other levels of the organization, from other sectors of the labor movement, and from the government. They must somehow be resolved into a feasible compromise. This is the job which he is called upon to perform.

A. ROSS, *supra* note 99, at 95.

108. When, therefore, a union behaves as though it had other ends in view than the maximization of the wage bill, when strikes are resorted to which by any monetary measure will not be worth their cost, when some differentials in wages are borne without protest and others occasion bitter attack, when emphasis seems to bear heavily upon the amount of the increase and less upon the amount of the wage, when the standardization of rates or of increases is pursued at the expense of a larger total wage bill, it would be imperceptive and mistaken to lay these problems to irrationality, shortsightedness, or lack of education. They have their meaning and their logic.

Id. at 45.

From a managerial perspective, highly restrictive seniority practices may be considered arbitrary if they are economically inefficient. From a union perspective, the practice may be a policy choice, as for example, to "reduce the rate of entry of younger men," M. BARATZ, THE UNION AND THE COAL INDUSTRY 71 (1955), or as a response to felt need. *See, e.g.*, H. NORTHRUP, RESTRICTIVE LABOR PRACTICES IN THE SUPERMARKET INDUSTRY 81-82 (1967) ("The loading platforms in a midwestern city were so situated that one sector was particularly hot and unpleasant in the summer while the others were shaded and cooler; but in winter, the shaded portions were whipped by bitter cold winds. The local Teamsters' bargaining committee, dominated by senior men, demanded seniority on the basis of platform sectors.").

109. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See* text accompanying notes 47-54 *supra*.

110. *See* H. NORTHRUP, ORGANIZED LABOR AND THE NEGRO 49-50 (1944):

During the last two decades of the nineteenth century a vigorous debate on the "Negro question" was waged in the journals of the Firemen and the Trainmen. These Brotherhoods had two possible methods

be argued that "psychic satisfaction" is irrelevant to the union's function.[111] The agreement breached the duty because federal policy made race a proscribed consideration, even if it otherwise maximized the majority's satisfaction. So, too, in *Ford Motor Co. v. Huffman*,[112] one would ordinarily have thought that military service by persons who had not been in the company's previous employ was not especially relevant to the company's seniority system, especially because Congress, in legislating on the subject, had spoken only to the status of the returning employee. The union was, however, confronted with the demands of returning veterans, not previously in the company's employ, who felt that they *ought* to be treated like those veterans who had left the company to enter military service. Thus, the union was asked to reconcile those demands with the interests of employees who had never been in service.[113] In contrast to *Steele*, the distinguishing characteristic was not proscribed by federal law; in fact, the union's solution, which necessarily disadvantaged some, found support in larger social policy.

In sum, the requirement that a union not act "arbitrarily" is appropriate in cases of contract administration, where the union must decide whether to pursue an individual's grievance, but has only limited significance in cases of contract making.[114]

> of meeting the competition of the unorganized Negroes. The first, as some northern member suggested, was to admit the Negroes into their union and to "teach him and educate him" to present a solid front against the employer. The second was to force the railroads to eliminate the Negro from train and engine service. The social origins of the Big Four [railroad brotherhoods] made it almost inevitable that the second alternative would be chosen.
>
> . . . [T]he Brotherhoods were founded as fraternal and beneficial societies rather than as trade unions. Much emphasis is still placed on these social features. To admit Negroes, the southern members declared, would be tantamount to admitting that the Negro is the "social equal" of the white man. This they refused to countenance.

See also Marshall, *The Negro in Southern Unions*, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT 128, 135-36 (J. Jacobson ed. 1968).

111. *See* Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817 (1967).

112. 345 U.S. 330 (1953). *See* text accompanying notes 55-58 *supra*.

113. "Widespread dissatisfaction with his lot, arising out of the veteran's feeling that he had lost out in his competitive status in employment, would have caused the type of unrest which leads to strikes." Reply Brief on Behalf of Ford Motor Co., Petitioner, at 21, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). "The Union was compelled to decide whether to run the risk of resultant labor unrest and a possible strike or to accord equal treatment to all veterans . . . ." Reply Brief on Behalf of Ford Motor Co., Petitioner, at 31.

114. *See* Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L.F. 35, 37. This

In the latter instance, the fair representation question must be determined by weighing the firmness and significance of the minority's defeated expectations against the degree of interference with the system of collective bargaining occasioned by the substitution of an external judgment for that of the union. The consequences of this view of the duty of fair representation in contract making are explored in the following propositions. These propositions are not intended to supply a code; they are simply rules of thumb that provide a more solid guide to the contours of the duty of fair representation.

(1) *A question of a departure from the duty of fair representation is not presented unless there is a disadvantagement of a minority within the bargaining unit or of an individual where the characteristic of the individual's disadvantagement is not shared with the majority.* Because the gravamen of the duty is a limitation on the majority's power over the minority, the duty does not restrain the power of the majority over itself. If, for example, a union agrees to an across-the-board reduction in benefits,[115] or fails to secure severance pay in the event of plant closing,[116] no question of fair representation is presented because the disadvantagement is of the majority (in these examples, the entirety) of the unit.

There are situations, however, in which the effect of apparently uniform treatment falls disproportionately on a minority. For example, a union might agree to a mandatory retirement age, which has the effect of summarily displacing employees beyond that age and curtailing the expectancy of future employment of those nearing the retirement age.[117] Although the adoption of a mandatory retirement provision will ultimately affect every unit member, it may well be that the majority composed of relatively young workers would be immediately advantaged by the increased opportunity for movement up the seniority ladder. This advantage to younger workers would be

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commentator, however, apparently sees no role for fair representation in the regulation of the substance of the union's bargaining position. *See* note 148 *infra*.

115. *See, e.g.*, Fogg v. Randolph, 244 F. Supp. 885 (S.D.N.Y. 1962).

116. *See, e.g.*, Woody v. Sterling Aluminum Prods., Inc., 243 F. Supp. 755 (E.D. Mo. 1965), *aff'd*, 365 F.2d 448 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967).

117. *See, e.g.*, Roberts v. Lehigh & N.E. Ry., 323 F.2d 219 (3d Cir. 1963); McMullans v. Kansas, Okla. & G. Ry., 229 F.2d 50 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956); Goodin v. Clinchfield R.R., 125 F. Supp. 441 (E.D. Tenn. 1954), *aff'd*, 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 953 (1956).

at the expense of older workers who fill the senior slots.[118] In such a case, scrutiny under the duty of fair representation is appropriate. If, however, the majority can reasonably be categorized as adversely affected by the rule, no question of fair representation is presented.

(2) *A union may not disadvantage a minority or individual out of hostility, malice, bad faith, dishonesty, or any other proscribed ground.* Consistent with *Steele*,[119] it is a fundamental element of the duty that the union may not act or refuse to act because of malice, hostility, or any ground proscribed by federal law. The Labor Act, for example, distinguishes between contractual arrangements that impermissibly tie job rights to union affiliation[120] and those that are properly supportive of the union's institutional function.[121] A provision improperly tying job rights to membership would constitute a breach of the union's duty to represent nonmembers fairly. This distinction might have supplied an arguable ground for finding a breach of the duty of fair representation in *Red Ball Motor Freight*,[122] which involved a union representation campaign for a merged bargaining unit. The campaign platform of the union that had represented the larger of the two groups included a promise to place the smaller group at the bottom of the merged seniority list. Such action would have had the ancillary effect of favoring union members over nonmembers,[123] which effect could supply a principled basis for finding a breach of the duty of fair representation.[124]

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118. Note the reasoning in Roberts v. Lehigh & N.E. Ry., 323 F.2d 219, 223 (3d Cir. 1963) ("Each lodge consented to the inclusion of the provision in the agreement only after a majority of its members voted in favor of it. The fact that the provision may favor younger workers who outnumber older ones with greater seniority rights is not a basis for a claim of hostile discrimination.").

119. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See* text accompanying notes 47-54 *supra.*

120. Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees in their exercise of the section 7 right to support or to refrain from supporting a union. 29 U.S.C. § 158(b)(1)(A) (1976). Section 8(b)(2) makes it an unfair labor practice for a union "to cause . . . an employer to discriminate against an employee in violation of section 8(a)(3)." *Id.* § 158(b)(2).

121. *See, e.g.*, Dairylea Coop., Inc., 219 N.L.R.B. 656 (1975), *enforced*, 531 F.2d 1162 (2d Cir. 1976).

122. *See* text accompanying notes 97-98 *supra.*

123. This is the sense of Jones v. TWA, 495 F.2d 790 (2d Cir. 1974). It supplies the better view of what was involved in NLRB v. Wheland Co., 271 F.2d 122 (6th Cir. 1959), and explains why NLRB v. Whiting Milk Corp., 342 F.2d 8 (1st Cir. 1965) was wrongly decided.

124. Although this would be arguable, it would not be right. If the same

Title VII of the Civil Rights Act of 1964[125] regulates the substance of employment policy concerning race, sex, religion, and national origin; as a result, title VII and the duty of fair representation overlap.[126] Under *Steele*,[127] for example, if it is clear that the collective agreement intentionally disadvantages a racial minority, the union will have breached the duty of fair representation owed to that group. Title VII, however, goes well beyond the duty of fair representation. Under title VII, an employer policy (or a provision of a collective agreement) that is neutral on its face, but has a disproportionate effect upon one of the classes protected by that Act, constitutes an unlawful employment practice unless it can be justified by overriding business necessity;[128] actual intent to discriminate is not a necessary element of a title VII violation. Furthermore, a charge of a title VII violation may necessitate the analysis of statistical data[129] or expert opinion on the validity of tests for employment and promotion.[130] Some courts have implied that, inasmuch as conduct violative of title VII is necessarily discriminatory, such conduct also breaches the duty of fair representation when it is undertaken pursuant to provisions of a collective agreement.[131] Other courts have distinguished the duty of fair representation as requiring, unlike title VII, a show-

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union in *Red Ball Motor Freight* had represented both groups and had done precisely the same thing, it would not, under proposition (6), *see* p. 222 *infra*, have breached the duty, even if its motivation derived solely from the political power of the numerically larger group. There is no reason why the union should not have been candid in the election about accomplishing that result. Indeed, a lack of candor might supply a basis for finding bad faith. *See, e.g.*, Teamsters Local 671 (Airborne Freight Corp.), 199 N.L.R.B. 994 (1972), *discussed in* note 201 *infra*.

125. 42 U.S.C. §§ 2000e, 2000e-1 to -17 (1976).

126. *See* Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U. L. REV. 449 (1971); Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums*, 46 WASH. L. REV. 455 (1971); Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965).

127. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See* text accompanying notes 47-54 *supra*.

128. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

129. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). *See, e.g.*, Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978).

130. *See, e.g.*, 43 Fed. Reg. 38,290, 38,290-309 (1978).

131. *See, e.g.*, Chrapliwy v. Uniroyal, Inc., 15 Fair Empl. Prac. Cas. 795, 819-21 (N.D. Ind. 1977); Stith v. Manor Baking Co., 15 Fair Empl. Prac. Cas. 511, 513-14 (W.D. Mo. 1976).

ing of discriminatory intent.[132]

This divergence may not be as wide at it first appears. Intention under the duty of fair representation may be evidenced by the clarity of the discriminatory effect of a facially neutral policy, as well as by the circumstances surrounding adoption of the policy. In the railway litigation following *Steele*, for example, the union proposed a seemingly neutral and uniform policy: abolishment of the distinction between black firemen, who were hired and acquired seniority on the basis of their ineligibility for promotion to engineer, and white firemen, who were hired as promotable to engineer and consequently had to pass a series of tests or be terminated. The union proposed that this distinction be abolished by requiring blacks to pass the tests that were previously required only of whites. Although seemingly nondiscriminatory, the policy would have resulted in the elimination of black firemen with substantial seniority who could not pass the tests but who desired to continue as firemen. The courts had no difficulty holding the proposal violative of the duty of fair representation.[133]

Title VII, however, is intended to effect the larger goal of eliminating discrimination in employment; toward that end, a mode of analysis has developed particular to that Act. Accordingly, the function of and the analysis under the duty of fair representation differs from the function of and the analysis under title VII, once the question of impermissible motive has been put aside.[134] Title VII necessarily contemplates intense judicial examination of the content and results of substantially every detail of employment policy and practice in order to ensure conformity with the social goal set by Congress. Statistics can play a significant, even dispositive role.[135] In contrast, the duty of fair representation supplies only an outer limit upon a system of private ordering that ordinarily precludes govern-

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132. *See, e.g.*, Williams v. General Foods Corp., 492 F.2d 399, 405 (7th Cir. 1974); Taylor v. Armco Steel Corp., 373 F. Supp. 885, 905 (S.D. Tex. 1973).

133. *See* Brotherhood of Locomotive Firemen v. Palmer, 178 F.2d 722 (D.C. Cir. 1949); Rolax v. Atlanta Coast Line Ry., 91 F. Supp. 585 (E.D. Va. 1950), *rev'd*, 186 F.2d 473 (4th Cir. 1951). For an account of this litigation and for a very critical appraisal of the actual impact of the duty of fair representation on the elimination of racial discrimination, see Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964).

134. *Compare* Whitfield v. United Steelworkers, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959) *with* Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970).

135. *See* text accompanying notes 128-129 *supra*.

ment from setting the terms of employment policy.[136]

Accordingly, the better view is to recognize that the duty of fair representation has a function and analysis independent of more broadly conceived remedial schemes. Positive law may now render impermissible distinctions in terms and conditions of employment directed toward certain groups—distinctions that had, in the past, been permissible. For example, external law now declares that women,[137] the elderly,[138] and the handicapped,[139] must be specifically protected against some forms of employment discrimination. It is appropriate, therefore, as in

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136. In United Steelworkers v. Weber, 99 S. Ct. 2721 (1979), the Court held that a collective agreement's affirmative action plan assigning job training on a one-for-one basis from racially segregated seniority lists did not violate title VII. The Court did not discuss the question of whether the agreement breached the duty of fair representation. Although the Court stressed that the issue before it was purely one of private action, and did "not present an alleged violation of the Equal Protection Clause," *id.* at 2726, the result is troublesome because the duty of fair representation was thought in *Steele* to draw sustenance from the analogy to the equal protection clause. *See* note 69 *supra*; text accompanying note 49 *supra*. As a matter of fair representation *Weber* could, conceivably, be disposed of under proposition (1), *see* p. 210 *supra*, as one of a majority discriminating against itself. The ancillary disadvantagement of whites by white-dominated unions has withstood fair representation challenges. In Williams v. Central of Ga. Ry., 178 F. Supp. 248 (M.D. Ga. 1955), a white fireman who had failed the test for engineer and was thus assigned to yard duty complained of breach of the duty of fair representation owed to whites because, under the white union's previous policy discriminating against blacks, blacks were not required to take the examinations for engineer. The court found no breach of the duty. *See also* Whitfield v. United Steelworkers, 263 F.2d 546, 549 (5th Cir. 1959) ("If there is racial discrimination under the new contract, it is discrimination in favor of negroes."). From the perspective of proposition (1), however, the question would turn on whether the "character of the disadvantagement"—to use the formulation offered here—was race alone or race plus seniority. All whites were not uniformly disadvantaged; the job training plan disadvantaged only those whites who were interested in training for craft positions and who would be displaced by the preference for blacks. Accordingly, the appropriate analysis would turn under proposition (6), *see* p. 222 *infra*, and proposition (7), *see* p. 227 *infra*, on whether a racial distinction is one relevant to collective bargaining as determined by the sources that inform that standard, especially in this context, by analogy to the equal protection clause. The *Steele* Court, however, applied that analogy and held race per se to be an irrelevant or arbitrary distinction. If the plan in *Weber* is considered to draw a racially permissible distinction for fair representation purposes, there would be no escaping the conclusion that the equal protection clause has, by analogy, assumed an accordion-like quality. *See generally* Van Alstyne, *Rights of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979). For a suggestion of how troublesome duty of fair representation issues become once a union is permitted to take account of race, albeit for seemingly benign purposes unrelated to the settlement of a possible title VII violation, see Rabin, *Fair Representation Constraints in the Voluntary Elimination of Job Discrimination*, 5 EMPLOYEE REL. L.J. 337 (1979-1980).

137. 42 U.S.C. §§ 2000e, 2000e-1 to -17 (1976).

138. 29 U.S.C. §§ 621-634 (1976).

139. *Id.* §§ 791, 793-794.

Steele[140] and *Ford Motor Co. v. Huffman*,[141] to look to larger social policy in order to ascertain whether intentional disadvantagement of such a group also constitutes unfair representation. Unless the discrimination has been intentional, however, complainants should be limited to relief under the relevant remedial scheme. Although it is highly unlikely that relief for employment discrimination would be sought exclusively under the duty of fair representation, the wholesale assimilation of broader remedial schemes into that duty serves no practical function and only blurs analysis of a doctrine that is beclouded enough.[142]

(3) *A majority may not expropriate a benefit or interest currently enjoyed by the minority solely to benefit itself.* In decisions of some vintage, the courts allowed a majority simply to expropriate a right or benefit enjoyed by a minority.[143] The contemporary view is that such an expropriation—a taking of an existing right or interest solely to advantage the majority—simply goes too far. This principle was presaged in an early Wisconsin case[144] in which, prior to unionization, a streetcar company and a bus company merged and established a joint seniority list. A decade later, the union, dominated by former streetcar operators, negotiated to alter the seniority list to their benefit. Although the court contemplated that seniority rights, once established, become "vested" and consequently cannot be altered in the absence of changed economic circumstances, the case is more properly read today for the proposition that seniority rights, once established, cannot be expropriated simply

140. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See* text accompanying notes 47-54 *supra*.

141. 345 U.S. 330 (1953). *See* text accompanying notes 55-58 *supra*.

142. One observer has argued that the enactment of separate measures to combat racial discrimination is all for the good:

> Without the background of employment discrimination matters, . . . it is easier to probe the duty of fair representation as that of a trustee charged with the welfare of his wards, rather than as a constitutional shield against deliberate, invidious abuse by the bargaining representative of some of the persons committed to its charge.

Jones, *The Origin of the Concept of the Duty of Fair Representation*, in THE DUTY OF FAIR REPRESENTATION 25, 35 (J. McKelvey ed. 1977).

143. *See, e.g.*, Britt v. Trailmobile Co., 179 F.2d 569 (6th Cir.), *cert. denied*, 340 U.S. 820 (1950); Jennings v. Jennings, 91 N.E.2d 899 (Ohio Ct. App. 1949). *But see* Trailmobile Co. v. Whirls, 331 U.S. 40, 68 (1947) (Jackson, J., dissenting). These cases were strongly criticized by Professors Cox, *supra* note 69, at 162-63, 165-66, and Wellington, *supra* note 69, at 1339-41.

144. Belanger v. Local 1128, Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees, 254 Wisc. 344, 36 N.W.2d 414 (1949).

for the benefit of the majority.[145]

This contemporary view is reflected in *Barton Brands, Ltd. v. NLRB*.[146] The merger of two companies resulted in the closing of one plant, and the employees in the two units, who were represented by the same union, voted separately to dovetail the seniority list. Although at the time the vote was taken it was assumed that a new facility would open, the employer subsequently abandoned that plan. As a result, the union negotiated to change the seniority list to endtail the minority of employees from the acquired company. Although under *Humphrey v. Moore*[147] the union could have endtailed the acquired employees initially, the majority could not, solely in order to benefit itself, expropriate the seniority it had previously accorded.

It could be argued that employees' expectations must take into account the union's ability to readjust seniority whenever changed economic assumptions threaten the majority's security. In *Barton Brands*, the seniority rule was altered to favor the majority because of a change in the economic assumptions upon which the original decision was made—that is, the abandonment of plans for a new facility that would have provided sufficient jobs for all. The purpose of a seniority system, however, is to provide employees with a predictable basis for gauging their relative job security. Consequently, the system's value to employees is especially significant in a time of economic recession. In terms of the balance described earlier, the expropriation of seniority in *Barton Brands* constitutes a violation of the duty of fair representation: the minority's interests are substantial, the majority's action simply too blatant, and the remedy fashioned works only a minor disruption in the system of private ordering.[148]

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145. *See also* Hargrove v. Brotherhood of Locomotive Eng'rs, 116 F. Supp. 3 (D.D.C. 1953); Local 4076, United Steelworkers v. United Steelworkers, 338 F. Supp. 1154 (W.D. Pa. 1972), *discussed in* text accompanying note 185 *infra*.

146. 529 F.2d 793 (7th Cir. 1976).

147. 375 U.S. 335 (1964). *See* text accompanying notes 62-64 *supra*.

148. One commentator has recently argued that the sole concern of the duty of fair representation in contract negotiation is the union's subjective motive; that is, the issue is whether the union is acting in good faith, with an honest purpose, and with a lack of hostility. Leffler, *supra* note 114, at 40. From that perspective, it is argued that *Barton Brands* was wrongly decided. *Id.* at 47-49. It suffices to say that that theory draws no support from the law of fair representation. Under that theory, there would have been no breach of the duty of fair representation in *Steele*, *see* text accompanying notes 47-54 *supra*, had the union proved that it adopted the racial distinction not out of malice or hostility, but for the honest purpose of accommodating the company's need to hire promotable firemen. *Cf.* Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896). (The Court in *Plessy* upheld as reasonable a state statute requiring separate but

It should be emphasized that proposition (3) addresses only a taking supported by no consideration other than majority will. Assume, for example, that as a result of a change in technology, a small group of employees receives a windfall under the operation of compensation provisions in the existing collective agreement.[149] Under those circumstances, a union could negotiate retroactively to alter the compensation scheme. Such an action would not be an expropriation—a taking by the majority solely to benefit itself—but an accommodation to a relevant change in circumstance.[150]

(4) *The majority may decline to advance the interests of the minority in order to advantage itself.* As *J.I. Case* teaches, "the majority rules, and if it collectivizes the employment bargain, individual advantages . . . will generally . . . go in as a contribution to the collective result."[151] It follows that the majority need not make any special accommodation to the interests of a minority in order to secure what the majority perceives as the greatest good for the greatest number.[152] An externally imposed requirement of partial accommodation of

equal railway accommodations for blacks. Although the Court stated that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class," *id.* at 550, the Court reasoned that segregated railway cars did not "[stamp] the colored race with a badge of inferiority." *Id.* at 551. The Court thus implied that the statute was not enacted out of malice or hostility toward blacks, but rather to prevent "a commingling of the two races upon terms unsatisfactory to either." *Id.* at 544.) In point of fact, the Alabama Supreme Court in *Steele* relied on *Plessy* and expressly stated that "there is no charge of bad faith or malice against the complainant or any of his class." Steele v. Louisville & N.R.R., 245 Ala. 113, 122, 16 So. 2d 416, 422, *rev'd*, 323 U.S. 192 (1944). The Supreme Court found a breach of the duty in *Steele* not because it disagreed with the Alabama court's characterization of the pleadings, but because the racial distinction alone was held to be irrelevant to the valid purposes of collective bargaining. 323 U.S. at 203. In other words, if Mr. Leffler's theory is correct, the Court misapplied the duty of fair representation in the very decision that created it.

149. *See, e.g.*, Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944); discussion of Jennings v. Jennings, 91 N.E.2d 899 (Ohio Ct. App. 1949) in Cox, *supra* note 69, at 165-66.

150. Clyde Summers would apparently not allow a retroactive accommodation on the theory that the collective agreement creates enforceable rights that can only be prospectively altered. *See* Summers, *supra* note 68, at 63-64. Under the analysis offered here, the union could give retroactive effect to a change if it complied with the duty of fair representation. *See, e.g.*, Kordewick v. Brotherhood of R.R. Trainmen, 181 F.2d 963 (7th Cir. 1950) and the discussion of Bosi v. USM Corp., 90 L.R.R.M. 2867 (D.N.J. 1975) accompanying note 166 *infra*.

151. J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

152. Duggan v. International Ass'n of Machinists, 510 F.2d 1086 (9th Cir.), *cert. denied*, 421 U.S. 1012 (1975); Seaboard World Airlines, Inc. v. Transport Workers Union, 443 F.2d 437 (2d Cir. 1971); *see* Trotter v. Amalgamated Ass'n of

minority interests would improperly involve the court in setting the terms of the collective agreement. It is one thing, as in *Barton Brands*,[153] merely to return the parties to the terms they had fashioned prior to the abuse of majority power. It is quite another to effectively dictate what the terms of a future collective agreement should be.

This distinction is illustrated by an episode in the history of the American Federation of Musicians, recounted in a recent study by Robert Gorman.[154] The displacement of live performances by recorded music was a basic concern of the union. Of the union's 250,000 members, only 53,000 were full-time musicians, and of these only 12,000, or three percent of the membership, were employed in radio, television, movies, and the recording industries. From 1946 to 1954, the union maintained the same wage scale for recording musicians, while creating two trust funds to modestly supplement the earnings of the part-time musicians comprising the bulk of the union's membership. One trust was funded by royalties from record sales and the other by revenue resulting from the release of old films to television. In 1954, the union negotiated a pay increase for recording musicians which it then diverted to the record sales trust fund, thereby maintaining the 1946 scale until 1959. Similarly, the union diverted into the film trust fund "rescoring fees" that were to have been paid to the musicians who worked on films released for television. There is no doubt that the union had the authority to set up the trust funds, an action which, it assumed, would advantage the majority (the part-time and the out-of-work musicians).[155] By the analysis offered here, however, the subsequent diversion of funds that had ini-

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Street Electric Ry. & Motor Coach Employees, 309 F.2d 584 (6th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

153. Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976). *See* text accompanying notes 146-147 *supra*.

154. Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, in SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMM. ON THE JUDICIARY, HOUSE OF REPS., 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS 1071 (Comm. Print 1978).

155. The union's president, James C. Petrillo, explained the diversion of rescoring fees:

> Musicians who originally made the picture received union scale. They didn't make the picture without pay, and we thought if we took the money and put it in the Trust Fund it will do more good for 260,000 musicians than a handful of musicians. . . . In the labor movement you deal with majority membership; what is best for the majority, not the individual.

Id. at 1099.

tially been negotiated as compensation to recording musicians constituted an expropriation in violation of proposition (3).[156]

More difficult is the union's decision not to seek a wage scale increase for recording musicians during the thirteen-year period. The union was not motivated by hostility or bad faith, but only by the desire to advantage the majority of its members. At first blush, one is strongly tempted to conclude that it is unfair representation for a union to fail to seek a pay scale increase for a minority over a thirteen-year period in order to benefit the majority—in essence, that the (unemployed) majority conscripted the labor of the (employed) minority.[157] It could be further suggested that where the labor market acts as an inadequate constraint upon the employer, and the situation of the minority gives no prospect of political concession to the minority, a tribunal should compel the union to do "more" for the disfavored group. To hold open the remote possibility of judicial relief, even if limited to this narrowly circumscribed set of criteria, would provide some additional leverage to the minority and enable it to exact a partial accommodation from the majority.

It is highly questionable, however, whether such intervention is consistent with the Supreme Court's decision in *J.I. Case*.[158] A study of union wage policy in the auto industry observed that:

> The UAW policy on general wage changes was designed deliberately to raise the living standards of low-paid workers. . . . The critical task of leadership was above all to maintain majority support, and policies were perforce subordinated to this objective. Under the circumstances it is not surprising that the more skilled and highly-paid production workers should have suffered a significant deterioration in relative wage position. These workers who, as union and management officials alike admit, have been "penalized" during the last two decades, have lacked strategic strength within the union and hence the wherewithal to express their dissatisfactions effectively. In this respect their position differs radically from that of the skilled craftsmen who,

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156. *See* p. 215 *supra*.

157. This situation is a variation of the problem contemplated by the Supreme Court in Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), *discussed in* note 46, *supra*. In concluding that retirees were not statutory employees, and thus that their retirement benefits were not a mandatory subject of bargaining, the Court observed: "Incorporation of such a limited-purpose constituency in the bargaining unit would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining." *Id.* at 173. Nevertheless, the Court did not declare that in view of the political consequences to the union, it was impermissible for the union to negotiate for nonemployee retirees.

158. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). *See* text accompanying notes 10-18 *supra*.

> despite minority status, have become an increasingly influential force within the union organization.[159]

This situation approximates the conditions suggested for judicial intervention more closely than does the situation of the recording musicians:[160] the skilled production employees could not have separated themselves from the production unit; the labor market failed to exert sufficient independent pressure on the employer to provide for an increased wage; and, unlike craftsmen, the skilled production workers lacked the strategic strength within the union to exact a concession from the majority.

Unlike the recording musicians, who were disadvantaged relative to the economy as a whole, the skilled production workers within the UAW were disadvantaged relative to where they might have been in the absence of a bargaining relationship. In either case, however, judicial intervention under a theory of fair representation would require the external imposition of a wage structure. In the UAW situation, such intervention would mean that the Labor Act would be violated whenever a union adheres to a wage policy of increasing the pay of the lowest paid workers at the expense of those who, by skill or effort, could do better without the union. Such a result could not be reconciled with the conception of collective bar-

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159. R. MACDONALD, COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY 158 (1963). In the steel industry, the composition of the work force has resulted in widened differentials, a situation which has also been explained in political terms:

> Unlike some industries and unions in which the skill distribution of employees and members gives considerable power to workers at the lower end of the wage scale, the distribution of steel classifications is particularly conducive to percentage wage adjustments. . . . The 1951 BLS survey of the iron and steel industry wage structure found that it took a 50¢ range to encompass half the industry's employees as compared with the automobile industry which, in February 1950, had the middle 50 per cent of all its production workers concentrated within an earnings range of only 14 cents.
>
> This wide distribution of employees has made it politically feasible for the union and eminently practical for the companies to allocate a portion of their negotiated wage adjustments to the widening of job class increments. Considerable pressure has been exerted upon the union's leadership by skilled workers—who are both numerous and influential—to maintain relative differentials between classifications.

J. STIEBER, THE STEEL INDUSTRY WAGE STRUCTURE 247 (1959) (footnotes omitted).

160. It is not at all clear that the recording musicians were truly a helpless minority. Failure to press for a wage scale increase resulted in numerous lawsuits and a revolt by the minority, including the establishment of a rival union, which ultimately led the AFM to accommodate the interests of the recording musicians. Gorman, *supra* note 154, at 1099-117.

gaining approved in *J.I. Case*.[161]

(5) *The majority may ordinarily provide for uniform treatment that advantages it at the expense of the minority.* If the majority may benefit itself by not advancing the minority's interests, it may further provide for uniform treatment that benefits the majority, even if the effect is to defeat the aspirations of a specially situated minority.[162] This proposition is illustrated in *Bosi v. USM Corp.*[163] Under the collective agreement, an employee who was fifty years old and who had thirty years of service (50/30) could opt for early retirement in the event of a layoff; this provision would not apply, however, in the event of plant closing. The plant closed and a plant closing agreement was negotiated. Under the agreement, the 50/30 group would not receive the benefit they could have received by early retirement in a normal layoff; the funds that might have gone to them were to be distributed to the bulk of the work force. The plant closing agreement was fully explained to the employees and they voted to ratify it over the opposition of the 50/30 group.

The court concluded that there was no breach of the duty of fair representation:

> [T]he Union was made aware of the drastic impact upon the rights of the 135 15-year employees if the 41 employees in the 50/30 group were permitted to acquire eligibility for early retirement . . . . [T]he Union had an interest in seeing that the maximum number of its members received the optimum benefit under the [Pension] Plan, rather than permit a small minority of employees to take a disproportionate share of a limited fund. Thus, the Union properly put the issue . . . before the membership.[164]

This reasoning is not helpful because collective bargaining agents invariably attempt to secure the optimum good for the maximum number. The question that the court did not address

161. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). *See* text accompanying notes 10-18 *supra*.

Professor Wellington, however, has expressed a contrary opinion:

> No one would suggest that wage differentials between skilled and unskilled workers necessarily violate the union's duty of fair representation. In this situation, perhaps, a failure to discriminate would be a breach of duty. On the other hand, a situation can be easily imagined in which an economic distinction has no legitimate basis in industrial experience, and can be explained only as a disregard of the interests of a minority group by the majority union.

Wellington, *supra* note 69, at 1336.

162. Jackson v. TWA, 457 F.2d 202 (2d Cir. 1972); Brotherhood of Maintenance of Way Employees v. Butte, A. & Pac. Ry., 201 F. Supp. 703 (D. Mont. 1962).

163. 90 L.R.R.M. 2867, 2874 (D.N.J. 1975).

164. *Id.*

is why the majority had not *unduly* advantaged itself at the expense of the minority.

The company's pension plan provided the following fixed order for the distribution of its assets in the event of termination: first, those who had already retired; second, those who had achieved normal retirement age but had not yet retired; and last, those with fifteen or more years of service. There was no special category for the 50/30 group; those employees were simply included in the larger group composed of those with fifteen or more years of service. Under the plan, distribution would be uniform among all employees in the larger group. Thus, the crucial question is whether the majority breached the duty of fair representation when it declined affirmatively to provide for special treatment of the minority by negotiating a roughly uniform distribution of the pension fund assets. In order to have found a breach of the duty, the court would have been required to decide what other, more reasonable treatment the majority should have accorded the minority. Thus, the potential for intrusion into the collective bargaining process was significant.

It would have been a different case had the collective agreement accorded the 50/30 group an early retirement option in the event of plant closing and had the plant closing agreement abrogated that provision. The external agency would not be determining whether, in securing a plant closing agreement benefiting the entire work force, the union had given "enough" to senior employees. Rather, the question would be whether the majority may alter a collective agreement that older employees had relied upon in order to give themselves increased benefits. Union action so predicated would be an expropriation in violation of proposition (3).[165] On the other hand, the majority in *Bosi* could have acceded to the desires of the 50/30 group; that is, it could have taken the position that the amount to be distributed uniformly to those with fifteen or more years of service would be so small that it would be better to provide older workers a more significant sum. Even though that action would alter the prior obligation, it would not breach the duty under proposition (1)[166] because the majority would be favoring the minority at its own expense.

(6) *The collective agreement may draw distinctions that*

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165. *See* p. 215 *supra*.
166. *See* p. 210 *supra*. *But see* note 150 *supra*.

advantage the majority at the expense of a minority if any factor relevant to collective bargaining also distinguishes the two groups. The Supreme Court's decisions concerning the duty of fair representation in contract making, that is, *Steele*,[167] *Humphrey v. Moore*,[168] and *Ford Motor Co. v. Huffman*,[169] all concerned distinctions between groups that were drawn by the collective agreement. These cases do not, however, stand for the broad proposition that a union labors under a general obligation not to act "arbitrarily" in taking a bargaining position. Rather, a closer reading of these cases supports the narrower proposition that a majority may advantage itself in a collective agreement by drawing distinctions between it and a minority *if* any other factor relevant to collective bargaining also distinguishes the two groups.

This more circumscribed formulation takes account of two political realities: first, that a union often must accommodate employee desires that may well strike a dispassionate observer as unreasonable or even arbitrary; and second, that such accommodation may properly be based on pure majoritarianism. *Beriault v. International Longshoremen's Union*[170] is a case in point. As work decreased due to mechanization, the union negotiated a new contract. Under its terms, longshoremen, who had not previously worked as checkers, were given a preference in checker work assignments over a minority of part-time checkers. The court recognized that the majority had advantaged itself at the expense of the minority. Nevertheless, the distinction between full and part-time status supplied the additional relevant factor sufficient to sustain the action against a duty of fair representation challenge.[171]

Proposition (6) does not itself supply the standards to determine if a distinction between groups is "relevant" for the purposes of collective bargaining. That determination turns upon a consideration of industrial practice, the expectations of the employee community, and the moral standards of the

167. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See* text accompanying notes 47-54 *supra.*

168. 375 U.S. 335 (1964). *See* text accompanying notes 62-64 *supra.*

169. 345 U.S. 330 (1953). *See* text accompanying notes 55-58 *supra.*

170. Local 40, Super Cargoes & Checkers of the Int'l Longshoremen's Union, 445 F. Supp. 1287 (D. Ore. 1978), *on remand from* 501 F.2d 258 (9th Cir. 1974).

171. 445 F. Supp. at 1293-94 ("I do not find it unreasonable for [the union] to take steps to insure a comfortable standard of living for a large number of regular employees . . . by giving such employees high priority for the available work even though a minority . . . are offered only a limited amount of work . . . .").

larger community.[172] For example, a mandatory retirement provision may advantage a majority composed of the relatively young at the expense of a minority composed of the relatively old. Nevertheless, the courts had routinely approved such provisions.[173] This age-based distinction, however, was supported by larger social policy of the time; that is, mandatory retirement was entirely consistent with the purposes of a Social Security system that facilitates the exit of older workers to provide jobs for previously unemployed young adults.[174] So, too, in the merger of seniority lists, the "length of service at *either* company"[175] would be a sufficiently relevant independent factor, supported by industrial experience, to allow a majority to endtail a minority.[176]

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172. *Compare* Hargrove v. Brotherhood of Locomotive Eng'rs, 116 F. Supp. 3, 8 (D.D.C. 1953) ("Here [as in *Steele*] the discriminations based on prior employment and geography alone are also irrelevant and invidious.") *with* Associated Transp., 185 N.L.R.B. 631 (1970) ("It is settled that a bargaining representative for the employees of a particular unit has the right to give an inferior seniority ranking to employees transferred from another unit."). *See also* Conrad v. Delta Airlines, Inc., 494 F.2d 914 (7th Cir. 1974) (twelve month probationary period for pilots sustained); Williams v. Pacific Maritime Ass'n, 384 F.2d 935 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968) (union promoted class B longshoremen with no previous violations to class A status and deregistered class B longshoremen with previous violations; allegations of breach of the duty of fair representation on these facts held to withstand motion to dismiss); Cafero v. NLRB, 336 F.2d 115 (2d Cir. 1964) (rule against holding two full-time jobs sustained). In NLRB v. Longshoremen's Local 1581, 489 F.2d 635, 637-38 (5th Cir. 1974), distinctions in job assignment made by the union, based on citizenship and family residence, were held to breach the duty of fair representation. In a related case, Guerra v. Manchester Terminal Corp., 498 F.2d 641, 646-47, 655 (5th Cir. 1974), the court held that such distinctions withstand title VII scrutiny but fall afoul of 42 U.S.C. § 1981.

173. *See* cases cited in note 117 *supra*.

174. *See* Moon & Smolensky, *Income, Economic Status, and Policy Toward the Aged*, in INCOME SUPPORT POLICIES FOR THE AGED (G. Tolley & R. Burkhauser eds. 1977) 45 ("The tension between providing aid and simultaneously discouraging work effort appears to trouble policymakers less when the elderly are involved than with the other disproportionately poor groups."). That policy has been undergoing reexamination in light of the aging of the American work force. *See* S. REP. No. 95-493, 95th Cong., 1st Sess. (1977).

Older workers are now specially protected against discrimination in terms and conditions of employment by the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976). This Act was recently amended to specifically prohibit mandatory retirement of most employees below age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (to be codified in 29 U.S.C. § 631(a)).

175. Humphrey v. Moore, 375 U.S. 335, 347 (1964) (emphasis added).

176. *Humphrey v. Moore* has been read to suggest that there is a duty, abstracted from the Labor Act, to dovetail merged employees. The court in *Red Ball Motor Freight* implied as much, 379 F.2d at 143 n.10 ("The condemnations of refusal to dovetail are legion."). This reading, however, is contrary to the analysis offered here, in Morris v. Werner-Continental, Inc., 466 F.2d 1185 (6th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973), in Schick v. NLRB, 409 F.2d 395 (7th

If there is an independently valid distinction, however, the union must consistently adhere to it; thus, the formulation offered here deals with the authentic situation of arbitrariness—the treating of the similarly situated differently. In *Butler v. Local 823, International Brotherhood of Teamsters*,[177] for example, the collective agreement provided for the dovetailing of employees in the event of merger, subject to alteration if the parties felt that different treatment was necessary.[178] When a relatively new company acquired an older one, the employees of the acquiring company vehemently protested the loss of their jobs to acquired employees. As a result, the union approved a plan to dovetail only those employees of the acquired company who were working on the date of the merger and endtail those employees of the acquired company who were on layoff status on that date—in effect, splitting the differences between the two groups to assuage the employees of the acquiring company. Although the court of appeals suggested that the union's decision was the result of hostility directed toward the employees of the acquired firm, the gravamen of the decision was the conclusion that the distinction between employees of the acquired company working and those laid off on the date of merger was not relevant. If the distinction between working and layoff status were relevant, consistency would require the

Cir. 1969), and in Bieski v. Eastern Automobile Forwarding Co., 231 F. Supp. 710 (D. Del. 1964), *aff'd*, 354 F.2d 414 (3d Cir. 1965).

In support of this proposition, moreover the decision of only one court is cited. Commercial Telegraphers' Union v. Western Union Tel. Co., 53 F. Supp. 90 (D.D.C. 1943). The case concerned the union's insistence on endtailing employees of an acquired firm in the face of the Federal Communications Commission's insistence on dovetailing employees of merged carriers as a protective measure under the Communications Act. The court made clear that the latter requirement was the basis of its holding: "To the extent that parity, rather than subordination, adversely affects plaintiff's [union] contract, there can be no doubt that the statute authorizing the consolidation itself in large measure has that effect." *Id.* at 96. It may well be that in some cases external law imposes solutions more protective of the minority than the duty of fair representation. *See, e.g.*, Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853 (8th Cir. 1975). But, analogous to the previous discussion under title VII, the very fact that Congress has chosen to do so does not necessarily assimilate those special requirements into generalized obligations under the duty of fair representation. To be sure, these protective measures may express the moral sense of the community, and that expression—coupled with widespread industrial practice—is a source that should be looked to as refining the content of the duty. At some point, a generalized obligation to accommodate the minority might be well grounded; but, in view of the foregoing, it remains to be seen whether that time has yet arrived.

177. 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975).

178. *Id.* at 451.

union to separately dovetail both groups.[179]

A useful further illustration is *Deboles v. TWA.*[180] In *Deboles*, the union negotiated separate seniority treatment for TWA's employees at the Kennedy Space Center. Unlike all other TWA employees who earned company-wide seniority, those employed at the Space Center achieved seniority only in that facility. The Space Center employees were vocal in their dissatisfaction with facility seniority, and, consequently, the union sought to secure retroactive system seniority for them. Although TWA was willing to agree, opposition among other TWA employees to the proposed change made ratification unlikely. The union accordingly withdrew the earlier proposal and bargained for system seniority to be effective on the date of the agreement. The union assured the Space Center group that it had done all it could to secure retroactive system seniority and that TWA insisted on the proposal's prospectivity. Although the contract was ratified, the disgruntled Space Center

179. In Ryan v. New York Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451 (2d Cir. 1979), the union was faced with a difficult problem. Under the contract, layoffs from the Alco Company were made in reverse order of seniority. Generally, however, seniority (or priority) in other companies is acquired on a date-of-hire basis. Since Alco was going out of business, many employees wanted to quit in order to establish priority in new jobs. The union ordered a "freeze" on its members leaving Alco for new jobs so that twelve journeymen who had been laid off could secure other employment first. After a second group of thirty journeymen received layoff notice, the union issued a second, but different, freeze order allowing all Alco journeymen to establish priority elsewhere once their layoff notice had been issued. The effect was explained by the court:

> [H]aving been prevented by the previous freeze orders from establishing New York newspaper priority superior to that of those with *lower* Alco priority because the latter had been laid off from Alco and employed at the newspapers earlier than appellants, appellants were now to lose New York newspaper priority also to those with *higher* Alco priority, even though the latter would necessarily be laid off later, or last, by Alco.

Id. at 454 (emphasis in original).

The Second Circuit found no breach of the duty of fair representation. The seniority structure in the collective agreement, the court pointed out, did not anticipate a flood of unemployment. The freeze orders were the union's response to a worsening situation, each rationally attuned to the increasing economic problems at Alco. Even though the effect was to treat some of Alco's previous employees differently from others, the union's ultimate action might be consistent with proposition (5); that is, the union's action might be viewed as the adoption of a uniform rule that had the incidental consequence of disadvantaging a minority. *See* the further discussion of this case in connection with proposition (7), *infra* note 195. *See also* McDermott v. Teamsters Joint Council No. 53, 347 F. Supp. 473 (E.D. Pa. 1972) (no breach of the duty of fair representation for union to dovetail new employees even though the effect dilutes the seniority of a group of employees who had been endtailed eight years before).

180. 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

employees later sued for breach of the duty of fair representation. They pointed out that the union's decision was based on the political consequences of retroactive system seniority: a large number of the union's members elsewhere feared that with retroactive system seniority, they would be "bumped" by TWA's Space Center employees in the event of termination of the TWA-Space Center contract.

The fair representation question in *Deboles* must be addressed from the perspective of the previous facility-only seniority system. Although that system denied Space Center employees seniority credit on a company-wide basis, it protected them from being "bumped" by senior employees outside the Space Center. That protection was of significance to Space Center employees, for it was negotiated during a time of Space Center expansion and thus of more rapid promotion there than was possible elsewhere in the TWA system. Because of the differences between Space Center and other TWA operations, a limitation of facility seniority for Space Center employees was founded upon relevant factors.[181] Accordingly, the union could simply have chosen not to seek system seniority for the Space Center group once a reduction in force impended; that is, the union could have maintained the facility-only system on the ground that those employees who had been protected from "bumping-in" by employees outside the Space Center could not properly lay claim to equal treatment once hard times arrived, to the disadvantage of those who had been earlier denied the benefit of bumping-in. A union declination to advance the interests of the Space Center minority would have been consistent with proposition (4).[182] Because no accommodation was required, it follows a fortiori that no breach of the duty occurred when the union made only a partial accommodation, *i.e.*, prospective system seniority. This was unlike *Butler v. Local 823, International Brotherhood of Teamsters*,[183] since the union did not differentiate among those in the Space Center group; it treated the similarly situated consistently.

181. Moreover, the employer sought to limit seniority to the Space Center to ensure the stability of the work force by preventing senior system employees from transferring to the Florida facility for the winter and then exercising their contractual right to transfer to their regular ports in the summer. The relevance of the employer's bargaining position to the duty of fair representation is discussed at p. 270 *infra*.

182. *See* p. 217 *supra*.

183. 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975). *See* text accompanying notes 177-179 *supra*.

(7) *Where higher authority within a union resolves a conflict to favor a more politically influential faction, its decision should be considered majority action for the purposes of the foregoing propositions.* In the *Deboles* case, the leadership of the international union was faced with a conflict among different factions of TWA employees. Because the contract was to be submitted to a ratification vote of the TWA-wide unit, a political fact which limited the scope of what the union leadership could accomplish, the case is best viewed as one of direct majority rule. However, union leaders are often faced with conflicts among factions that will not be the subject of referendum. Accordingly, the Third Circuit has said that the duty of fair representation is breached by the "arbitrary sacrifice of a group of employees' rights in favor of another stronger or more politically favored group."[184] Again, the use of the term "arbitrary" is not helpful; the satisfaction of the majority is surely a valid consideration. The cases cited by the Third Circuit are better read to suggest that the same limits on a majority's direct advantage over a minority apply as well to a union leadership's political ability to favor a majority.

In *Local 4076, United Steelworkers v. United Steelworkers*,[185] for example, the Steelworkers' regional director set aside an arbitrator's award that ordered dovetailing of seniority lists following a merger, and negotiated a collective agreement endtailing the employees of the acquired firm. The change was intended to favor the seventy employees of the acquiring firm over the thirty employees of the acquired firm. The regional director's action favored the more influential majority by expropriating rights conferred on the minority by the arbitrator's award, in contravention of proposition (3).[186] Because the majority is forbidden by that proposition from taking such action directly, union leadership should be similarly forbidden so to act. However, had the union decided initially to endtail the acquired employees, that decision would have been consistent with proposition (6).[187]

184. Gainey v. Brotherhood of Ry. & S.S. Clerks, 313 F.2d 318, 324 (3d Cir. 1963). *See also* Truck Drivers Local 568 v. NLRB (Red Ball Motor Freight, Inc.), 379 F.2d 137, 142 (D.C. Cir. 1967); Hardcastle v. Western Greyhound Lines, 303 F.2d 182, 187 n.10 (9th Cir.), *cert. denied*, 371 U.S. 920 (1962).

185. 338 F. Supp. 1154 (W.D. Pa. 1972).

186. *See* p. 215 *supra*.

187. *See* p. 222 *supra*. In Lewellyn v. Flemming, 154 F.2d 211 (10th Cir.), *cert. denied*, 329 U.S. 715 (1946), the union negotiated to expand the seniority pool for bidding on conductor vacancies, an action that had the effect of diluting the seniority of an employee with long service who, but for the collective agree-

The proposition offered here suggests that the more removed the union's leadership is from political influence, the more discretion it should have to do what it believes to be best, free from judicial interference.[188] A useful illustration is supplied by *Waiters Local 781 v. Hotel Association*.[189] The hotel employees bargained with a multi-employer association through a joint board composed of seven locals, each representing a separate craft. It had long been the practice in the industry for banquet waiters to receive a gratuity, fixed by collective

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ment, would have been the senior bidder under long-standing company policy that antedated the collective agreement. Professor Wellington has cited both *Lewellyn* and *Jennings v. Jennings*, 91 N.E.2d 899 (Ohio Ct. App. 1949), as decisions that "indicate no awareness whatever of the problem" of fair representation. Wellington, *supra* note 69, at 1341. *Jennings v. Jennings* is a clear violation of proposition (3). *See* p. 215 *supra*. *Lewellyn*, on the other hand, did not concern an expropriation of the employee's seniority; rather, the union opened up bidding to a wider seniority pool, an action that had the ancillary effect of reducing the employee's seniority.

188. It has been pointed out that many bargaining choices do not present clear majority-minority distinctions.

> Most negotiations do not consist of clear-cut choices between majority and minority interests. Rather, the union works with many demands that are pressed with varying degrees of intensity by different groups. Under these circumstances, the typical union member is not simply identified with the majority or the minority; his interests lie with different groups on different issues. On wages, he may belong to a majority; on fringe benefits to the minority; on working conditions, he may simply belong to one of the many minorities that are backing special demands relevant to particular job classifications or departments. Under these conditions, the union negotiator has no easy calculus to decide which contract will win the largest following in the union.

D. BOK & J. DUNLOP, *supra* note 45, at 113.

It has also been pointed out that the insulation of union leadership from political accountability frees the leader to choose what he thinks best.

> Deep-rooted grievance stemming from conditions within the plant comprised the third major determinant factor [of the union's decisions] in this case. Using the members of the bargaining committee as his main line of communication with the rank and file, Hill [the union business agent] knew that action would have to be taken to mollify the discontent of the men in the shop. The result was the long, detailed seniority clause which the bargaining committee hoped would guard against any recurrence of the alleged examples of favoritism in the plant. It was on this issue that Hill received the greatest verbal support from members of the bargaining committee during negotiations. By recounting specific incidents in the shop, by reflecting the angry mood of the work force, the committee men impressed management with the fact that this was a real, not a manufactured, issue.
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> However, Hill would go only so far with the committee men. Because the members in the shop were numerically small, relative to the entire District, and because these members were distributed among several locals where their political influence would be diluted, he did not show concern over the likelihood of being rejected by the members at the next general election. Thus, Hill felt fairly secure in asserting himself.

A. Weber, *supra* note 99, at 149.

189. 498 F.2d 998 (D.C. Cir. 1974).

agreement as a percentage of the customer's bill. The bartenders, who received no gratuities under the agreement, attempted to persuade the joint board to change the practice. When the joint board refused, the bartenders appealed to the president of the International, pointing out that agreements in several major cities allowed bartenders to share in banquet gratuities. The president agreed and ordered the joint board to insert the bartenders' proposal into the contract demands. The waiters subsequently sued the International alleging a breach of the duty of fair representation because of the resulting change in their compensation. In a brief opinion, the District of Columbia Circuit had no difficulty affirming a directed verdict for the defendants: "The doctrine of fair representation must be applied realistically in the context in which union officials resolve internal disputes, even though a decision in favor of one local or faction . . . arouses keen resentment in the hearts of the other . . . ."[190]

Although the Court of Appeals did not discuss the terms of the rule change, the provision actually allocated to the bartenders only that share of the gratuity represented by drinks they personally served.[191] Even if the bartenders had obtained favorable votes from other craft representatives on the joint committee in return for the bartenders' vote on other issues, adoption of the gratuities proposal by the committee would not have breached the duty of fair representation. Although the majority (the coalition) would have been advantaging itself at the expense of a minority (the waiters), the provision would be independently defensible under proposition (6)[192] as based on a relevant factor, inasmuch as bartenders would receive only that share of the gratuity represented by drinks that bartenders personally served. Accordingly, it follows that union officers removed from the controversy could accomplish the same change.

It remains to be seen, however, whether the president of the International could have gone beyond that distinction. For example, it is unclear whether he could have ordered an in-

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190. *Id.* at 1000.

191. The relevant provision reads as follows: "Where beverages on which a service charge is made are served to the guest by a bartender, each bartender staffing said bar shall receive one waiter's [waiters] share of the service charge on [the] beverages only." *Id.* Brief for Appellees at 6, Waiters Local 781 v. Hotel Ass'n, 498 F.2d 998 (D.C. Cir. 1974). The bracketed language is the difference in the statement of the provision contained in the Brief for Appellee Joint Board at 2.

192. *See* p. 222 *supra*.

terim reallocation to the bartenders to make up for the period during which the local practice should have changed.[193] Had the majority (the coalition) taken this action directly, it would raise a serious question of expropriation under proposition (3).[194] A persuasive argument can be made, however, that a union's national officers, if relatively uninfluenced by the political power of either the waiters or bartenders locals in one city, should be free to conclude that the waiters had been unjustly enriched by adherence to an outdated practice and that some redistribution would be warranted.[195] On the other hand, under proposition (4),[196] it would not have been a breach of the duty of fair representation for the International president to have left the outdated practice undisturbed, even if his sole reason for doing so was to curry favor with a politically influential waiters local.[197]

(8) *The duty of fair representation in contract making imposes no special procedural obligations toward those who are eligible for union membership.* Under the analysis offered here, and especially in view of Congress' explicit refusal to make fairness in the conduct of union affairs a statutory right, the duty of fair representation in contract making imposes no procedural obligations upon the union, unless, as in *Steele*,[198] the union is disadvantaging a group that is ineligible to participate in the union.[199] This is not to suggest, however, that union pro-

193. Three years earlier, the International president had rejected the bartenders' appeal to change the practice on the ground that it would set a bad precedent for bartenders' unions elsewhere. He reversed himself on this occasion after learning that, in fact, bartenders elsewhere were tip-sharing; that is, the factual basis for his earlier decision was in error.

194. *See* p. 215 *supra.*

195. This aspect of proposition (7) may explain why Ryan v. New York Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451 (2d Cir. 1979), *discussed in* note 179 *supra*, was rightly decided. There is no hint in that case of political motivation; instead, the case suggests that the union leadership was struggling, perhaps ineptly, with a serious problem. Accordingly, under proposition (7), the leadership could have altered the current seniority of former Alco employees to make way for more senior Alco employees.

196. *See* p. 217 *supra.*

197. It is, however, extremely unlikely, as a practical political matter, that the leadership would provide for a retroactive change. By the same token, it is equally unlikely that the leadership would be inconsistent in adhering to the new policy.

198. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See* text accompanying notes 47-54 *supra.*

199. The Third Circuit has suggested, in cases concerning the merger of seniority lists arising under the Teamsters' "open-end" grievance procedure, that the disadvantaged group be given "an opportunity to make their case" before the decision makers. Price v. International Bhd. of Teamsters, 457 F.2d

cedure is entirely irrelevant to the issue of fair representation in contract making. For example, the failure to submit a collective agreement to a ratification vote in violation of a union's own procedures has been held to breach the duty of fair representation.[200] Further, the manner in which the union advances its bargaining position may, in some cases, be evidence of malice, hostility, or bad faith in contravention of proposition (2).[201] Finally, examination of the union's procedures may help to

605, 611 (3d Cir. 1972) (citing Bieski v. Eastern Auto. Forwarding Co., 396 F.2d 32, 38 (3d Cir. 1968)). Although the Third Circuit in *Price* implied that the "open-end" grievance procedure is far more akin to collective bargaining than to grievance arbitration, 457 F.2d at 611, the courts adoption of a requirement for notice and an opportunity to be heard derives from the notion that what the union was doing was processing a grievance under the collective agreement, such that the court could ensure sufficient procedural rigor in the "arbitration" of the grievance as an element of judicial review of the "award." *See also* Larson v. All-American Transp., Inc., 83 S.D. 622, 164 N.W.2d 603 (1969).

200. Teamsters Local 310 v. NLRB, 587 F.2d 1176 (D.C. Cir. 1978); Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747 (3d Cir. 1977). Under the theory advanced here, the fair representation aspect of these cases derives from the differential abrogation of a pre-existing right unsupported by any consideration other than union politics. *But see* text accompanying note 197 *supra*. The duty of fair representation has not been understood to require that the ballots of a multi-local ratification be separately counted, in the absence of an explicit obligation on the union's part to do so. Black v. Transport Workers, 454 F. Supp. 813 (S.D.N.Y. 1978).

201. *See* p. 211 *supra*. In *Branch 6000*, the Board relied on Teamsters Local 671 (Airborne Freight Corp.), 199 N.L.R.B. 994 (1972). Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808, 811 (D.C. Cir. 1979). The Teamsters were elected by a unit of full-time drivers and regular part-time warehousemen; the former were union members, the latter were not. The union proceeded, in stages, to work for the elimination of all part-time employment. The Board sustained the administrative law judge's finding that such a course of conduct breached the duty of fair representation. The theory of the case, however, is obscure. The administrative law judge expressly found that the lack of membership played no role in the case. 199 N.L.R.B. at 1000. In *Branch 6000*, the Court of Appeals nevertheless characterized the case as one involving "discrimination . . . between member and non-member employees." 595 F.2d at 811 n.9. The Board found that the union had failed to represent part-time workers "in a fair and impartial manner." 199 N.L.R.B. 994. That observation is troublesome, insofar as a union may surely act to curtail part-time employment to provide more secure conditions for full-time employees. It is significant, however, that the union, recently elected by a unit of six full-time drivers and six part-time warehousemen, proceeded in a "duplicitous" manner to eliminate part-time employees. 199 N.L.R.B. at 1000. Indeed, if, during the election, the union had been candid about its policy concerning part-time workers, it would not have been selected by a majority. In contrast to Beriault v. Local 40, Super Cargoes & Checkers of the Int'l Longshoremen's Union, 445 F. Supp. 1287 (D. Ore. 1978), the disadvantagement was found to be the product of "bad faith" as manifested by the union's conduct. 199 N.L.R.B. at 1000. In Deboles v. TWA, 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977), on the other hand, where the union clearly misrepresented the situation to the affected group, there was simply no impermissible disadvantagement, and so no breach of the duty of fair representation.

clarify or resolve the fair representation question. Under propositions (1)[202] and (7),[203] no further scrutiny of an action is required where the majority has disadvantaged itself in order to benefit a minority; thus, it may be unclear whether a majority is consciously disadvantaging itself. In such a case, a manifestation of majority sentiment, for example, by a vote of ratification, might be dispositive of the fair representation issue.[204]

3. *The Functional Analysis: A Summary and Application*

David Feller has suggested the following test of a successful legal theory:

> A legal theory is important . . . only if solutions to particular problems can be derived from it; it is sound only if the solutions it produces are more satisfactory than those which would result without it; and it is supportable only if it conforms, at least in large measure, with the principles followed by the courts in the decided cases.[205]

The theory offered in this Article attempts to accommodate the system of majority rule contemplated by the Labor Act with the need to protect minorities from the abuse of majority power. There must be a balancing of the nature of the disadvantagement against the degree of external intrusion into internal union affairs required to upset a union's decision. From this perspective, there is a significant difference between expropriating or abrogating a right or benefit already conferred and not granting it to begin with. There is similar significance in the difference between a distinction drawn by a union between groups it represents and the manner in which it decides to draw the distinction.

Whether this analysis satisfies Feller's test can be determined by examining the Ninth Circuit's decision in *NLRB v. Truck Drivers Local 315 (Rhodes & Jamieson)*,[206] the one case that plainly purports to adopt a "rational decisionmaking

202. *See* p. 210 *supra*.
203. *See* p. 227 *supra*.
204. In Barker v. Newspaper and Graphic Communications Local 6, 461 F. Supp. 109 (D.D.C. 1978), the union negotiated with the Washington Star to dovetail stereotypers with pressmen to the disadvantage of some pressmen, and in contravention of agreements made when their two unions had merged. The court found no breach of the duty:

> At a two-hour local union meeting about the proposed contract, the President discussed and answered members' questions about the provisions of the contract. . . . The membership voted 99 to 44 to approve the contract. The small number of stereotypers in the Union compared to the larger number of pressmen established mathematically that the great majority of pressmen voted for the contract.

Id. at 112-13.
205. Feller, *supra* note 8, at 664.
206. 545 F.2d 1173, 1176 (9th Cir. 1976).

processes" requirement as an element of the duty of fair representation. Under a Teamsters contract, the reassignment rights of employees displaced by job elimination were to be determined by the local union. The job of one Holman, a dump truck driver, was eliminated and the union conducted an election on the following proposition: "Do you want the warehousemen, yard men, flat rack and dump drivers to be re-assigned, with their full seniority, as ready-mix drivers?"[207] The vote was twenty to eight against the reassignment, and Holman was terminated.

A majority of the NLRB panel determined that under the collective agreement, Holman had a right to bump less senior employees in other jobs; from that perspective, the question was whether the union had acted arbitrarily in refusing to recognize Holman's reassignment right. The Board noted some anomalies in the referendum. Although only dump truck drivers had been laid off, the ballot was extended to a larger group—that is, warehousemen, yard men, and flat rack drivers. Moreover, because each voter presumably knew whether his particular job had been slated for elimination, he would also know whether he would benefit or suffer from an affirmative vote. In holding that the union had breached the fair representation duty, the majority of the Board stated that the duty cannot be avoided merely because a decision is made by referendum. The referendum procedure used in *Rhodes & Jamieson* did not comply with the duty: "[T]he election itself was designed so that it could express, not fairness, but only the conflict of interest of each member of the electorate."[208]

In dissent, Board member Penello argued that the case involved contract making—that is, the referendum was not a means of divesting a right previously accorded, but rather was employed to determine a question unresolved by the collective agreement. From that perspective, imposition of a restriction on bumping rights would not breach the duty of fair representation. In addition, member Penello saw no infirmity in the union's adoption of a referendum procedure at that time. The ballot's only potential adverse effect was upon ready-mix drivers, and there was no evidence in the record indicating the voting strength of this group relative to the remaining electorate.

Although the Ninth Circuit, on review, agreed with Penello

207. *Id.* at 1175.
208. 217 N.L.R.B. 616, 619 (1975).

that the case involved contract making, the court nevertheless accepted the Board majority's position:

> We do not intimate that it would be improper for a union to use an election process to make a decision under other circumstances. However, we agree with the Board that to base its decision as to whether the bumping principle should in general be applied to this Employer upon an expression from the employees so limited in scope and focus constituted arbitrary Union action without rational basis prejudicial to Holman, and a failure fairly to represent his interests.[209]

Under the functional analysis offered here, if the Board majority's reading of the collective agreement in *Rhodes & Jamieson* was correct, there was a clear-cut violation of proposition (3):[210] the majority abrograted employee Holman's existing right to "bump" in order to benefit itself. On the other hand, if those adversely affected by the "no bumping" ballot actually were in the majority, no question of fair representation would have been presented under proposition (1).[211] The case would then have been one of a majority voting to disadvantage itself. The better view, however, was that taken by both Board member Penello and the court of appeals: under the existing contract, the determination of reassignment rights was to be postponed until after the layoff. The Ninth Circuit suggests that the referendum was contrary to the requirement under the contract that the union decide "whether the bumping principle in general should prospectively be approved."[212] Consistent with propositions (4)[213] and (5),[214] but contrary to the Board majority (and to *Branch 6000*),[215] the union surely could have held a referendum in order to decide whether there would be bumping in general. Consequently, the majority could have voted for a general "no bumping" rule solely to favor itself.[216]

The union breached the duty of fair representation not because it held a referendum, but because the distinction resulting from the vote denied some the right to bump while leaving the resolution of the rights of others open. This distinction

209. 545 F.2d at 1176.
210. *See* p. 215 *supra*.
211. *See* p. 210 *supra*.
212. 545 F.2d at 1176.
213. *See* p. 217 *supra*.
214. *See* p. 220 *supra*.
215. Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979). *See* text accompanying notes 86-88 *supra*.
216. Contrary to the reasoning in *Branch 6000*, *see* text accompanying notes 86-88 *supra*, the union permissibly could have limited such a vote to its own members. Were the effect of such a vote to give bumping rights to union members only, however, the result would run afoul of proposition (2). *See* p. 211 *supra*.

rested upon no consideration relevant to bargaining[217] other than the majority's desire to favor itself by not allowing Holman to bump while hedging its bets against the possibility of more widespread layoffs in the future. Similar to the union's decision in *Butler v. Local 832, International Brotherhood of Teamsters*[218] to dovetail some acquired employees while endtailing others, the majority's action treated the similarly situated differently, thereby contravening proposition (6).[219] Accordingly, depending on how one reads the somewhat muddled record, *Rhodes & Jamieson* could have been readily disposed of without suggesting that a referendum reflective only of a conflict of interest within the unit breaches the duty of fair representation.[220] To return to Feller's test,[221] this analysis helps in applying the duty of fair representation to concrete cases, it produces more satisfactory results than are produced without it, and it conforms in large measure to what courts actually do.

D. FAIR REPRESENTATION AND PRIVATE ORDERING

The limits of majority rule in private sector collective bargaining derive from positive law and the duty of fair representation. Positive law directly constrains employer policy; by limiting what an employer may agree to, such constraints also limit what unions may demand. The duty of fair representa-

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217. It would have been relevant, for example, if different skills were required of ready-mix drivers than were required of dump-truck drivers.

218. 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975). *See* text accompanying notes 177-179 *supra*.

219. *See* p. 222 *supra*.

220. *See also* the criticism of the analogous reasoning in *Branch 6000* in note 102 *supra*. It should also be noted that Holman had appealed to the union's executive board, which sustained his appeal because the "vote was taken after the fact that an operation was being eliminated and that a fair vote could not be taken" at that time. Rhodes & Jamieson, 545 F.2d at 1175. That the union hierarchy thought the contractual distinction unfair is significant under proposition (6), *see* p. 222 *supra*, but the ground asserted seems difficult to reconcile with Teamster practice. Teamster agreements, as in Humphrey v. Moore, 375 U.S. 335 (1964) (*see* text accompanying notes 62-64 *supra*), usually reserved to later negotiation the rights of employees affected by merger or absorption. Under such an arrangement, the union's decision concerning the rights of employees is made not in advance of the merger but only after the fact, when the dimensions of the situation are known. Necessarily, some will benefit and some will suffer by whatever decision the union makes. Nevertheless, in *Humphrey v. Moore*, the Court sustained a union's ability to decide the seniority consequences of a merger after the fact. Although the timing of the referendum is relied upon as a factor in the case, neither the Labor Board nor the court of appeals discusses the relevance of *Humphrey v. Moore*.

221. *See* text accompanying note 205 *supra*.

tion, on the other hand, is a direct limit on unions, and affects employers only secondarily. Accordingly, the duty of fair representaion in contract making is usually unconcerned with the fairness or reasonableness of the employer's bargaining position. It is assumed that the employer is acting in his self-interest. If he is taking a plainly unreasonable, or even arbitrary bargaining stance, the remedy must be found in the Act's requirement of good faith bargaining. As a result, the case law governing the duty of fair representation in contract making is almost entirely concerned with decisions in which the employer had little or no voice—that is, decisions that the union was free to make. Examples include the decisions to grant or deny "bumping" rights in *Rhodes & Jamieson*,[222] to apportion banquet gratuities among bartenders and waiters in *Waiters Local 781 v. Hotel Association*,[223] and to set the schedule for days off in *Branch 6000*.[224]

To be sure, a contractual distinction that intentionally disadvantages a group specially protected by positive law also breaches the duty of fair representation owed to that group. In such a case, the source of the bargaining demand is irrelevant. Once that special case is put aside, however, it becomes clear that the duty of fair representation does not function as a separate, uniform limit on the terms of a collective agreement, divorced from the bargaining process that produced the agreement.

For example, in *Strick Corporation*,[225] an arbitrator awarded 200 employees, discharged for engaging in a wildcat strike, the right to be rehired with full seniority, the rehiring to occur as strike replacements quit and their jobs become available. Reinstatement on those terms would adversely affect the seniority of remaining strike replacements, who then comprised the overwhelming majority of the employer's work force. The replacements pressured the union to abrogate the award, threatening to seek the union's decertification if it proved insensitive to their demands. The employer opposed the award on the grounds that the award would encourage further strikes in breach of a no-strike commitment and would cause labor unrest as former strikers were reinstated who enjoyed greater

222. 545 F.2d 1173 (9th Cir. 1976). *See* text accompanying notes 206-209 *supra*.
223. 498 F.2d 998 (D.C. Cir. 1974). *See* text accompanying notes 189-190 *supra*.
224. 595 F.2d 808 (D.C. Cir. 1979). *See* text accompanying notes 86-88 *supra*.
225. 241 N.L.R.B. No. 27 (Mar. 19, 1979).

seniority than the remaining strike replacements. Accordingly, the company insisted upon abrogation of the arbitrator's award as a condition of a subsequent collective agreement. The union, unable to persuade the current work force to strike to their own detriment, capitulated to the employer's demand, and the strike replacements charged a breach of the duty of fair representation.

The administrative law judge concluded that the threat of decertification was a valid consideration and that the union's action was therefore not arbitrary. On the face of it, however, the union's action would appear to be an impermissible expropriation under proposition (3).[226] To reconcile the administrative law judge's view with the court's holding in *Barton Brands*,[227] one would have to conclude that the abrogation of previously accorded rights can be legitimated by the additional consideration of a union's institutional survival. The Board avoided this troublesome distinction and focused instead on the union's position vis-à-vis the employer rather than the employees. The Board held that the duty of fair representation did not limit the employer's demands and that, under the circumstances, the union did not breach the duty by capitulating to those demands.[228]

226. *See* p. 215 *supra*.

227. Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976). *See* text accompanying notes 146-147 *supra*.

228. While we agree with the Administrative Law Judge's ultimate finding that Respondent Unions did not violate their duty of fair representation, we regard as irrelevant the fact that the Unions may have lost the support of the then-working unit members if the Unions had failed to accede to the Employer's demand for a contract clause abrogating the arbitrator's award giving rise to this controversy. The only issue presented herein is whether the Unions acted arbitrarily or in bad faith in *acquiescing* in the Employer's demand for the clause. Given the particular circumstances herein, including the Employer's adamant demand for the clause, the Employer's avowed intention to "take a strike" if the Unions failed to agree to the clause, the desire of the working employees and their shop committee that the clause be included, and the probable ineffectiveness of a strike in opposition to the clause and the fact that resistance of the clause further would delay implementation of the new contract and its improved benefits thus resulting in detriment to working employees, we conclude that the Union was faced with a "Hobson's choice," and in making its decision did not act arbitrarily or in bad faith.

241 N.L.R.B. No. 27, slip op. at 2-3 (Mar. 19, 1979) (emphasis in original). *See also* Bruen v. Local 492, Int'l Union of Elec. Radio & Mach. Workers, 425 F.2d 190, 191 (3d Cir. 1970) ("[the contested seniority clause] was placed in the agreement at the suggestion of the company negotiator to eliminate existing friction in the Division involving those employees but the company was not willing to make this exception the rule by extending it to cover all future employees . . . .").

A contrary view would ignore the relevance of the bargaining process to the duty of fair representation. Under such a view, the duty of fair representation would be breached by a union's mere participation in a collective agreement that strikes an impermissible balance between groups the union represents. The logic of this position requires the federal judiciary (and the Labor Board) to decide at the outset what fairness dictates the terms of a collective agreement to be, thereby converting the system of private ordering to one of public ordering. However, the reason the duty of fair representation is "subtle business"[229] is precisely because it must accommodate the bargaining process.[230] Accordingly, the fact that the duty of fair representation in private sector contract making operates primarily as a limit upon the union, not the employer, should play a significant role in ascertaining whether the system of private sector collective bargaining can be transferred into the public sector without modification.

III. THE PUBLIC SECTOR

When the system of exclusive representation is translated into public employment, the frame of reference explored in Part II changes. As Clyde Summers explains,

> The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer. The employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters. We have developed a whole structure of constitutional and statutory principles, and a whole culture of political practices and attitudes as to how government is to be conducted, what powers public officials are to exercise, and how they are to be made answerable for their actions. Collective bargaining by public employers must fit within the governmental structure and must

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229. Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 361 (1961).

230. As a practical matter . . . courts must use a relatively loose standard like "reasonableness" when judging union conduct. The alternative is for courts to assume a task they probably could not perform well. Problems vary from industry to industry and from union to union. The internal structure and politics of a union, the history of collective bargaining and the present power relations reflected in it, and the state of development and economic condition of an industry, are the obvious, though by no means the exclusive, interacting factors which affect judgments about competing employee claims. A court is institutionally unable to second guess union judgments which result from a weighing and balancing of such dynamic variables. And as one moves away from tests of reasonableness one moves ineluctably into the second guessing game.

Id. at 362.

function consistently with our governmental processes. . . .[231]

How the frame of reference differs because of the nature of the employer is illustrated in the current controversy surrounding the scope of bargaining in the public sector;[232] in this setting, one encounters problems not commonly encountered in private employment. First, a statute might specifically govern a seemingly bargainable matter arguably precluding negotiation. Second, management prerogatives reserved to the public employer under the state's collective bargaining law may prohibit the public employer from agreeing to a contract demand. To similar effect, a concession to a contract demand might be precluded by the statutory powers of the public employer under the legislation that created the particular agency. Finally, a court might decline to give effect to a provision of a collective agreement that it considers offensive to "public policy."[233] These limits exist because of a perceived conflict between ordering by collective agreement and the democratic nature of governmental processes. Because the employer is government, some contract provisions that would be enforceable in the private sector might not be permitted to be the subject of negotiation in the public sector.

Like federal laws that limit employment policy in the private sector, a narrowed scope of public sector bargaining limits

231. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 670 (1975).

232. *See, e.g.*, Nelson, *State Court Interpretation of Teacher Collective Bargaining: Four Approaches to the Scope of Bargaining Issue*, 2 INDUS. REL. L.J. 421 (1977); Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C. L. REV. 155 (1977); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685. *See also* Feller & Finkin, *Legislative Issues in Faculty Collective Bargaining*, in FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION 117-31, 164-74 (1977) (Carnegie Council series) for a proposed solution.

233. For example, in 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), the New York Court of Appeals held that a school board lacks the power to agree to a provision that would allow a nontenured teacher to arbitrate his nonretention under a standard of "just cause." The state education law provides that a nontenured teacher may be refused reappointment without stated reasons. The school board's responsibility to renew or not "must be exercised by the board for the benefit of the pupils and the school district and cannot be delegated or abnegated. Accordingly, it is beyond the power of the board to surrender . . . as part of any agreement reached in consequence of collective bargaining." *Id.* at 777-78, 358 N.E.2d at 880, 390 N.Y.S.2d at 55. The sense of the decision is that the legislature intended there to be a period of probation and that it offends the public interest for a school board to collapse the distinction between probation and tenure by collective agreement.

the content of collective agreements, and thus serves as a limit on majority rule. The permissible scope of public sector bargaining varies from state to state and is beyond the scope of this Article; this discussion assumes, for the purposes of analysis, that the parties have the power to negotiate upon a particular question as a matter of state law.

A. THE CONSTITUTION AS A LIMIT ON THE PUBLIC EMPLOYER

In 1927, the Tennessee Supreme Court made the following observation of that state's "Monkey Law" forbidding the teaching of evolution:

> [I]t is an act of the state as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform. In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States.[234]

Implicit in this analysis, as William Van Alstyne has pointed out, is a theory of "reverse state action"—government, when acting as an employer, is functioning no differently from a private employer and is therefore just as unhampered by the Constitution as the private employer would be.[235] This reasoning, Van Alstyne has also pointed out, completely inverts the logic of the Constitution.[236]

It is now well established that the Constitution imposes limits upon the government even in its role as an employer. Unlike those of a private employer, a government employer's policies concerning, for example, citizenship,[237] political belief and affiliation,[238] and extramural[239] and intramural[240] utter-

234. Scopes v. State, 154 Tenn. 105, 112, 289 S.W. 363, 365 (1927).

235. *See* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 *passim* (1977).

236. The Bill of Rights exempted private parties, *but not government*, because those who drafted and ratified the Bill of Rights were not then apprehensive of private parties, but were apprehensive of government. Similarly, the fourteenth amendment exempted private parties, *but not government*, because those who drafted and ratified it were not then sufficiently apprehensive of private parties, but were apprehensive of state government. To say that private citizens may deal with one another "unhampered by" the fourteenth amendment may be true . . . , but plainly it says nothing at all as to why a state may likewise deal with private citizens unhampered by that amendment, which was drafted precisely to hamper the state.

Id. at 486 (emphasis in original).

237. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

238. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976).

239. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968).

ances, must withstand constitutional scrutiny simply because the employer is the government.

This Article's concern is less with the substance of constitutional law than with the function of the Constitution under a regime of collective bargaining. A useful predicate for that analysis is supplied in three illustrative situations. Whether the result should differ because the challenged action complies with provisions of a collective bargaining agreement is examined later.

A case of academic freedom. A school board issues a directive to teachers of an elective, twelfth grade course in contemporary poetry, forbidding the assignment of outside reading for credit or in-class recitation of enumerated works of two "beat" poets—Alan Ginsberg and Lawrence Ferlinghetti. The Board has stipulated that an appropriate decisionmaker could permissibly determine that the books are suitable for use by the class.[241]

The Supreme Court has indicated, at least in dicta, that academic freedom is protected by the first amendment.[242] Accordingly, several lower courts have held that secondary school teachers have a modicum of first amendment protection for their professional utterances, including the assignment of supplemental readings.[243] So long as the literary works assigned are suitable for the purposes of the class, are not obscene, and are in keeping with the students' level of maturity, the first amendment forbids the school board to impose its own brand of literary orthodoxy upon the classroom. The school board's directive here is a clear violation of academic freedom.[244]

A case of termination of tenure. The rules of a state university provide that

240. *See, e.g.*, Givhan v. Western Line Consol. School Dist., 99 S. Ct. 693 (1979).

241. The case is Cary v. Board of Educ., 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979), *discussed in* Note, *Union Waiver of Constitutional Rights: Academic Freedom as a Bargaining Chip in Union Contracts*, 49 U. COLO. L. REV. 299 (1978). The author drafted a brief amicus curiae in the case on appeal to the Tenth Circuit on behalf of the American Association of University Professors.

242. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Weiman v. Updegraff, 344 U.S. 183 (1952).

243. *See* Wilson v. Chancellor, 418 F. Supp. 1358 (D. Ore. 1976); Sterzing v. Fort Bend Indep. School Dist., 376 F. Supp. 657 (S.D. Tex. 1972), *vacated on remedial grounds*, 496 F.2d 92 (5th Cir. 1974); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); Parducci v. Rutland, 316 F. Supp. 352 (N.D. Ala. 1970).

244. In Cary v. Board of Educ., 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979), the district court held that the first amendment protected the teachers' right to assign the books but went on to hold that a collective agreement, which recognized the school board's management prerogatives, operated to waive the right. The Tenth Circuit reversed on both issues, thereby affirming the result but not the district court's reasoning. However, the first amendment limb of the Tenth Circuit's decision cannot be reconciled with the cases cited in note 243 *supra*.

academic tenure, once awarded, confers a right to continued employment until retirement, subject to termination upon the existence of specified conditions such as "cause" to dimisss or "financial exigency." There are no express standards or procedures provided to determine the existence of the conditions. A tenured professor is dismissed by reason of an alleged "financial exigency."

In *Board of Regents v. Roth*[245] and *Perry v. Sindermann*,[246] the Supreme Court returned to the precise language of the fourteenth amendment: a violation of one's right to due process in the termination of public employment occurs only when the employee has been deprived of a constitutionally cognizable liberty or property interest. "Property," however, is not created by the Constitution; it derives from an independent source, such as state law or an informal source recognized by state law. In *Arnett v. Kennedy*,[247] however, Mr. Justice Rehnquist, writing for a plurality, conceived of one's "property" in a government job as including the procedure for its divestiture: "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a [public employee] must take the bitter with the sweet."[248] Mr. Justice Powell, writing for himself and Mr. Justice Blackmun, concurred in the result but rejected the plurality's analysis. The plurality's approach, he reasoned,

> would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.[249]

Thus far, the positivist reasoning of the *Arnett* plurality has not unequivocally commanded a majority of the Court. In *Bishop v. Wood*,[250] however, the Court held that the sufficiency

245. 408 U.S. 564 (1972).
246. 408 U.S. 593 (1972).
247. 416 U.S. 134 (1974).
248. *Id.* at 153-54.
249. *Id.* at 166-67 (Powell, J., concurring) (footnote omitted).
250. 426 U.S. 341 (1976). It has been argued that *Bishop* accepts, at least tacitly (and wrongly), the positivism of the *Arnett* plurality. Note, *Democratic Due Process: Administrative Procedure After* Bishop v. Wood, 1977 DUKE L.J. 453, 459-60 (1977). *Compare* Prince v. Bridges, 537 F.2d 1269, 1272 (4th Cir. 1976) *with* Muscare v. Quinn, 520 F.2d 1212, 1216 n.4 (7th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 560 (1976) *and* Aiello v. City of Wilmington, 426

of the claim of entitlement to a job in state or local government must be determined by state law. Only if the state recognizes something akin to tenure—a state-granted entitlement to continued employment—does the fourteenth amendment due process requirement apply. But if the fourteenth amendment does apply, the employee is constitutionally entitled to contest—in some forum, at some time, and with sufficient procedural rigor—the validity of the grounds asserted for the termination. In the "financial exigency" case, the tenured professor enjoys the quintessential "property"; accordingly, the fourteenth amendment commands that he be given an opportunity to contest both the authenticity of the reason asserted for the termination, and the reasonableness of the standards employed to single out his position for termination.[251]

> *A case of changing rules.* Under the policies of the school board, a tenured teacher must acquire so much academic credit within a three-year period; failure to engage in mandated continuing education results in withholding of salary increments. A teacher, relying upon that policy, elects to forego salary increments for two years by declining to pursue further study. The legislature then mandates salary increments for all teachers. The school board alters the continuing education policy to make noncompliance grounds for termination. As a result, the teacher (and a few others similarly situated) has only one academic year to comply while all other teachers (who had been pursuing continuing education) have three years to comply.[252]

The requirement of continuing education arguably advances a legitimate state interest and invades no constitutionally protected interest of the teacher. The difficulty here is the disparate impact of the policy change. The Supreme Court held that the addition of a new sanction to assure conformity with school policy, made necessary by the abolition of the previous sanction, did not unconstitutionally burden the group that had relied on the previous sanction; but, it seems clear that the result would have been different had the new sanction been retroactively applied, *i.e.*, without allowing that group any opportunity to secure the requisite number of academic hours.

The analysis in each of the illustrative cases contrasts with the analysis in the private sector. Inasmuch as the Constitution is inapplicable, a private school is free to impose an ortho-

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F. Supp. 1272, 1287 (D. Del. 1976). This question is further discussed in note 298 *infra*.

251. *See* Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976); Klein v. Board of Higher Educ., 434 F. Supp. 1113 (S.D.N.Y. 1977); Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.* 510 F.2d 975 (7th Cir. 1975); Levitt v. Board of Trustees, 376 F. Supp. 945 (D. Neb. 1974); Brady v. Board of Trustees, 196 Neb. 226, 242 N.W.2d 616 (1976).

252. The case is Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979).

doxy in the classroom. By the same token, a private university could limit the standards or procedures used to terminate "tenured" faculty; there is no limitation, other than that found in the law of contract, upon a private institution's ability to adopt the positivism reflected in the *Arnett* plurality.[253] Finally, nothing prohibits the private employer from changing rules after the game is over (or from treating those similarly situated differently),[254] unless to do so would be inconsistent with the individual contract or with antidiscrimination legislation.

B. Collective Bargaining Under the Constitution

In the absence of a collective bargaining relationship, a governmental employer is constrained by the Constitution. The question is whether the establishment of a bargaining relationship in the public sector alters the character of that constraint. That issue will be explored by reference to three particular constitutional provisions: the first and fourteenth amendments and the contract clause.

1. *The First Amendment*

Two decisions of the Supreme Court concern the first amendment as a limit on exclusive representation in the public sector. In *City of Madison v. Wisconsin Employment Relations Commission*,[255] a school board allowed a nonunion teacher, in a school board session otherwise devoted to hearing the views of the public, to voice opposition to the union's demand for an agency shop clause.[256] The clause was then under negotiation with the teachers' union. The Wisconsin Employment Relations Commission held that the school board's action constituted an unfair labor practice. "In the private sector," as Clyde Summers has pointed out, "even listening to the minority representative might be viewed as undermining the majority union's status."[257] Nevertheless, the Supreme Court held that the Commission's order violated the first amendment; the state impermissibly conditioned access to a public forum not on the

253. *See* text accompanying notes 247-248 *supra*.

254. *See generally* Summers, *Individual Protection Against Unjust Dismissal: A Time for a Statute*, 62 Va. L. Rev. 481 (1976); sources cited in *id.* at 484 n.12.

255. 429 U.S. 167 (1976).

256. An agency shop clause requires nonunion members to pay to the union a sum equivalent to union dues.

257. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1198 (1974).

relevance of the speaker to the agenda, but on the content of expression otherwise relevant to the business before the public agency.

In *Abood v. Detroit Board of Education*,[258] the Court confronted a first amendment challenge to an agency shop clause in the public sector. The Court had earlier held that the exaction of union dues under explicit statutory authorization withstood constitutional scrutiny in the private sector, except that the union could not exact monies to be expended in support of political or ideological causes unrelated to the union's role as negotiator and administrator of collective agreements.[259] Inasmuch as that decision was thought to avoid the possible first amendment issues involved in the statutorily authorized agency shop, the Court had no difficulty in applying that decision to similar effect in the public sector. Mr. Justice Powell, writing for himself and Justices Burger and Blackmun, concurred in the result but argued that closer scrutiny was required in the public sector. In the view of the concurring Justices, government may authorize parties to enter into agreements in the private sector that government could not itself adopt without violating the first amendment. Nevertheless, it does not appear that the majority disagreed with the concurring Justices' characterization of the constitutional status of the collective agreement in the public sector:

> The collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all the attributes of legislation for the subjects with which it deals. Where a teachers' union . . . obtains the agreement of the school board that teachers residing outside the school district will not be hired, the provision in the bargaining agreement to that effect has the same force as if the school board had adopted it by promulgating a regulation.
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> . . . [T]he [School] Board's collective-bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation.[260]

This view of the collective agreement, and thus of the constitutional consequences flowing from it, draws support from the function of the collective agreement in industry. Although the Labor Act speaks of the collective agreements as "contracts" for the purposes of securing judicial enforcement,[261] the better analogy is to legislation.[262] The union and the employer from time to time adopt rules governing the workplace. Al-

258. 431 U.S. 209 (1977).
259. *See* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).
260. 431 U.S. at 252-53 (Powell, J., concurring).
261. 29 U.S.C. § 185 (a) (1976).
262. *See* Weyand, *supra* note 18, at 561.

though collective bargaining serves as a device by which at least some of the rules that would otherwise be established unilaterally by management are jointly established, the rules nevertheless remain those of management:

> The rules contained in [the collective agreement] are standards against which management's actions are to be measured, but management retains the right to act, to manage the business and direct the working forces. This means that management retains the exclusive power to administer the rules, not only those governing the productive process, but also those relating to wages, hours and working conditions. No matter how specific the rule, the initial determination of its proper application, and the right to insist on performance by the employees in accordance with that interpretation, remains with management, precisely as if the rules had been unilaterally adopted by it for the internal guidance of management personnel.[263]

Like the private sector employer, the public employer adopts rules governing the workplace. The federal Constitution does not prohibit government from committing itself to "meet and confer" with its employees' representative on proposed rules in an effort to achieve agreement on them;[264] but as *City of Madison*[265] teaches, that special means of employee participation is in addition to the other channels of political activity and protest designed to influence governmental decisions available to all citizens, including decisions concerning terms and conditions of public employment. Similarly, although the Constitution does not prohibit the public employer from "conferring" for the purposes of employee participation exclusively with a representative selected by a majority of the employees, in contradistinction to the private sector, the grant of exclusivity does not affect the employees' right to petition government for redress of grievances in derogation of the bargaining relationship.[266] Rules adopted in a public sector collective agreement, however, must withstand constitutional scrutiny simply

263. Feller, *supra* note 8, at 737.

264. The duty to bargain in the private sector is defined by 29 U.S.C. § 158(d) (1976) as including only the obligation "to meet . . . and confer in good faith."

265. City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). *See* text accompanying notes 255-257 *supra.*

266. In the private sector, an employee may be dismissed for peacefully distributing leaflets in public areas adjacent to his employer's premises, in derogation of an existing bargaining relationship, to protest his employer's policies. Emporium Capwell Co. v. Community Org., 420 U.S. 50 (1975). The Court has expressed a radically different view with regard to public sector employees: "Surely no one would question the *absolute* right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media." City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 n.10 (1976) (emphasis added).

because the government is the employer.[267]

Accordingly, in the academic freedom case, it should make no difference whether the school board acted unilaterally in forbidding the use of otherwise appropriate teaching materials, or acted pursuant to a term in a collective agreement with a teachers' union that permitted the school board to censor teaching materials. The issue in either case is whether the restriction on teaching materials offends the first amendment. The collective agreement is immaterial to the analysis of that issue. The first amendment, like the Bill of Rights generally, is a limit upon the power of the political majority, in this case, the school board. It would make no sense at all to allow a different political majority—that of one's fellow workers[268]—to limit the first amendment by ratifying a collective agreement having that effect. If a teachers' union can bargain away academic freedom, or, more accurately, if a school board can limit academic freedom by securing the agreement of the majority representative, there is no reason why the school board could not also, by such agreement, forbid political expression in or out of school,[269] re-

267. Thus, in deciding the permissibility of a collective agreement's provision for exclusive union access to certain intramural means of communication, the Second Circuit stated:

> [A] dispute, commonplace in the private sector, becomes constitutional litigation by virtue of the fact that public employers (the school boards) are involved, rather than private entities . . . . Mindful of the undesirability of becoming entangled in the operation of local school systems, we nevertheless must address this case in a constitutional, rather than a private law framework.

Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471, 478 (2d Cir. 1976). *See also* Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004 (1970); Note, *The Validity of Exclusive Privileges in the Public Employment Sector*, 49 NOTRE DAME LAW. 1064 (1974). In Civil Service Employees Ass'n, Inc. v. State University at Stony Brook, 82 Misc. 2d 334, 368 N.Y.S.2d 927 (Sup. Ct. 1974), the court sustained a contractual exclusion of rival organizations from using university facilities for meetings. The exclusion, however, was limited only to the rival organizations' organizational activity in opposition to the Civil Service Employees Association. The court thought (rather curiously) that government, in imposing such an exclusion, would not be limiting access according to the content of expression. That decision cannot be reconciled with *City of Madison*.

268. In fact, most often teachers accept the prevailing norms of the communities in which they live and work. Thus, until recently, secondary school teachers have not vigorously asserted a right to academic freedom. *See generally* A. APPLEBEE, TRADITION AND REFORM IN THE TEACHING OF ENGLISH: A HISTORY (1974); H. BEALE, A HISTORY OF FREEDOM OF TEACHING IN AMERICAN SCHOOLS (1941); W. ELSBREE, THE AMERICAN TEACHER (1939).

269. *See* Tinker v. School Dist., 393 U.S. 503 (1969); Pickering v. Board of Educ., 391 U.S. 563 (1968).

quire teachers to salute the flag,[270] require teachers to belong to a particular political party,[271] or mandate any number of other employment-related conditions that the Constitution clearly forbids the public employer to do directly. Deference to collective agreement upon such questions would allow government to do that which the Constitution plainly forbids.

2. *The Fourteenth Amendment*

The Court has never accepted the notion that the first amendment may be waived as a condition of government employment.[272] The Court has held, however, that an individual may waive the right to due process under the fourteenth amendment, at least if certain conditions are met.[273] It could be argued that if the individual may so relinquish that constitutional right, so may a collective representative acting on his behalf. In *Antinore v. State*,[274] the New York Court of Appeals embraced that theory.

a. The Theory of Waiver of Due Process by Collective Agreement

Under New York law, the dismissal of a permanent state civil servant could occur only after a relatively elaborate trial-like hearing. In 1972, the legislature amended the law to allow those procedures to be supplemented, modified "or replaced by agreements negotiated between the state and an employee organization" acting as a collective bargaining agent under that state's public employment collective bargaining law.[275] The

270. Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

271. Elrod v. Burns, 427 U.S. 347 (1976).

272. In Elrod v. Burns, *id.*, the Court held that a political test for the hiring or retention of non-policy-making government employees violated the first amendment. The dissent argued in part that prior beneficiaries of the political patronage system could not be heard to complain when the system under which they acquired their jobs operated to oust them. The plurality took note of the argument, pointing out that it

> completely swallows the rule. Since the [political] qualification may not be constitutionally imposed absent an appropriate justification, to accept the waiver argument is to say that the government may do what it may not do. A finding of waiver in this case, therefore, would be contrary to our view that a partisan job qualification abridges the First Amendment.

Id. at 360 n.13. The concurring Justices were also apparently unpersuaded by the waiver argument. *See id.* at 374.

273. *See* text accompanying notes 285-289 *infra*.

274. 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976).

275. Act of May 15, 1972, ch. 283, § 1, 1972 N.Y. Laws 1432 (codified at N.Y. Civ. Serv. Law § 76(4) (McKinney 1973)).

Civil Service Employees Association, the exclusive representative for the bulk of the state's work force, negotiated to subject all disciplinary action to the agreement's arbitration procedure in lieu of the previous statutory system. A permanent civil servant was served with notice of charges and a prospective termination of employment which, under the agreement, he could contest through arbitration. Instead, he sought to declare the arbitration procedure constitutionally infirm because, unlike the previously applicable statutory hearing procedure, the arbitration procedure provided that the arbitrator would not be bound by the rules of evidence, he need not provide reasons for his decision, a transcript would not be provided unless the employee paid for it, and only limited judicial review of the arbitrator's award would be available. Although the intermediate appellate court in *Antinore* indicated that some of these features cast "doubt upon [the] constitutional sufficiency" of the procedure,[276] the court held that the collective agreement operated as a waiver of the employee's right to constitutional due process: "due process requirements—and we think equal protection as well—are not relevant when they have been waived by the party seeking to assert them, as by voluntarily entering into an agreement for the resolution of disputes in a manner which dispenses with one or more of the rights constitutionally guaranteed."[277] The New York Court of Appeals affirmed.[278]

The full sweep of this reasoning is reflected in *Di Lorenzo v. Carey*,[279] a consolidated case concerning the termination of tenured faculty at the State University of New York (SUNY). The collective agreement for the University's professional staff allowed termination because of "retrenchment,"[280] and provided that the agreement's arbitration provision would be the sole and exclusive means of adjudicating retrenchment decisions. Under the collective agreement, however, the University administration had the discretion to determine whether the institution's financial status required retrenchment. The administration could also determine the standards and procedures

276. Antinore v. State, 49 A.D.2d 6, 9, 371 N.Y.S.2d 213, 216 (1975), *aff'd*, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976).

277. 49 A.D.2d at 10, 371 N.Y.S.2d at 216.

278. Antinore v. State, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976).

279. 62 A.D.2d 583, 405 N.Y.S.2d 356, *appeal dismissed*, 45 N.Y.2d 832, 409 N.Y.S.2d 212 (1978), *cert. denied sub nom.* Farrell v. Carey, 440 U.S. 914 (1979). The author argued these appeals before the Appellate Division on behalf of amicus curiae American Association of University Professors and represented the plaintiffs for the purpose of appeal from the decision of that court.

280. 62 A.D.2d at 586, 405 N.Y.S.2d at 358.

used to identify the "unit, program or . . . other level of organization"[281] that would be subject to cutbacks. Two tenured professors were terminated at the State University College at Brockport, ostensibly because of fiscal retrenchment.[282] They sued in state court, asserting that the fourteenth amendment commanded that they be given some opportunity to contest both the validity of the institution's claim of financial exigency and the reasonableness of the standards and procedures utilized to identify them for retrenchment—matters that were unreviewable as reserved to the administration under the collective agreement.[283] The trial court dismissed upon the strength of *Antinore*. The Appellate Division affirmed, stating that the faculty members "agreed to be bound by the collective bargaining agreement by their membership in the negotiating unit, irrespective of whether they personally supported the contract when approved. Whatever other rights they might have had of a procedural or constitutional nature, are deemed waived. . . ."[284]

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281. *Id.* at 586-87, 405 N.Y.S.2d at 359.

282. The Higher Education Committee of the New York State Assembly later concluded that the State University "was not under budgetary mandate or constraint" to terminate tenured faculty. Report on Retrenchments in Higher Education, *1977*, at 8 (January 1978).

283. It might have been possible to read the collective agreement differently, and, in fact, the State of New York argued in its brief opposing certiorari that the question of the scope of the arbitration clause had yet to be determined because the grievances had not been submitted to arbitration. Brief for Respondents in Opposition to Granting Certiorari at 5, Farrell v. Carey, 440 U.S. 914 (1979). However, the faculty members pointed out in reply that under New York law the scope of arbitration is to be judicially determined. Petitioner's Reply Memorandum at 3, n.* (citing Acting Superintendent v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 510-11, 369 N.E.2d 746, 747, 399 N.Y.S.2d 189, 190 (1977)). The faculty members further pointed out:

> Petitioners' pleadings asserted that the . . . collective agreement impermissibly bargained away their constitutional right to contest the existence of the ground asserted as justifying their dismissals and the reasonableness of the standards and procedures employed to single them out for termination. The State's Motion to Dismiss did not contend that the collective agreement allowed review of these questions. Rather, the State relied upon a theory of waiver of due process: that, under *Antinore v. State of New York* . . . , it was constitutionally irrelevant that Petitioners could not vindicate their constitutional rights. The State could have moved to dismiss upon the ground that the collective agreement did not foreclose review of the procedures and standards employed to terminate these professors, thereby placing that question in issue; but, the State did not challenge Petitioners' reading of the collective agreement. The only question raised and passed upon below was whether it is constitutionally permissible for a public sector collective agreement to do just what the parties agreed it did, that is, waive the individual's constitutional right to due process.

Petitioners' Reply Memorandum at 2.

284. 62 A.D.2d at 588, 405 N.Y.S.2d at 360. The waiver theory was expressly

Although the Supreme Court has held that one's right to procedural due process is waivable, the Court has assumed that standards governing the effectiveness of a due process waiver in criminal cases also apply in the civil setting.[285] In the criminal setting, the waiver must be made by the individual rather than by his legal representative, at least as to fundamental questions of due process.[286] Second, the Court has declared that a waiver of due process is not to be lightly implied;[287] it has thus commanded that a waiver, to be effective, must be both knowing and voluntary.[288] In the civil setting, the requirement of voluntariness has meant that there be at least a rough equality of bargaining power between the parties.[289]

In order to accept the waiver theory under a regime of collective bargaining, however, the requirement of an individualized waiver, as the New York courts fully recognize, must be abandoned as antithetical to a system of exclusive representation.[290] The maintenance of such a requirement would necessi-

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rejected in a similar setting by the Nebraska Supreme Court. Brady v. Board of Trustees, 196 Neb. 226, 242 N.W.2d 616 (1976). It has, however, been approved by the Kansas Supreme Court. Gorham v. City of Kansas City, 590 P.2d 1051, 1056 (Kan. 1979).

285. *See* Fuentes v. Shevin, 407 U.S. 67, 94 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972).

286. Schneckloth v. Bustamonte, 412 U.S. 218, 246 (1973); Brookhart v. Janis, 384 U.S. 1, 7 (1966).

287. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937).

288. *See* Fuentes v. Shevin, 407 U.S. 67, 94-95 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972).

289. *See* Fuentes v. Shevin, 407 U.S. 67, 95 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186 (1972).

290. The Appellate Division was fully aware that the individual had not entered into any waiver at all, let alone a voluntary one; thus, it proceeded to point out that the agreement was a voluntary one on the part of the union, representing "a reciprocal negotiation between forces with strengths on both sides, reflecting the reconciled interests of employer and employees." 49 A.D.2d at 10, 371 N.Y.S.2d at 217. However, the New York courts have not applied a test of voluntariness in the constitutional sense, as requiring a finding of equality of bargaining power. *See, e.g.*, United States v. Wynn, 528 F.2d 1048, 1050 (5th Cir. 1976) (per curiam).

Curiously, the New York Court of Appeals has allowed an individual teacher to waive the statutory protection of tenure (as part of a settlement of outstanding charges for dismissal), relying in part on *Antinore*; however, the court subjected the adequacy of the waiver to precisely that showing of voluntariness, in the sense of the absence of duress, that *Antinore* declined to require of a collective waiver. Abramovich v. Board of Educ. of Cent. School Dist. No. 1, 46 N.Y.2d 450, 414 N.Y.S.2d 109 (1979). (For a discussion of Antinore v. State, 49 A.D.2d 6, 371 N.Y.S.2d 213 (1975), *aff'd*, 40 N.Y.2d 291, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976), see text accompanying notes 274-278 *supra*.)

The application of a constitutional test of voluntariness would rest on an assumption of complete commonality of interest between the individual and

tate a return to the conception of the collective agreement as a "trade agreement" binding only those who, by their membership in the union and, perhaps, by their vote to ratify the agreement with full appreciation of the consequences, have voluntarily assented to be bound. The practical effect is that some would be bound by the agreement and others would not.

However, the transference of the power to waive due process from the individual to a collective cannot be reconciled with the Constitution. The fourteenth amendment, like the first amendment, is a limit upon government. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[291] It follows that one's right to due process cannot be infringed simply because a majority of one's fellow workers choose that it be. The waiver theory would improperly foreclose scrutiny of whether a governmental employer has acted in contravention of the limits imposed by the fourteenth amendment.[292]

b. The Positivist Theory

The positivist theory of the *Arnett* plurality,[293] put with

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the union, and upon the unlikelihood that a relatively strong union would bargain due process away. Insistence on this element of the Supreme Court's construction of the fourteenth amendment would at least prevent the state from demanding a waiver of constitutional rights in return for merely grudging concessions to which a weak, hard-pressed union might have no practical alternative but to accede. On the relative weakness of the professional staff union of the State University of New York, see Wollett, *State Government—Strategies for Negotiations in an Austere Environment: A Management Perspective*, 27 LAB. L.J. 504 (1976), and E. DURYEA & R. FISK, COLLECTIVE BARGAINING, THE STATE UNIVERSITY AND THE STATE GOVERNMENT IN NEW YORK (1975). As the discussion in Part II amply evidences, however, once the power to waive is transferred from the individual to the group, considerations extraneous to those that an individual would take into account in deciding whether to waive his right to due process are injected into the decisionmaking process. In *Antinore*, for example, the union's control of access to the arbitration procedure would heighten the union's power over the individual and thus its power as an institution. The question of union control of access to arbitration is discussed at pp. 255-63 *infra*.

291. Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736-37 (1964). *See also* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property . . . may not be submitted to vote; they depend on the outcome of no elections.").

292. *Cf.* Kewin v. Board of Educ., 65 Mich. App. 472, 237 N.W.2d 514 (1975) (holding impermissible a waiver by collective agreement of the constitutional right to individualized maternity leave treatment under Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)). *See also* Union Free School Dist. No. 6 v. New York State Div. of Human Rights, 43 A.D.2d 31, 349 N.Y.S.2d 757 (1973), *appeal dismissed*, 33 N.Y.2d 975, 353 N.Y.S.2d 739 (1974).

293. Arnett v. Kennedy, 416 U.S. 134 (1974). *See* text accompanying notes 247-248 *supra*.

customary piquancy by William Van Alstyne, is that "what you get is what you see."[294] Insofar as state-imposed limits on the divestiture of the property are part-and-parcel of the property itself, the employee "must take the bitter with the sweet."[295] In *Antinore*,[296] the New York Court of Appeals also embraced the positivism of the *Arnett* plurality. The employee took his job subject to the collective agreement's provision that determination of cause sufficient for dismissal would be subject to the administration of a grievance-arbitration procedure. In the words of the New York Appellate Division, he could "no more claim exemption from the negotiated agreement than may a citizen, with impunity, withhold compliance with a statute" because he disapproved of it.[297]

The fundamental infirmity in the Appellate Division's analogy (wholly apart from the question of whether a majority of the Court would now fully embrace the positivism that failed to command a majority in *Arnett*)[298] is the failure to recognize that a citizen may claim a statutory benefit while challenging such portions of the law as may be inconsistent with the Constitution. The court's positivist position refuses to recognize that the Constitution is a limit on the government when the government acts as an employer. In function, if not in form, the positivist position is indistinguishable from the waiver theory.

There is a closely related but, perhaps, more subtle argument implicit in the positivist position. Apart from considerations of equal protection, the legislature's ability to abolish job security is constitutionally limited only by the contract clause. Only if the legislature initially intended to be bound by a tenure law as a matter of individual contract would the federal constitution forbid the state from upsetting that settled expec-

294. Van Alstyne, *supra* note 235, at 469.

295. 416 U.S. at 151.

296. Antinore v. State, 49 A.D.2d 6, 371 N.Y.S.2d 213 (1975), *aff'd*, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976). *See* text accompanying notes 274-278 *supra*.

297. 49 A.D.2d at 11, 371 N.Y.S.2d at 217.

298. William Van Alstyne has argued that the shifting votes on the Court in later decisions suggests that such a majority has been mustered. Van Alstyne, *supra* note 235, at 469 n.74. *See also* note 250 *supra*. Professor Van Alstyne's discussion, however, antedates Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) and Barry v. Barchi, 99 S. Ct. 2642 (1979), which subject state procedures for the divestiture of constitutionally cognizable property interests to independent scrutiny under the fourteenth amendment. These two decisions cannot be reconciled with the positivist position. *See* Needleman v. Bohlen, 602 F.2d 1, 4-6 (1st Cir. 1979) (reviewing the question and rejecting the position of the *Arnett* plurality).

tation.[299] Because the state conceivably could abolish the right to continued employment altogether, thereby defeating *any* due process claim deriving from statutory tenure, it could be argued that the state may take the far less drastic action of merely curtailing some of the incidents of the right to continued employment, such as the right to contest the reasonableness of the standards and procedures employed by the state to dismiss a tenured professor because of retrenchment.

It does not follow, however, that because the state could, in some circumstances, totally abrogate tenure, the state is also free to accord tenure while simultaneously disclaiming fourteenth amendment procedural (or substantive) limitations on its termination. That the state could decide to abolish a welfare program, for example, does not imply that the state may condition an individual's welfare benefit by reserving to itself unfettered discretion to summarily terminate the benefit. The fact that the fourteenth amendment plainly forbids the seemingly less drastic alternative insures that, given the constitutional requirement of due process, the state must confront the larger political issue if it wishes to relieve itself of the perceived administrative burden of maintaining a system of job security for public employees.

c. The Fourteenth Amendment as a Limitation on the Collective Agreement

The better view is that a public employer's rules contained in a collective agreement must withstand constitutional examination. From this perspective, the fundamental error in *Antinore*[300] was the misperception of the issue. The authentic question was whether an arbitration of a dismissal from employment satisfies the minimum constitutional requirement of an opportunity to be heard. The employee was given notice of the charges against him and provided a chance to present his case before a neutral adjudicator prior to dismissal. Thus, there would seem to be no significant constitutional deficiency in the arbitration procedure.[301]

299. The role of the contract clause is treated in greater detail at pp. 263-68.

300. Antinore v. State, 49 A.D.2d 6, 371 N.Y.S.2d 213 (1975), *aff'd*, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976). *See* text accompanying notes 274-278 *supra*.

301. *See* Mills v. Long Island R.R., 515 F.2d 181 (2d Cir. 1975); Chung v. Park, 514 F.2d 382 (3d Cir.), *cert. denied*, 423 U.S. 948 (1975). Where, however, the basic elements of fairness are wanting in an arbitration, due process will not have been afforded. *See, e.g.*, Sedita v. Board of Educ., 82 Misc. 2d 644, 371 N.Y.S.2d 812 (Sup. Ct. 1975).

Accordingly, there remains to be resolved the related question of whether union control of access to arbitration, a common provision in private sector collective agreements, can be reconciled with the requirement of due process in the public sector. In *Winston v. United States Postal Service*,[302] the Seventh Circuit held that the developed law in the private sector governing the union's rights and responsibilities in the administration of the grievance-arbitration procedure, when translated into the public sector, fully satisfied the requirement of due process. The soundness of the holding, however, remains to be seen. Through the Postal Reorganization Act, Congress placed postal workers under the National Labor Relations Act, just as if they were private sector employees.[303] Postal workers are nevertheless federal employees for constitutional purposes, and in *Winston*, a postal worker was held to have a property interest in his job by virtue of the collective bargaining agreement's "just cause" provision. The employee received notice and a statement of the grounds for discharge. Although he appealed through the various stages of the grievance procedure, the union ultimately declined to take the discharge to arbitration. The employee sought relief in federal district court charging, in part, a denial of due process. The court of appeals rejected the positivist reasoning of the *Arnett* plurality.[304] Nevertheless, the court held that the entirety of the procedure satisfied due process requirements:

> The exclusive representation of . . . postal employees in labor-management relations under the PRA [Postal Reorganization Act] is no different from that of private sector employees under the National Labor Relations Act. Just as in the private sector, the Government has a vital interest in seeing to it that a union representing government employees has authority to meet its "duty to discountenance disruptive and frivolous claims" in order to avoid conditions of disorder and instability which could be disastrous to the economy. . . .
>
> In view of the foregoing, we hold that the grievance procedures adopted . . . do not violate the due process clause of the Fifth Amendment.[305]

302. 585 F.2d 198 (7th Cir. 1978). The case concerned nonpreference-eligible employees. Preference-eligible employees were given a statutory election of remedies, not applicable in this case. The Sixth Circuit had held that a voluntary election of remedies by the employee avoids the due process problem. Malone v. United States Postal Serv., 526 F.2d 1099 (6th Cir. 1975). *Winston* was approved, albeit in dictum, in Stritzl v. United States Postal Serv., 602 F.2d 249 (10th Cir. 1979).

303. 39 U.S.C. §§ 1201-1209 (1976).

304. Winston v. United States Postal Serv., 585 F.2d 198, 209 n.30 (7th Cir. 1978). For a discussion of Arnett v. Kennedy, 416 U.S. 134 (1974), see text accompanying notes 247-248 *supra*.

305. 585 F.2d at 210 (quoting Ostrofsky v. United Steelworkers, 171 F. Supp.

Thus, the decision ultimately rests on the assumption that due process is satisfied by the mere availability of a suit against the union for breach of the duty of fair representation in refusing to pursue the grievance to arbitration.[306]

In the private sector, the union customarily controls access to arbitration under the grievance procedure. If it declines to proceed to arbitration, the employee may sue the employer for breach of the collective agreement only if he can show that the union also breached the duty of fair representation in dealing with his case. As the Court made clear in *Vaca v. Sipes,*[307] the duty of fair representation does not obligate the union to pursue every grievance to arbitration. The union may not, however, "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion."[308] The dismissed employee secures no relief, for example, if the union can show that it diligently investigated the case and consistently applied its announced policy to pursue to arbitration only those discharges that, in good faith, the union believed had a better-than-even chance of being reversed, even if it is ultimately determined that the dismissal was in fact not for just cause.[309]

The result in *Winston* cannot be reconciled with the court's ostensible rejection of the plurality view in *Arnett.* The fifth amendment's command that an employee be given a hearing

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782, 791 (D. Md. 1959), *aff'd,* 273 F.2d 614 (4th Cir.), *cert. denied,* 363 U.S. 849 (1960)).

306. "Although their representative declined their request to demand arbitration, appellants could have sued the Union for breach of its duty to fairly represent them if the refusal to demand arbitration was not in good faith." *Id.*

307. 386 U.S. 171 (1967).

308. *Id.* at 191.

309. *Id.* at 192-93. In a subsequent postal workers case, the Seventh Circuit recognized that the merit of the grievance is not dispositive of the fair representation issue. Melendy v. United States Postal Serv., 589 F.2d 256, 258-59 (7th Cir. 1978) ("The collective bargaining agreement . . . places control of the grievance in the union once it leaves the local work level, not in the employee. It is the union that continues the grievance, but only when in its judgment further processing is in the common good."). As one study observed of the role of local officers in the evaluation of grievances:

> In responding to the demands made upon them, the officers must develop some system of priority. Many grievances are contradictory (particularly where there are conflicting group interests), some are unjustified, and all require time, energy, and the expenditure of the union's limited bargaining power. Only a few will have strategic importance to the union as a whole.
>
> Before deciding what to do with a grievance, the officers must consider its possible ramifications upon (1) political relationships within the local itself, (2) the union's relationship with management, and (3) the amount of support the members will provide in pushing the case.

L. SAYLES & G. STRAUSS, THE LOCAL UNION 40 (rev. ed. 1967).

on the ground asserted for discharge is not satisfied by a suit that tests the union's diligence, consistency and good faith in declining to afford him a hearing on the merits of his discharge. *Winston* would be in accord with the fifth amendment only if a subsequent finding of merit in the employee's grievance would constitute a per se breach of the duty of fair representation—that is, if the law of fair representation in the public sector were to adopt the position expressly rejected in the private sector by *Vaca v. Sipes*.[310]

In sharp contrast to the Seventh Circuit, one commentator has argued that in order to sustain union control of access to arbitration in the public sector, the due process requirement must apply to the union's handling of the grievance-arbitration procedure.[311] Under this reasoning, the union's institutional role in the procedure becomes "state action" subject to regulation by the Constitution. In essence, the union's decision not to pursue a grievance to arbitration would have to be reached after the practical equivalent of a hearing on the merits. Although the argument has superficial appeal, the result should give pause, for it contemplates nothing less than judicial regulation by that bluntest of regulatory instruments—the Constitution—of a union's day-to-day administration of the grievance-arbitration procedure.

Some states have obviated the problem by making breach of the collective agreement an unfair labor practice to be litigated before a public tribunal, or by constituting a public tribunal as the adjudicator of all contract grievances to which any individual grievant may have resort.[312] Although these devices

310. The thrust of David Feller's magisterial article, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973), is that, absent agreement to the contrary, a collective agreement in the private sector creates no judicially enforceable rights in the individuals governed by them; thus, the individual's sole recourse in the event of employer noncompliance with a provision of a collective agreement is suit against the union for breach of the duty of fair representation in the administration of the grievance-arbitration procedure. That argument is congruent with the positivist position in the public sector. Although the Supreme Court could adopt the Feller position in the private sector, under the position advanced here, it could not do so in the public sector.

311. Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation*, 89 HARV. L. REV. 752, 780-88 (1976).

312. Section 926 of the Vermont Statutes Annotated gives the individual the right to appeal all grievances to the Vermont Labor Relations Board, and a grievance is defined under Section 902(14) to include a departure from the collective agreement as well as from an agency's rules. VT. STAT. ANN. tit. 3, §§ 902(14), 926 (Supp. 1979). *See also* N.H. REV. STAT. ANN. § 273-A:5(I)(h) (1977); S.D. CODIFIED LAWS ANN. § 3-18-15.2 (Supp. 1979); S.D. COMP. LAWS ANN. § 3-18-15.1 (1974). Minnesota provides for an election of remedies by civil service employees. MINN. STAT. § 179.70 (Supp. 1979).

avoid the constitutional issue, they also preclude the union from winnowing and sifting the myriad of grievances presented to it, a function that in the private sector has been thought an important part of the collective bargaining process.[313] If, as in the private sector, the public sector collective agreement represents a set of management rules, and if, as in the private sector, arbitration under the collective agreement is the preferred means of resolving disputes arising under those rules, it should follow that, at least as to grievances presenting questions of group interest, the union should have the authority to select those cases it believes will best develop the common law of the agreement, subject to its duty of fair representation.

A more refined approach, better attuned to both constitutional doctrine and the practicalities of labor relations, must distinguish those provisions of a collective agreement that create interests protected by the due process clause. The argument for the application of the due process clause to the union's administration of the grievance procedure is built on the assumption that a public employee has a property interest in every provision of the collective agreement—that is, that the terms of every contract with the state constitute "property" for constitutional purposes, such that any failure by the state to comply would be unconstitutional.[314] But the validity of that assumption remains to be seen. Assume, for example, that a school board adopts a rule that class size shall not exceed twenty-five students. A teacher is assigned a class with thirty-five students. Whatever administrative remedy might be available as a matter of state law, the assignment of an excessive number of students would surely not raise a question of constitutional dimension. The result should not differ if the rule were expressly embodied in the individual teacher's contract of employment nor should it differ if the rule were contained in a col-

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313. Feller, *supra* note 8, at 752-55.

314. See Note, *supra* note 311, at 773 ("a broad range of employment benefits in which a grievant has more than a unilateral expectation of entitlement may be expected to be covered by due process"). Two observers have argued to similar effect. "The breadth of the judicial decisions in this area strongly supports the conclusion that, when squarely confronted with the question, the courts will hold that a collective bargaining agreement between a public employer and a union representing that employer's public employees is sufficient to vest in those employees a constitutionally protected property interest in the employment conditions it establishes." Baird & McArthur, *Constitutional Due Process and the Negotiation of Grievance Procedures in Public Employment*, 5 J.L. & EDUC. 209, 212 (1976). The cases cited, however, do not strongly support that conclusion; rather, the decisions primarily concern the right to the job, and not to all the rules that might be contained in a collective agreement.

lective agreement with the school board that also reserved to the union the power to take to arbitration all cases involving alleged failure to comply with the rules. This seems to be the sense of *Memphis Light, Gas & Water Division v. Craft*:[315]

> The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Although the underlying substantive interest is created by "an independent source . . . ," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.[316]

The sources that give rise to a property interest may include not only the employer's established rules, but long-standing practices and informal understandings as well. Accordingly, unless one were to adopt the positivist position verbally rejected but tacitly accepted by the *Winston*[317] court—that a collective agreement creates no constitutionally protected interest but only guarantees that individual grievances will be treated consistently with the duty of fair representation—it is as appropriate to look to the terms of a collective agreement as to these other sources in order to determine whether the individual had a property interest sufficient to trigger a requirement of due process.[318] The positivist position

315. 436 U.S. 1 (1978).

316. *Id.* at 9 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 602 (1972)). This distinction is illustrated in a recent decision of the Tenth Circuit concerning the termination of a tenured professor due to financial exigency. The institution had terminated the tenured professor while retaining more "versatile" nontenured teachers, and continued to offer courses that the tenured teacher was fully competent to teach. This action, he asserted, was inconsistent with the tenure system which, by definition, accords the tenured teacher a legal preference in retention over the nontenured so long as the tenured teacher is competent to teach remaining class offerings. There was no challenge either to the existence of a bona fide financial exigency or to the procedures used to single the teacher out for termination; thus, the question perceived by the court was one of substantive due process, *i.e.*, whether the institution had arbitrarily deprived the professor of property. Whether tenure did accord such a preference, the court stated, "essentially is a matter of simple contract law for state court interpretation . . . . It is enough to note that the interpretation applied by the college's administrative officials in selecting the criteria for deciding which faculty members would be terminated was sufficiently reasonable to put to rest any claim that their decision was [unconstitutionally] arbitrary or capricious." Brenna v. Southern Colo. State College, 589 F.2d 475, 477 (10th Cir. 1978). In sum, the reach of the fourteenth amendment is not coextensive with the protection accorded by the individual's contract.

317. Winston v. United States Postal Serv., 585 F.2d 198 (7th Cir. 1978). *See* text accompanying notes 302-306 *supra*.

318. *Compare* Aiello v. City of Wilmington, 426 F. Supp. 1272, 1286 (D. Del. 1976) *with* New Castle-Gunning Bedford Educ. Ass'n v. Board of Educ., 421 F. Supp. 960 (D. Del. 1976).

would produce the anomaly that although an employer rule, or even an informal understanding, according an individual tenure would carry with it constitutional limitations on his termination, the same rule incorporated in a collective agreement would not. The fact that the property interest is created by collective agreement as opposed to some other source is surely irrelevant for constitutional purposes; the critical distinction is that the property interest that rises to the level of constitutional protection is an interest in the job itself, not an interest in the ancillary incidents and myriad of work rules surrounding the job. Just as the Court would distinguish from among provisions of an agency's regulations and other sources governing employment those entitlements that rise to a level protected by the Constitution,[319] so too must a court distinguish such entitlements from among the provisions of the collective agreements.[320] If it is determined that such provisions create an entitlement to the job, whether the terms derive from the collective agreement, directly from the state laws, or from informal understanding, *Roth*[321] and *Sindermann*[322] command that the employee be afforded due process in the termination of employment.

Once the scope of the due process issue is narrowed, the problem becomes more manageable. In *Carey v. Piphus*,[323] the Court stated that the due process clause protects persons "not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[324] It follows that it is a de-

319. Needleman v. Bohlen, 602 F.2d 1 (1st Cir. 1979) (contract right to salary increment constitutes property); Moore v. Otero, 557 F.2d 435 (5th Cir. 1977) (no property interest in assignment); Schwartz v. Thompson, 497 F.2d 430, 433 (3d Cir. 1977) (no property interest in promotion unless it is "virtually a matter of right"), *followed in* Colm v. Vance, 567 F.2d 1125 (D.C. Cir. 1977).

320. *See, e.g.*, Gordon v. Anker, 444 F. Supp. 49 (S.D.N.Y. 1977). In *Gordon*, a guidance counselor alleged that the failure to assign duties to her within her licensed area, in contravention of a collective agreement, contravened due process. The court disagreed:

> That she is not now working as a guidance counselor is unfortunate, but does not amount to a federal claim. In fact, it may well be that "absent termination of . . . employment, an 'interest' in employment does not rise to the level of a property . . . right constitutionally protected by due process."

Id. at 52 (quoting Teachers United for Fair Treatment v. Anker, 76 Civ. 283 (E.D.N.Y. Mar. 8, 1977)).

321. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). *See* text accompanying notes 245-246 *supra*.

322. Perry v. Sindermann, 408 U.S. 593 (1972). *See* text accompanying notes 245-246 *supra*.

323. 435 U.S. 247 (1978).

324. *Id.* at 259.

fense to a due process challenge that the employee would have been discharged or suspended even if a hearing had been afforded.[325] In a case involving deprivation of a constitutionally protected interest that the union declines to pursue to arbitration (and does not permit the individual to pursue to arbitration on his own behalf), the employee may nevertheless sue the public employer for an unconstitutional deprivation, in which case the court would have to determine the merits of the dismissal. It should be no defense for the public employer to assert that the union declined to afford a hearing, because a wrongful termination would still be constitutionally infirm.

The Court also recognized that another purpose of "procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivation of protected interests."[326] Accordingly, the Court allowed recovery of those damages that the individual could prove to have resulted from the denial of procedural due process, distinct from damages caused by the deprivation of the constitutionally protected property interest.[327] To the extent that the failure to supply due process resulted from the union's refusal to proceed to arbitration, the public employer should be able to implead the union as a defendant on the theory that the union should be liable for so much of the damages as flowed not from the dismissal but from the union's refusal to take the case to arbitration. By the same token, if the employee prevails on the merits of his dismissal, the union should nevertheless be held liable for so much of the damages as the individual can prove to have resulted from the refusal to proceed to arbitration.

Not every provision of a public sector collective agreement rises to the level of constitutional property. Thus, the union's role in the administration of the grievance procedure involving the bulk of a public employer's work rules, a role thought indispensable to the private sector system of collective bargaining, can be fully translated into the public sector. Furthermore, where the merits of suspension, dismissal or other deprivation of a constitutionally cognizable property interest are uncertain or even arguable, it would simply be in the interest of the employer (and the union) to afford due process. The union could

325. *Id.* at 260.
326. *Id.* at 262.
327. For example, the Court indicates that a plaintiff could collect damages for the mental and emotional distress caused by the denial of due process. *Id.* at 261-64.

easily agree that in such cases the grievant would have the individual right to proceed to arbitration. Unlike decisions concerning whether to arbitrate grievances that implicate group interests, *e.g.*, class size, questions of deprivation of constitutionally protected property tend to turn upon individual factual determinations. Thus, in such cases, the erosion of the union's exclusive control of access to arbitration does little violence to the rationale for that control.

In sum, the fact that a public employer's rules (including those rules incorporated into a collective agreement) must withstand constitutional scrutiny has serious, but limited, implications for the administration of a public sector contractual grievance-arbitration procedure. In cases in which a grievance implicates no constitutionally protected property interest, the developed law of the private sector would apply without modification. In cases in which a grievance does implicate a constitutionally protected property interest but the case has been arbitrated, the due process clause will have been satisfied so long as there was no fundamental deficiency in the arbitration procedure. Finally, in cases in which a grievance does concern the deprivation of a constitutionally protected interest and has not been arbitrated, the scheme of rights and liabilities adopted in *Carey v. Piphus* would apply. This approach goes far to meet the test, addressed earlier, for assessing the soundness of any legal theory:[328] it allows solutions to be derived from it; the solutions it produces are more satisfactory than those that would result without it; and it conforms to the principles announced by the Supreme Court.

3. *The Contract Clause*

The prior analysis has explored two areas, the first and fourteenth amendments; there is at least some texture to the decisional law governing the role of these amendments under a regime of public sector collective bargaining. That the Constitution limits what a governmental employer may accomplish by collective agreement, just as it limits what he may accomplish by unilaterally promulgated rules, can be further measured against a constitutional provision that should be expected to supply a rich ground for future litigation.

The contract clause prohibits the states from making any law impairing the obligations of a contract,[329] including any

328. *See* text accompanying note 205 *supra*.
329. U.S. CONST. art. I, § 10, cl. 1.

contract made with the state itself. Analysis in contract clause cases must address several questions: first, whether a contract exists; second, whether the state could permissibly limit itself by the particular term or terms of the contract; third, whether a law impairs the contract's obligations; and fourth, whether the law is nevertheless permissible as a necessary exercise of public power.

The existence of a contract is a federal question. It would scarcely be consistent with the function of the contract clause as a limit on the power of the states to allow the state to avoid impairment questions merely by having the state declare one's relationship to the state to be noncontractual.[330] Insofar as the terms of the contract are supplied by statute, however, the Supreme Court has required a showing that the legislature intended the law to comprise part of the individual's contract, rather than merely to declare a policy that a subsequent legislature would be free to repeal. Where, for example, public school teachers hold tenure pursuant to statute, the elimination of the employer's obligation by repeal of the tenure law raises no impairment question unless it is first determined that the legislature intended the tenure law to comprise a contract with each employee.[331] It has been suggested that instances of such legislative intention are relatively rare.[332] Nevertheless, a collective agreement made by a public agency pursuant to the power delegated to it by the legislature under a public em-

330. *See* Larson v. South Dakota, 278 U.S. 429, 433 (1829). *Cf.* Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."). Apparently Mr. Justice Stewart, who joined the plurality in Arnett v. Kennedy, 416 U.S. 134 (1974) (*see* text accompanying notes 247-248 *supra*), saw no inconsistency in having the state's determination of whether a public employee has "property" in his job be dispositive of the fourteenth amendment issue. For a statement of how far a state court may go under Bishop v. Wood, 426 U.S. 341 (1976), see Gardner v. Talley, 373 N.E.2d 175, 176-78 (Ind. Ct. App. 1978).

331. *Compare* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 104-08 (1938) (holding that a state tenure act gave a permanent teacher the contractual right to continued employment, such that a repeal of the act constituted an unconstitutional impairment) *with* Phelps v. Board of Educ., 300 U.S. 319, 323 (1937) (holding that a state statute did not create contracts with individual teachers, but merely placed limitations on boards of education with respect to tenure and salary decisions). The cases are collected at Annot., 147 A.L.R. 293-94 (1943).

332. Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 207-08 (1975) (tenure laws). *See also* Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 993-94 n.8 (1977) (listing the minority of jurisdictions where pensions are a contractual obligation of the state).

ployee collective bargaining law[333] might alter an individual's contract to his disadvantage, either by dealing with a subject covered by the individual's existing contract (*e.g.*, salary or classification), or by dealing with a subject governed by a statute that was intended to enjoy contractual status (*e.g.*, retirement benefits).[334] In such cases, the appropriate question would be whether the impairment was nevertheless justified as a necessary exercise of public power, assuming that the previous contractual commitment did not impermissibly invade the state's reserved police power.[335]

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333. The Court has earlier made it plain that a city ordinance, or an order of a state administrative agency, issued pursuant to authority delegated by the legislature, is to be considered a "law" for the purposes of the contract clause. *E.g.*, Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 555 (1914); Louisville & N.R.R. v. Garrett, 231 U.S. 298, 318 (1913). So, too, the provisions of a collective agreement made pursuant to authority delegated by the legislature to supersede individual contracts should be considered "law" for that purpose.

334. For example, under the New York Constitution, "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." N.Y. CONST. art. V, § 7. Accordingly, New York City could not alter its rules for reentry into the City retirement system to the detriment of a retired employee, prior to the date of his reentry. Donner v. New York City Retirement Sys., 33 N.Y.2d 413, 417, 308 N.E.2d 896, 897, 353 N.Y.S.2d 428, 430 (1975). However, in Schacht v. City of New York, 39 N.Y.2d 28, 346 N.E.2d 518, 382 N.Y.S.2d 717 (1976), the city reclassified the plaintiff as a managerial employee, resulting in a significant loss of pension benefits. *Id.* at 31, 346 N.E.2d at 518-19, 382 N.Y.S.2d at 718. The trial court stated that a personnel order (for example, a reclassification or change in retirement age) is a term and condition of employment which is not a contractual commitment under the retirement system even though such orders have incidental effects upon the retirement benefits ultimately received. Schacht v. City of New York, 79 Misc. 2d 457, 460, 359 N.Y.S.2d 952, 955-56 (Sup. Ct. 1974). The court went on to hold, however, that plaintiff's reclassification was made pursuant to agreement with the union that represented her and so her contract rights had been "waived." *Id.* at 461, 79 Misc. 2d 359 N.Y.S.2d at 956. The New York Court of Appeals affirmed on the latter ground. "Plaintiff, having designated the union to be her agent for collective bargaining purposes, is bound by agreements made by that union on her behalf. She may not reject certain acts of her bargaining representative and accept others." 39 N.Y.2d at 32, 346 N.E.2d at 519, 382 N.Y.S.2d at 718. Judge Fuchsberg dissented on the ground that the "waiver" was not at all clear. *Id.* at 32, 34, 346 N.E.2d at 519-20, 382 N.Y.S.2d at 719.

The trial court may have been correct on the first ground of its decision; but, in terms of the analysis offered here, the "waiver" theory is plainly unconstitutional as applied by the court of appeals. Interestingly, Judge Fuchsberg suggests that an element of an effective waiver is a showing that "the employees affected, knew or should have known that the waiver of rights already earned and vested were intended to become subject to unilateral divestiture by the employer." *Id.* at 33, 346 N.E.2d at 519, 382 N.Y.S.2d at 719. This observation, which would have salvaged the city's action, assumes that the employee could have opted out of the change; thus, implicit in the observation is the rejection of the principle of exclusive representation insofar as the relinquishment of a vested right is concerned.

335. In the nineteenth century, for example, the power delegated by the leg-

The argument against the finding of an impermissible impairment would proceed by analogy to the law in the private sector. The Court in *J.I. Case*[336] plainly contemplated that a collective agreement negotiated pursuant to the Labor Act could supersede an individual's contract to his disadvantage; that power is subject, under *Steele*,[337] to the union's duty of fair representation in the making of the collective agreement. Furthermore, although the contract clause, by its terms, is a limit only on states and not upon the federal government, the fifth amendment has been held to limit the federal legislature's ability to impair private contracts, analogous to the contract clause's limitation on state power.[338] Pursuing this analogy, it could be argued that the very same policies that Congress has determined reasonably allow the impairment of individual contracts of private employment similarly operate to allow impairment of individual contracts of public employment.[339]

There are two reasons why this analogy is misplaced. First, prior to the Labor Act, individual employment contracts giving any real rights to employees were virtually nonexistent; the individual contract was often an effort to defeat unionization. Accordingly, the Labor Act was predicated on the gross disparity of bargaining power between employees and employers and the lack of "full freedom of association or actual liberty of contract"[340] in the private sector. In the public sector, however,

islature to run state institutions was held to preclude the institution from binding itself by employment of a specified duration, Gillan v. Board of Regents, 88 Wis. 7, 13, 58 N.W. 1042, 1044 (1894), or even to commit itself to afford so much as three months of notice of termination. Devol v. Board of Regents, 6 Ariz. 259, 262-63, 56 P. 737, 738 (1899). The logic (or illogic) of these cases survived, in some parts of the country, as late as the mid-1950s. *See* Posin v. Board of Higher Educ., 86 N.W.2d 31, 36 (N.D. 1957); Worzella v. Board of Regents, 77 S.D. 447, 450-51, 93 N.W.2d 411, 413 (1958). In Texas, the nineteenth century posture seems to survive even today. Fazekas v. University of Houston, 565 S.W.2d 299 (Tex. Civ. App. 1978), *appeal dismissed*, 99 S. Ct. 1487 (1979). For the contemporary view, however, see Pima College v. Sinclair, 17 Ariz. App. 213, 214-15, 496 P.2d 639, 640-41 (1972) and Zimmerman v. Minot State College, 198 N.W. 2d 108, 117-18 (N.D. 1972).

336. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). *See* text accompanying notes 10-18 *supra*.

337. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See* text accompanying notes 47-48 *supra*.

338. Perry v. United States, 294 U.S. 330 (1955).

339. In fact, the Board in *J.I. Case* justified its position by adverting to the then leading decision on permissible state impairment of private contracts. J.I. Case Co., 42 N.L.R.B. 85, 96 n.11 (1942) (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)), *enforced as modified*, NLRB v. J.I. Case Co., 134 F.2d 70 (7th Cir. 1943), *affirmed and modified on unrelated grounds*, 321 U.S. 332 (1944).

340. 29 U.S.C. § 151 (1976).

the constitutional rights of association and speech, and the employees' ability to influence the decisions of their governmental employer through the political process, give them far greater protection than their private sector counterparts had in the absence of the Labor Act. As a result, there may be a contract to impair in the public sector while there customarily was not in the private sector.

Second and far more important, the Court has made plain that "[t]here is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements."[341] The Court's recent revivification of the contract clause in *United States Trust Co. v. New Jersey*[342] pursued that reasoning:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.[343]

Accordingly, the fundamental infirmity of the analogy to the private sector is that it would allow the state by negotiation with a majority representative to take back a right it had earlier granted, by mere reference to the reasonableness of providing for a system of collective bargaining rather than by showing the overriding public end served by the particular impairment. To the extent the state is acting to impair the obligations of contracts made with the state, however, *United States Trust Co. v. New Jersey* requires an assessment of the reasonableness and necessity of the precise impairment. If, for example, the state bargains to eliminate tenure,[344] it must show, irrespective of the generalized purposes served by the system of collective bargaining, *i.e.*, allowing special access by employees to participate in the formulation of management's rules, that the abrogation of tenure was justified by an overriding public need impossible to achieve by less drastic means.

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341. Perry v. United States, 294 U.S. 330, 350-51 (1955).
342. 431 U.S. 1 (1977).
343. *Id.* at 25-26.
344. That this example is not entirely fanciful is illustrated by the following provision (reproduced in its entirety) of a public sector collective agreement: "Tenure is eliminated." Agreement between the University of Alaska and the Alaska Community College's Federation of Teachers, Local 2404, § 7.4(g) (Aug. 5, 1974) (under heading "Layoff, Nonretentions, and Terminations") (on file with the author).

In sum, analysis under the contract clause supports the general proposition that government may not justify merely by reference to an agreement with a majority representative, action that the Constitution forbids government to take. This reading of the clause does little real violence to the system of public sector collective bargaining. Some contract rights may be insulated, even in the private sector, from disposition by the majority.[345] The scope of public sector bargaining may be more narrowly circumscribed because of the perceived consequences of an expanded bargaining agenda upon democratic processes. In the case of the contract clause, the resulting limitation on the scope of what the parties may agree to, or on what government may demand at the bargaining table, flows from the constitutional requirement for government to show that some overriding public need is being served when an individual is divested of a contract right government had heretofore accorded.

C. FAIR REPRESENTATION AND PUBLIC ORDERING

Professors Koretz and Rabin have observed, in commenting on *Antinore*,[346] that,

> Waiver of constitutional rights should be looked upon askance, espe-

345. *See* Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), *discussed in* note 46 *supra*.

In Kolcum v. Board of Educ., 335 A.2d 618 (Del. Super. Ct. 1975), the court held that an accrued benefit (reimbursement for moving expenses) had vested, and so was insulated from disposition by the collective. *Id.* at 622. The court reasoned,

> The clear purpose of a bargaining unit under the circumstances here present was to establish an agreement as to working conditions and pay scales which would be the consideration in return for the performance of services to be rendered in the future. Individual rights which are to accrue on the basis of future services rendered in his professional capacity as a teacher are usually bargaining tools within reach of the negotiators. These rights connected with services yet to be rendered may be modified or altered for the benefit of the larger body. However, where a minority of teachers have special accrued rights from past performance, there is not a valid bargaining connection between these vested rights and the securing of a favorable pact for the rendition of future services by the entire body of teachers.

Id. at 623. The distinction, apart from the Court's cryptic footnote in Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), *see* note 46 *supra*, is difficult to square with the law in the private sector; thus, the case is better read simply as avoiding a serious problem by a narrow reading of the collective agreement. If, however, the collective agreement did what the school board asserts it to have done, then a question of impermissible impairment would be raised.

346. Antinore v. State, 49 A.D.2d 6, 371 N.Y.S.2d 213 (1975), *aff'd*, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976). *See* text accompanying notes 274-278 *supra*.

> cially when individual rights are extinguished by group action. Until our courts develop sophisticated doctrines for reviewing the adequacy of fair representation in the public sector, courts should be wary of expedient solutions. A union's freedom to make choices between different groups and interests should be more carefully circumscribed than in the private sector, since such decisions may affect preexisting statutory and constitutional rights.[347]

The tacit assumption of this otherwise sobering caution is that relinquishment of individual constitutional rights might be permissible when subject to a suitably sophisticated doctrine of fair representation. From this, it would follow that the collective's relinquishment of an antecedent individual contractual right occasions no impairment problem so long as the duty of fair representation is adhered to. Apart from the problem of defining a suitably "sophisticated" doctrine,[348] the commentators' assumption misapprehends the distinctly different character of analysis in the two sectors.

As the concluding section of Part II pointed out, the duty of fair representation in the making of collective agreements is an outer limit on the extent to which a majority may advantage itself at the expense of a minority when framing the rules in a collective agreement. This duty limits the union's conduct, not the employer's. The Constitution, however, is a limit upon government as employer. Accordingly, a collective agreement in the public sector must survive scrutiny under both the duty of fair representation and the Constitution. Inasmuch as one taproot of the duty of fair representation is the analogy to the equal protection clause, the results under the duty and the equal protection clause may overlap where a contractual distinction between groups in the bargaining unit is at stake. The questions posed by the two differ, however, and the results may not always coincide. The differences (and similarities)

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347. Koretz & Rabin, *1975 Survey of New York Law: Labor Relations Law*, 27 SYRACUSE L. REV. 139, 159 (1976).

348. After reviewing the cases, Professor Aaron concludes that

> [a]lthough it might be argued that in the public sector the bargaining representative's duty of fair representation should be enforced more strictly than in the private sector, the courts have so far shown no inclination to do so. The reason, as I have indicated, is that the duty has its roots in the Constitution; so the difference between the public and private sectors that we observed in respect of procedural due process does not exist regarding fair representation. Further refinements in the law governing the duty of fair representation—for example, in the standards for determining whether the duty has been breached—are therefore likely to continue to be made in private-sector cases and then adopted in the public sector.

Aaron, *Procedural Due Process and the Duty of Fair Representation in Public Sector Grievance Disputes*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 179, 195-98 (A. Knapp ed. 1977).

can best be explored by returning to the illustrations discussed at the outset of Part III.

A case of academic freedom.[349] A collective agreement in the private sector under which a school administration could select instructional material and forbid teacher reference to any source not so selected would not breach the duty of fair representation. Assuming the term disadvantaged a majority, such a provision would not present a valid fair representation issue under proposition (1).[350] On the other hand, assuming that the disadvantage was not shared by a majority—that is, that the rule adversely affected a minority of teachers who cared to exercise academic freedom, but did not disadvantage a docile or indifferent majority—the rule would nevertheless appear to be a uniform one, consistent with proposition (5).[351] Moreover, the fact that the employer insisted on the term as a condition of agreement would militate against any conclusion that by agreeing, the union had breached the duty. None of this is relevant in the public sector for the simple reason that the first amendment prohibits such a rule, whether promulgated unilaterally by a school board or embodied in a collective agreement with the teachers' union. In the public sector, such an agreement would be permissible as a matter of fair representation, but unconstitutional.

A case of changing rules.[352] On the face of it, the employer merely adopted a uniform rule, adding a sanction for employee noncompliance with employment policy; if this had been done pursuant to a collective agreement in the private sector, even to the discomfiture of employees who had relied on the prior rule, there would be no breach of the duty of fair representation under proposition (5).[353] In the public sector, the disparate impact of the rule change gives rise to no valid equal protection claim.[354] In this case, the results under fair representation and equal protection coincide. As the Supreme Court implied, however, the case would have been different had it concerned the retroactive application of a new penalty to prior employee conduct. In this case as well, the results in the public and private sectors would coincide, but only where the union sought the

349. *See* pp. 241-42 *supra*.
350. *See* p. 210 *supra*.
351. *See* p. 220 *supra*.
352. *See* p. 244 *supra*.
353. *See* p. 220 *supra*. *See, e.g.*, Ryan v. New York Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451, 454 (2d Cir. 1979) (discussed in note 179 *supra*).
354. Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979).

change. Were the union reluctantly to have yielded to a public employer's strongly held bargaining position, the results would diverge. Union action so predicated might be considered a breach of the duty of fair representation in the private sector;[355] a public sector agreement doing so would in the Tenth Circuit's view, also be unconstitutional.

A case of termination of tenure.[356] Of relevance to the "financial exigency" case, *Di Lorenzo v. Carey*,[357] is the fact that a coalition composed of nontenured faculty (who may have had an interest in facilitating the elimination of tenured positions) and nonfaculty administrators (who were not eligible for academic tenure) constituted a majority in the State University bargaining unit, which was willing to bargain away some of the protection afforded by tenure to secure other concessions.[358] Were such a case to arise in the private sector, the outcome would be dictated by the source of the bargaining demand. Assuming that tenure is not a "vested" contract right insulated from disposition by the majority,[359] it could be argued that tenure is, one of these "individual advantages" that, under *J.I. Case*,[360] may be subsumed to the larger good.[361] Nevertheless, proposition (3)[362] limits a majority's ability to expropriate, or, in this context, abrograte an important interest of the minority solely to advantage itself. Accordingly, had the majority (coalition) decided on its own initiative to abrogate such an interest, a significant fair representation question would be presented. From what is known of the SUNY negotiations, however, the coalition was acting in response to the employer's demand for greater administrative flexibility in dealing with retrenchment than was possible under the existing tenure system. The sacri-

355. *See, e.g.*, Williams v. Pacific Maritime Ass'n, 384 F.2d 935, 939-42 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968) (claim that the union based de-registration upon prior conduct that was not grounds for de-registration at the time it was committed, was held to state a cause of action for breach of the duty of fair representation).

356. *See* p. 242 *supra*.

357. 62 A.D.2d 583, 405 N.Y.S.2d 356, *appeal dismissed*, 45 N.Y.2d 832, 409 N.Y.S.2d 212 (1978), *cert. denied sub nom.* Farrell v. Carey, 440 U.S. 914 (1979). *See* text accompanying notes 279-284 *supra*.

358. Finkin, Book Review, 123 U. PA. L. REV. 217, 232 (1974).

359. *See* notes 46, 345 *supra*.

360. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). *See* text accompanying notes 10-18 *supra*.

361. Menard, *"May Tenure Rights of Faculty Be Bargained Away?"*, 2 J. C. & UNIV. L. 256 (1975). Mr. Menard answers in the affirmative the question posed by the title of his article. The discussion evidences awareness of neither the duty of fair representation nor the constitutional problems in the public sector.

362. *See* p. 215 *supra*.

fice of the minority's interest in those circumstances would militate against a finding of breach of the duty, at least where the union may have had no realistic alternative to acquiescence.[363]

The analysis radically changes in the public sector. Even if the Court were ultimately fully to embrace the positivist reasoning of the *Arnett*[364] plurality, thereby obviating due process analysis of the terms of the collective agreement, the contract clause would still limit what the state can accomplish by collective agreement. In order to demand a partial abrogration of academic tenure, at least where the award of tenure antedates the collective agreement, the state would have to show more than mere agreement by the majority representative—the state would also have to show that the abrogation was a necessary response to a public emergency.[365] More important, the positiv-

363. In Belen v. Woodbridge Township Bd. of Educ., 142 N.J. Super. 486, 362 A.2d 47 (Super. Ct. App. Div. 1976), of the one thousand members of the bargaining unit, six were psychologists working in teams with learning disability teachers and social workers. *Id.* at 489, 362 A.2d at 48-49. Psychologists received a 25% premium above the salary scale and other team members a lesser differential. The union sought to maintain the 25% differential for psychologists and to give the same differential to the other team members. The School Board agreed to equalization but at a 10% level. *Id.* at 489, 362 A.2d at 49. After impasse, the parties accepted a fact-finder's recommendation of parity at a 15% level. *Id.* at 489-90, 362 A.2d at 49. The court found no breach of the duty of fair representation because the union "did not act in bad faith and . . . its actions were not deceptive, arbitrary or misleading." *Id.* at 492, 362 A.2d at 50. Had the union sought the change, the question would be whether the reduction in the differential constituted a partial expropriation in contravention of proposition (3), *see* p. 215 *supra*, or a permissible refusal to advance the minority's interests under proposition (4), *see* p. 217 *supra*; but, that question need not be reached, for the simple reason that the union did not breach the duty of fair representation by accepting a fact-finder's recommendation that accommodates the employer's strongly held bargaining position.

364. Arnett v. Kennedy, 416 U.S. 134 (1974). *See* text accompanying notes 247-248 *supra*.

365. In Faitoute Iron & Steel Co. v. Asbury Park, 316 U.S. 502 (1942) (Frankfurter, J.), the Court sustained legislation providing for the composition of the obligations of defaulting municipalities against impairment challenge. *Id.* at 507-10. The legislative scheme required that 85% of the creditors approve. *Id.* at 506-07. The Court held that the provision was a reasonable response to a genuine public emergency. *Id.* at 510-11. The Court relied upon its earlier decision in Doty v. Love, 295 U.S. 64 (1935) (Cardozo, J.), concerning a statute that provided for court-ordered bank reopening upon petition of three-fourths of the bank's creditors. 316 U.S. at 513-14. In *Doty*, the Court stated:

> The argument will not hold that the necessary operation of the statute is to subject dissenting creditors, who may be as many as one-fourth, to the will or the whim of the assenting three-fourths. The creditors favoring reorganization, though they be ninety-nine per cent, have no power under the statute to impose their will on a minority. They may advise and recommend, but they are powerless to coerce. Their recommendation will be ineffective unless approved by the Superintendent. Even if approved by him, it will be ineffective unless the court after a hearing shall find it to be wise and just. Upon such a hearing every ob-

ist view has not commanded an unequivocal majority of the Court. Accordingly, it would be irrelevant that the union acted in accordance with the duty of fair representation in making the concession. If, for example, a majority of the unit were tenured faculty and it was clear that they approved the agreement with full awareness of its terms, the agreement would nevertheless have to withstand constitutional scrutiny. According to the Appellate Division in *Di Lorenzo*, the collective agreement provided that during retrenchment, a professor who has tenure—that archetypical property—could not contest in any forum the existence of the conditions alleged to justify his termination, the reasonableness of the standards, or the procedures employed to single him out for termination. Such a set of rules, when adopted by a public employer, violates the due process clause. The rules are no less unconstitutional when incorporated into a collective agreement.

IV. CONCLUSION

The American system of collective bargaining provides a means of employee participation, through a majority representative, in the formulation of the rules governing the job. The system, so understood, may be translated from the private to the public sectors, but it is subject to different constraints in the two settings. Although the scope of agreement in the private sector has been increasingly encroached upon by positive law, particularly by antidiscrimination legislation, a basic limitation on what the parties may accomplish by collective agreement still lies in the union's duty of fair representation. This limitation primarily concerns the union's responsibility to the group it represents, and affects employers only secondarily. The practical effect of finding a breach of the duty in contract making is the excision of a contract term; that is, the partial making (or unmaking) of the contract by the government—the courts or the Labor Board. Thus, private sector fair representation poses the problem of reconciling governmental intrusion with a statutory system that was intended to foster private, not

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> jection to the plan in point of law or policy may be submitted and considered. The decree when made by the Chancellor will represent his own unfettered judgment. The judicial power has not been delegated to nonjudicial agencies or to persons or factions interested in the event.

295 U.S. at 70-71. It follows that a substantial Constitutional issue would be presented if the state were to defend the abrogation of an antecedent contract right solely upon the ground of approval of "factions interested in the event," *id.* at 71; that is, by delegation of authority to a majority representative under a public employment collective bargaining law.

public, determination of terms and conditions of employment. Accordingly, the duty of fair representation as a limit on the private sector system of majority rule calls for the most delicate judgment, weighing the nature of the contractual disadvantagement against the degree of intrusion into the system of private ordering posed by the excision of the offensive term.

In the public sector, however, the determination of employment conditions is necessarily the result of a system of public ordering. Accordingly, unlike the private employer, the public employer is constrained by the Constitution. Unless individual constitutional rights are considered to be dispensable by statutory delegation to a majority representative, such rights impose limits on the terms reached by collective agreement just as they impose limits on the rules a governmental employer may unilaterally adopt.

Curiously, some courts have tended to blur the distinctions in these respective settings, though to quite opposite effect. In the private sector, the acceptance of the theory of a rational decisionmaking process and the expansion of the concept of reasonableness or rationality as a generalized element of fair representation, lead inexorably to a denigration of majority rule and a heightened role for the courts in the review of collective agreements, analogous, perhaps, to judicial review of the actions of administrative agencies. The ineluctable effect is a metamorphosis of the system of private ordering from one contemplating a rather circumscribed role for the judiciary into one more routinely accountable to the judiciary. In the public sector, on the the other hand, some courts have deemed the Constitution as dispensable by collective agreement, thereby allowing government unaccountably to accomplish that which the fundamental document constitutive of government plainly forbids it to do. Neither of these lines of decision is faithful to its respective source and setting.