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PROTECTING RETIRED WORKERS FROM INFLATION: COLLECTIVE BARGAINING FOR RETIREE BENEFITS

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Today, nearly twenty million workers in the private sector are participants in defined benefit pension plans negotiated as a result of collective bargaining agreements. These twenty million workers represent nearly two-thirds of all private sector workers participating in defined benefit pension plans.

Defined benefit pension plans guarantee a specific dollar amount for the worker at the time of retirement.[1] The high inflation rate of recent years, however, has begun to weaken seriously the value of this guarantee. For example, with only a five percent inflation rate, the value of a $100 pension declines to $61

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[1] The most common type of collectively-bargained defined benefit plan calls for a fixed dollar benefit per month for every year of service. This is the so-called "flat benefit" plan. The fixed amount in the formula is subject to bargaining each negotiating session—usually every three years—and frequently this number is increased through what is called an "ad hoc adjustment" so that the defined benefit provides what is considered by the bargaining parties to be an adequate replacement of preretirement earnings.

Another, less common type of private sector collectively-bargained defined benefit plan is the "final-average-pay" plan. This type of plan usually provides a benefit based on the workers' final (or high) three or five years of salary or wage. The benefit is therefore automatically increased as the level of salary or wages increases. Because of this automatic process, changes in the benefit formula in final average pay plans are much less frequent than in flat benefit plans. Nevertheless, once a worker retires under a "final-average-pay" plan, the worker's need for adjustments to make up for the erosion over time of pension value is the same as that of a worker who retires under a "flat benefit" plan.

in ten years; with a ten percent inflation rate it declines to $39.[2] Several private sector surveys indicate that despite the recognized effect of inflation on the value of pensions, few private sector plans provide for automatic pension benefit increases.[3] Even among such plans, a "cap" limiting benefit increases to a three percent to five percent increase in the Consumer Price Index is common. Virtually all collectively-bargained pension plans rely on *ad hoc* benefit adjustments that occur at each round of collective bargaining to stabilize the value of their pensions as inflation increases.[4]

Before 1971, unions were not barred explicitly from forcing employers to bargain over increased benefits for retired workers, or from striking if employers refused union demands on behalf of retirees. That year, however, the United States Supreme Court handed down the landmark case of *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*[5] The Court

[2] The following table illustrates the effect of inflation on retirement income:

Real Value of Retirement Income Based on Initial Replacement Rate of 100 Percent (Figures are percentages of initial retirement income)				
YEARS IN RETIREMENT	NO INFLATION	3% ANNUAL INFLATION	5% ANNUAL INFLATION	10% ANNUAL INFLATION
0	100	100	100	100
5	100	86	78	62
10	100	74	61	39
15	100	64	48	24
20	100	55	38	15
25	100	48	30	9

R. CLARK, THE ROLE OF PRIVATE PENSIONS IN MAINTAINING LIVING STANDARDS IN RETIREMENT 42 (1977).

[3] *See* R. MYERS, INDEXATION OF PENSION AND OTHER BENEFITS 124 (1978).

[4] *Id.* at 116-28.

[5] 404 U.S. 157 (1971). In *Pittsburgh Plate Glass*, the employer and union had negotiated an agreement under which the employer contributed toward the cost of an employee group health insurance plan in which retirees participated. While this agreement was in force, the employer notified the retirees, without first bargaining with the union, that they could individually withdraw from the negotiated group plan, in which case the employer would make contributions toward a program of supplemental medicare premiums. The union argued that benefits for already retired employees were a mandatory subject of bargaining and that the employer could not make the offer it did unilaterally. The Supreme Court disagreed, ruling that unions had no right to force employers to bargain over retirees' benefits.

The Supreme Court based its decision on two critical findings. Because retirees had severed themselves from employment, the Supreme Court found that legally they were no longer "employees." *Id.* at 172. Therefore, the Court held that an employer has no legal duty to bargain about retiree benefits when a union raises the issue. *Id.* at 165. The Court also found that because the interests of active workers and the interests of retirees

held in *Pittsburgh Plate Glass* that an employer has no legal duty to negotiate over retiree benefits should a union raise the issue during the collective bargaining process.[6] As a result of the decision, unions could no longer force employers to discuss retiree benefits or strike if the employer ignored the demand. *Pittsburgh Plate Glass* left retirees without any real representation at the bargaining table. The Court forced them to rely upon the good will of their former employers for possible post-retirement pension benefit increases.

Identical legislation has been introduced in both houses of Congress to overturn *Pittsburgh Plate Glass*[7] by making retiree benefits a "mandatory subject of bargaining."[8] Under such legislation, if a union placed the question of retiree benefits on the table during the course of collective bargaining, the employer would be under a legal obligation to negotiate about it. If the parties could not reach agreement on the question of such benefits, the union would have the right to strike to enforce its demands on behalf of retirees.

While legislation to make retiree benefits a mandatory subject of bargaining would give unions new power to push for retiree benefits, the effectiveness of this or other attempts to provide a mechanism for protecting retirees against inflation through the collective bargaining process is open to question. Today, when nearly twenty million workers in the private sector are participants in defined benefit pension plans negotiated in the collective bargaining process,[9] the current high rate of inflation in the United States economy forces reappraisal of the mechanisms for providing inflation protection for retired workers. The purpose of this article is to explore whether the collective bargaining process in its present form, or with certain modifications, can provide workers with meaningful protection against inflation. Part I

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may well collide, retirees cannot be included within a unit of active workers represented by a union in collective bargaining negotiations. *Id.* at 172-73. However, a union does not even have a legal duty to attempt to raise the issue of benefits for retirees. *Id.* at 182.

[6] *Id.* at 165.

[7] H.R. 1145 and S. 1473, 96th Cong., 1st Sess. (1979). Similar legislation had been introduced in previous sessions of Congress.

[8] The bills are so broadly drafted that unions would not be limited to bargaining for catch-up pension increases for retirees. Under their provisions, a union could press for extension of benefits in any area affecting retirees (such as medical benefits). Presumably a union could even demand the institution of pensions and other benefits for groups of retirees who previously had not been entitled to them.

[9] These 20 million workers represent nearly two-thirds of all private sector workers participating in defined benefit pension plans. A majority of both workers and management prefer defined benefit plans over other types of pension plans. Louis Harris and Associates, Study of American Attitudes Toward Pensions and Retirement (1979).

evaluates the adequacy of the collective bargaining process by examining the internal dynamics of unions, the interests of employers and the application of the doctrine of fair representation to collective bargaining. After concluding that the current system inadequately protects retirees, Part II proposes alternative methods to strengthen the role of retirees in the collective bargaining process.

I. COLLECTIVE BARGAINING AS A MECHANISM TO PROTECT THE VALUE OF PENSIONS

In collective bargaining, the parties come to the bargaining table with demands and expectations but not with guarantees. To reach agreement with the employer, a union necessarily must balance, compromise, and trade off the interests of the groups it represents. Inevitably, the bargaining process results in agreements that benefit some groups more than others. If the goal is to protect retirees' benefits from inflation on a consistent basis, the question becomes whether a freewheeling give-and-take process like collective bargaining is adequate to the task. Putting aside the crucial role of the employer who is free, with some exceptions, to veto union proposals not in its own interest, the answer depends upon whether unions have as strong an institutional interest in representing retirees as they do in representing active workers.

A. The Internal Political Dynamics of Unions and the Interests of Employers

Unions undoubtedly feel strong moral obligations to retirees, many of whom helped build the union movement in its infancy. Nevertheless, the institutional political structure of many, if not most, unions dictates that any conflicts between the interests of active workers and retirees be resolved in favor of active workers. Under the law, union officers must be elected.[10] Yet, unions generally do not extend voting membership to retirees.[11] Conse-

[10] Landrum-Griffin Act of 1959 (Labor Management Reporting and Disclosure Act), § 401, 29 U.S.C. § 481 (1976) [hereinafter cited as LMRDA], requires the election of international, intermediate, and local union officials by convention or referendum at specified intervals.

[11] Federal law does not generally limit a union's discretion to decide its own conditions of membership. *See* LMRDA, 29 U.S.C. §§ 401-531 (1976); Moynahan v. Para-Mutuel Employees Guild of Cal., Local 280, 317 F.2d 209 (9th Cir.), *cert. denied*, 375 U.S. 911

quently, to stay in office, officers of most unions must respond predominantly to the interests of active workers. Nowhere are those interests more important than in the collective bargaining arena where the economic welfare of workers and their families is at stake.

Furthermore, in many unions, rank and file members must approve tentative collective bargaining agreements before they become effective. Because retirees generally may not retain union membership, they have no right to vote upon proposed agreements, even upon those provisions that affect their benefits.[12] Because only those who are union members, *i.e.*, active workers, vote under a ratification system, the likelihood of contract approval is negligible unless the expectations of active workers are satisfied. Therefore, where ratification is the rule, to assure the successful conclusion of a collective bargaining agreement, union negotiators must tailor the agreement to the needs of active workers voting on the contract, regardless of the equities.

No incentive exists for unions to allow retirees to vote on ratification because, since the decision in *Pittsburgh Plate Glass*, unions may not strike over the issue of retiree benefits. If retirees were allowed to vote, especially where they composed a large part of a union's jurisdiction, or where balloting over contract approval was likely to be close, they could defeat a proposed collective bargaining agreement if dissatisfied with provisions made for them. The union would then be on the horns of a dilemma, as any attempt to force the employer to renegotiate provisions for retirees would violate the law.[13] In the absence of such an attempt, ratification might become impossible.

Active workers and retirees do share some common interests,

(1963). Some state courts have held that unions, as voluntary associations, are free to set their own conditions of membership. *E.g.*, Walter v. McCarvel, 309 Mass. 260, 34 N.E.2d 677 (1941); Havens v. Detroit Motion Picture Projectionists, 338 Mich. 418, 61 N.W.2d 790 (1953) (equally divided court). However, other state courts have held that because of a union's quasi-public nature, unions may not establish membership criteria which unreasonably deny membership to those actively employed in the trade or occupation over which a union has jurisdiction. *E.g.*, Directors Guild of America, Inc. v. Superior Court, 64 Cal. 2d 42, 409 P.2d 934, 48 Cal. Rptr. 710 (1966). No court has held, however, that a union must accept as members those *retired* from a trade or occupation over which it has jurisdiction. Nevertheless, a few well known unions such as the United Mineworkers and the United Steelworkers do offer voting membership to retirees.

[12] *Cf.* Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979) (active non-union workers have no right to vote upon local union agreements affecting their working conditions); LMRDA, § 101(a)(1), 29 U.S.C. § 411(a)(1) (1976) (only union members guaranteed right to participate in union affairs).

[13] National Labor Relations Act of 1935, § 8(b)(3), *as amended*, 29 U.S.C. § 158(b)(3) (1976) [hereinafter cited as NLRA]; Allied Chemical and Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

however. For example, active workers will someday be retirees and have a real interest in seeing, through periodic benefit increases, that retirees' pensions are adequate. This is particularly true of older workers. Nevertheless, wages and non-retirement fringe benefits directly and immediately benefit active workers. Predictably, these will be the highest financial priority of active workers during collective bargaining. Logically, this tendency should be strongest during periods of high inflation when immediate financial pressures upon active workers are the heaviest. Yet, it is precisely at such times that retirees also will need the greatest relief through *ad hoc* benefit increases. With the internal structural dynamics of most unions favoring the needs of active workers, the result is that when retirees need substantial pension increases the most, they may be least likely to receive them.

Employers have only a minimal degree of self-interest in granting benefits to retirees, despite the fact that many employers do grant pension increases to retirees. Regardless of self-interest and the *Pittsburgh Plate Glass* decision, numerous employers have granted pension increases for retirees either unilaterally or as the product of collective bargaining. The question here, however, is whether employer good will is a *reliable* source of protection against inflation. Because retirees have severed themselves from active employment, they do not contribute to the productivity or success of the employer's business. Thus, the satisfaction of retirees has little practical consequence for an employer's day-to-day operations. In contrast, the satisfaction of active workers with their wages and working conditions has direct bearing upon their morale, and consequently upon the employer's operations in terms of productivity and labor relations. Thus, usually the employer benefits by favoring the interests of active workers over those of retirees.[14]

B. The Doctrine of Fair Representation

With the institutional forces promoting the collective bargaining interests of retirees so weakly, a question arises as to how retirees could be guaranteed proper representation at the bargaining table even if unions were given real power to represent them. Traditionally the mechanism for promoting proper repre-

[14] There are, however, boundaries to these dynamics. If an employer were to neglect the needs of retirees completely, the morale of certain workers, looking forward to their own eventual retirement, might well be adversely affected.

sentation has been a judically-erected doctrine known as the duty of fair representation.[15] The doctrine, a broad equitable corollary of the grant to unions of exclusive power to represent collective bargaining interests, simply requires that the power delegated to unions be exercised fairly in behalf of whomever a union has been empowered to act.

The right of active workers who are "employees" within a "bargaining unit"[16] to fair representation by a union is the most familiar application of this general equitable principle, but the right to fair representation is theoretically applicable to whomever a union represents. For example, in *Steele v. Louisville & Nashville Railroad Co.*,[17] the landmark case announcing the doctrine of fair representation, the Supreme Court defined its scope under the National Labor Relations Act in the broadest possible terms:

> We hold that the language of the Act to which we have referred, read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of *all those for whom it acts, without hostile discrimination against them.*[18]

The Supreme Court has since confirmed the wide sweep of the duty of fair representation in *Railroad Trainmen v. Howard.*[19] There, the Supreme Court held that, even against employees it did not represent, a union may not exercise power to bargain unfairly.

More recently, in *Nedd v. United Mine Workers*[20] a case di-

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[15] The reciprocal terms "duty of fair representation" and "right to fair representation" will be used interchangeably here depending upon the context.

[16] *See* discussion of terms "employees" and "bargaining units" in Pittsburgh Plate Glass, 404 U.S. at 165-76.

[17] 323 U.S. 192 (1944). In *Steele*, the Supreme Court applied the duty of fair representation to unions under the jurisdiction of the Railway Labor Act. The Supreme Court later extended the duty to unions under the jurisdiction of the NLRA. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[18] Steele v. Louisville & N. R.R. Co., 323 U.S. 192, 202-03 (1944).

[19] 343 U.S. 768 (1952).

[20] 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). In *Nedd*, the union voluntarily undertook to collect royalties from employers due to a pension fund from which retirees received benefits. Certain retirees alleged that the union had been lax in this endeavor, and sued the union, in part, on the theory that the union had failed to represent retirees' interests fairly. The union argued, under *Pittsburgh Plate Glass*, that because retirees were not "employees" or "bargaining unit members," it had no legal duty of fair representation towards retirees. The Third Circuit Court of Appeals rejected

rectly on point, the Third Circuit Court of Appeals ruled that a union must represent the interests of retirees fairly, notwithstanding the fact that (1) retirees are neither "employees" nor "bargaining unit members," and (2) the union had voluntarily undertaken to represent retirees, even though the union had no legal duty to do so.[21] Relying upon the Supreme Court's decision in *Howard,* the court in *Nedd* recognized the union's duty to represent fairly all of those for whom a union acts whether *inside or outside* the bargaining unit.[22]

The *Nedd* decision properly distinguishes the considerations relevant to mandatory bargaining from those relevant to fair representation. The Supreme Court in *Pittsburgh Plate Glass* found the nexus between retirees, on the one hand, and their former employers and active employees on the other to be extremely tenuous. This finding led the Court to conclude that a union need not represent retirees, and that an employer has no legal duty to bargain about retirees' benefits. However, this decision implies neither that a union may not voluntarily undertake to represent retirees nor that an employer may not agree to bargain about their interests. Where such bargaining occurs, no reason exists to allow the union to ignore efforts on behalf of retirees. Consequently, regardless of *Pittsburgh Plate Glass,* under existing law, where a union actually does represent retirees' interests, it owes retirees a duty of fair representation.

1. The application of the doctrine of fair representation in the context of collective bargaining— Fair representation issues arise at every stage of the bargaining process—in the formulation of contract demands, in agreement upon contractual provisions, and in the administration of the agreed contract. In *Steele,* the Supreme Court set the parameters of a union's duty of fair representation in the negotiating context. The Court required that any "unfavorable effects" upon particular groups the union represents which result from bargaining be based upon "relevant differences" between those groups and other groups the union represents.[23]

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this contention outright, holding that while the union was under no legal obligation to represent retirees' interests, "[h]aving undertaken, on behalf of the Fund to enforce the employers' obligation to pay royalties, the Union was not then entitled to act in a manner which discriminated against the pensioners." *Id.* at 200.

[21] *Id.* at 199-200.

[22] The court in *Nedd* stated that "[f]ederal common law implied from the statutory authority conferred upon collective bargaining representatives has recognized the need to place limitations upon the power of the recognized bargaining representative to injure minorities *inside and outside* the bargaining unit." *Id.* at 200 (emphasis added).

[23] Steele v. Louisville & N. R.R. Co., 323 U.S. 192, 203 (1944).

Even though requiring unions to premise distinctions upon "relevant differences," the Supreme Court has recognized that unions must have significant leeway—a "wide range of reasonableness"—in bargaining.[24] The parameters of a "wide range of reasonableness" bounded by a duty to act upon "relevant differences" are unclear. Some courts have analyzed contractual provisions negotiated to determine if they are, on some minimal level, based upon differences which make objective sense.[25] Other courts have hewn a more restrictive line and refused to overturn union bargaining conduct in the absence of explicit allegations and proof of bad faith or hostility towards a particular group the union represents.[26] In the absence of hostility or irrationality, courts have approved negotiated forced retirement of older workers,[27] super-seniority for union officials,[28] differential seniority systems favoring the rights of some union members over others,[29] differential seniority systems favoring union over non-union employees,[30] and the termination of non-vested pension rights.[31] A number of courts have attempted to build into the duty of fair representation a requirement to consider and

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[24] Thus, in upholding preferential seniority provisions negotiated for returning veterans, the Court said:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals . . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. 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.

Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953). This "wide range of reasonableness" is, of course, circumscribed by the duty to act upon "relevant considerations."

[25] Hargrove v. Brotherhood of R.R. Locomotive Eng'rs, 116 F. Supp. 3, 8 (D.D.C. 1953) ("Here the discrimination based on prior employment and geography alone are . . . irrelevant and invidious.").

[26] Gainey v. Brotherhood of Ry. and S.S. Clerks, 313 F.2d 318 (3d Cir. 1963); Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962), *cert. denied*, 371 U.S. 920 (1962).

[27] Roberts v. Lehigh & New England Ry., 323 F.2d 219 (3d Cir. 1963); Goodlin v. Clinchfield R.R., 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 953 (1956).

[28] Aeronautical Ind. Dist. Lodge 727 v. Campbell, 337 U.S. 521 (1949).

[29] Deboles v. Trans World Airlines Inc., 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

[30] Beriault v. Local 40, Super Cargoes & Checkers of the Int'l Longshoremen's & Warehousemen's Union, 445 F. Supp. 1287 (D. Ore. 1978).

[31] Dwyer v. Climatical Industries, Inc., 544 F.2d 307 (9th Cir.), *cert. denied*, 430 U.S. 1932 (1977).

take into account in decisionmaking the interests of minorities within the union.[32] No court, however, has required a union to comply with its duty of fair representation by attempting to negotiate contractual provisions which meet specific substantive benefit levels or standards.[33]

By and large, regardless of the formal rubric, courts are concerned primarily with the process by which a union makes negotiating decisions and not with what the union actually negotiates. Consequently, even assuming retirees were entitled to a duty of fair representation, it would be difficult to argue successfully under existing law that unions must attempt to negotiate pension increases for retirees at any particular level, for instance one which would offset inflation or equal benefits of active workers.

2. *Inadequacy of relief under the traditional doctrine of fair representation*— Even if retirees could establish a violation of their rights, certain difficulties concerning the proper remedy arise. Although the Supreme Court ruled early that breach of the duty of fair representation entails "the usual judicial reme-

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[32] Several courts have outlawed discriminatory procedural conduct that would be especially harmful to the interests of retirees were retirees to become entitled to the right of fair representation. For instance, retirees, because they generally are not entitled to vote in union matters, are weak politically, and several courts have explicitly ruled that unions may not make negotiating decisions on the basis of the relative political power of factions within the union. Ferro v. Railway Express Agency, Inc., 296 F.2d 847, 851 (7th Cir. 1961) ("[I]t is not proper for a bargaining agent in representing the employees to draw distinctions among them which are based upon their political power within the union."); Barton Brands, Ltd. v. NLRB, 529 F.2d 793, 798 (7th Cir. 1976) ("[D]ecisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group."); *see also* Truck Drivers and Helpers Local 568 v. NLRB, 379 F.2d 137, 142-43 (D.C. Cir. 1967)(union's duty of fair representation breached where its advocacy of a position preferred by a majority group is supported only by the "purely political motivation of winning an election"). Likewise, discrimination by unions against nonmembers is uniformly condemned. Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 797 (2d Cir. 1974). Because retirees generally are not allowed to participate in the contract ratification process, active workers decide what benefit increases retirees will receive in any given collective bargaining agreement. Consequently, should majority approval of contract provisions which discriminate against retirees legitimize them, the right to fair representation would become meaningless for retirees. A few courts have indicated that majority approval of discriminatory contract provisions does not insulate unions from charges of unfair representation. Barton Brands, Ltd. v. NLRB, 529 F.2d 793, 793 (7th Cir. 1976); *see also* Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808 (D.C. Cir. 1979). Another court has taken the contrary view. Roberts v. Lehigh & New England Ry., 323 F.2d 219 (3d Cir. 1963).

[33] *But see* O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 500, 107 N.W.2d 484, 489 (1961) ("The overall consideration is whether the bargaining . . . was in good faith and reached a fair and reasonable solution to the merger problem").

dies of injunction and award of damages,"[34] applying this relief where future financial benefits are at stake might be difficult for several reasons discussed so far. One of the primary obstacles is that the measure of damages would be unclear. Also, in cases covering large numbers of retirees, courts face the problem that awarding appropriate damages to retirees might destroy the union's fiscal viability and, thus, its future bargaining capacity. Finally, employers have a legitimate business interest in protecting their pocketbooks, and for a court to award damages against an employer merely for striking a hard bargain that adversely affects retirees would be difficult to justify.

Fair representation decisions overturning union collective bargaining actions usually involve situations where previously accrued rights have been bargained away.[35] In such cases, the courts can easily determine the remedy because preceding collective bargaining agreements provide a readily ascertainable measure of relief. For example, where previously existing seniority rights have been forfeited, courts need only order their restoration.[36] However, where a court found that a union had unfairly represented the interests of retirees in bargaining over future benefit increases, no such norm would be available. The court would have to step into the shoes of the parties and decide what should have been negotiated. Past agreements might provide some guidance; but because financial benefit packages are negotiated in the context of the current fiscal picture, such guidance would not be determinative. In essence, the court would have to decide how the union should have split what it obtained from the employer between active workers and retirees. This speculative judgment is outside the normal range of judicial expertise, and courts should entertain such deliberations only with the greatest reluctance.

Courts also would be reluctant to make large damage awards jeopardizing the fiscal stability of offending unions. In *Electrical Workers* v. *Foust*[37] the Supreme Court addressed the issue of whether punitive damages could be awarded against unions breaching their duty of fair representation. The Court rejected the possibility of punitive damages in fair representation cases

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[34] Steele v. Louisville & N. R.R. Co., 323 U.S. 192 (1944); Mount v. International Bhd. of Locomotive Eng'rs, 226 F.2d 604, 608 (6th Cir. 1955).

[35] *See, e.g.*, Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974); Mount v. International Bhd. of Locomotive Eng'rs, 226 F.2d 604 (6th Cir. 1955).

[36] Mount v. International Bhd. of Locomotive Eng'rs, 226 F.2d 604 (6th Cir. 1955); Hargrove v. Brotherhood of R.R. Locomotive Eng'rs, 116 F. Supp. 3 (D.D.C. 1953).

[37] International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979).

on the grounds that punitive damages "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this court has previously articulated in the unfair representation area."[38] Similarly, in a case involving issues analogous to fair representation, the United States District Court for the District of Columbia faced the task of assessing purely compensatory damages against a union which had used pension fund assets for its own purposes to the detriment of retirees. The court expressly limited the union's liability. Because the union protects the interests of both past and prospective beneficaries, the court did not want to weaken the union financially so as to substantially impair its collective bargaining position.[39]

Balancing the right of individual retirees to fair compensation against the collective need of all those a union represents for a viable bargaining representative would be easier if the employer could be required to contribute in compensating retirees. Courts have awarded damages against employers in fair representation suits under a variety of rationales. Generally a court will award damages in circumstances where an independent ground of employer liability was present. For example, where an employer violates a collective bargaining agreement and employees file a grievance which a union fails to process fairly, damages may be awarded against both the union and the employer. The damages awarded against the union are for failure to represent the employees fairly. Awards against the employer, however, are for breach of the collective bargaining agreement and must be limited to the provable damages occasioned thereby.[40] However, some courts have indicated that even where no independent ground of liability exists, employers may be joined in fair representation suits to afford "complete relief."[41] In the context of most decided cases, affording "complete relief" means requiring employers to reinstate previous seniority or job status to employees injured by discriminatory contractual provisions advocated by the union and agreed to by the employer, and to contribute in compensating the victim.[42] Several courts have

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[38] *Id.* at 49.

[39] Blankership v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971).

[40] Vaca v. Sipes, 386 U.S. 171 (1967); Barrett v. Safeway Stores, Inc., 395 F. Supp. 161 (W.D. Mo. 1973).

[41] Vaca v. Sipes, 386 U.S. 171 (1967); Glover v. St. L.S.F. Ry., 393 U.S. 324, 329 (1969); Cunningham v. Erie Ry., 266 F.2d 790 (7th Cir. 1974); *see* Carroll v. Brotherhood of R.R. Trainmen, 417 F.2d 1025 (1st Cir. 1969).

[42] *See, e.g.*, Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975).

allowed joinder of employers in fair representation suits on the broader theory that the employer has a duty analagous to that of the union to refrain from conduct at the bargaining table that discriminates against particular classes of employees.[43]

Although the theoretical distinction is clear, the practical difference in breach of fair representation cases between incidentally joining an employer to afford complete relief and independently joining an employer as one who aids and abets the union is hazy at best. Regardless of the theory, courts tend to find employer conduct culpable where a union proposal constitutes clearly identifiable discrimination against a class, and the employer has no legitimate business reasons for agreeing to it. Such cases often involve racial discrimination,[44] discrimination against non-members,[45] or destruction of the accrued benefits of partic-

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[43] Richardson v. Texas & New Orleans R.R., 242 F.2d 230 (5th Cir. 1957); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974). In *Richardson*, the union and the employer had agreed to contractual terms discriminating against black employees who were not union members but whom the union represented. The plaintiffs brought suit against both the union and the employer. In ruling that the action against the employer should not be dismissed, the court held the employer jointly responsible for violating its independent duty to represent fairly the black employees:

> It takes two parties to reach an agreement, and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they know, or should know, is unlawful. Unless financial responsibility for a *joint breach of such duty* is required from both sides of the bargaining table, the statutory policy implied under *Steele* will be impracticable of enforcement. For the foregoing reasons, *we think the Brotherhood's obligation under the statute does not exist in vacuo, unsupported by any commensurate duty on the part of the carrier.*
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> The Railroad may not have been the Brotherhood's keeper for bargaining purposes, but *we think that, under the allegations of this complaint, it can be required to respond in damages for breach of its own duty not to join in causing or perpetuating a violation of the Act and that policy it is supposed to effectuate.*

242 F.2d at 236. (emphasis added). In Glover v. Saint L.S.F. Ry., 393 U.S. 324 (1969), a subsequent Supreme Court case involving negotiation of racially discriminatory provisions, Justice Harlan enhanced the vigor of *Richardson*, stating: "I believe that Richardson v. Texas & N.O.R. Co., 242 F.2d 230 (1957), decided by the Fifth Circuit some years ago before the decision in the present case, also supports today's holding that the federal courts may grant . . . relief against an employer who aids and abets [the] union in breaching its duty of fair representation." 393 U.S. at 331 (Harlan, J., concurring). The Supreme Court also cited *Richardson* favorably in Vaca v. Sipes, 386 U.S. 171, 186 (1967).

[44] *See, e.g.*, Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); Richardson v. Texas & New Orleans R.R., 242 F.2d 230 (5th Cir. 1957). These cases were decided prior to the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976), which imposed an independent duty upon employers to refrain from racial discrimination. Therefore, relief against the employer was premised upon employer bargaining conduct, not upon an independent violation of the civil rights laws.

[45] Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974).

ular employees.[46] Some courts have ruled that an employer may be held liable even where it may have a legitimate business reason for agreeing to the offending clause.[47]

Nevertheless, under present law, whether courts would penalize employers for agreeing to inadequate union proposals made for retiree benefits is highly questionable for two reasons. First, employers agreeing to inadequate increases would not deprive anyone of accrued benefits. Second, by its very nature, collective bargaining presupposes an important and legitimate employer interest in protecting its pocketbook. Therefore, courts would certainly be reluctant to penalize employers for acting in their self-interest.

Making the subject of retirees' benefits a mandatory subject of bargaining will not by itself provide any reliable guarantee of adequate benefit increases for retirees. Both the internal political dynamics of most unions and employer interests dictate that retiree benefits be given only secondary consideration at the bargaining table. In addition, the doctrine of fair representation gives unions wide latitude in settling upon their bargaining priorities. Moreover, whether retirees could expect adequate compensation even if they were able to prove a breach of the duty of fair representation, is highly unlikely. In order for mandatory bargaining over retirees' benefits to be meaningful, additional protections have to be extended to retirees.

II. ALTERNATIVES TO STRENGTHEN THE RIGHTS OF RETIREES WITHIN THE BARGAINING PROCESS

A number of alternatives exist to strengthen the position of retirees in the collective bargaining context. These include allowing retirees to bargain for themselves, increasing the consultative role of retirees in the bargaining process, establishing a higher than ordinary standard for retiree benefits, and negotiating automatic cost-of-living adjustments for post-retirement

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[46] *Id.*; Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976).

[47] Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976) (legitimate business concerns inherently destructive of important employee rights do not excuse discriminatory conduct); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974) (regardless of motive, employer liable as "direct cause" of plaintiffs' injuries by violating seniority rights accrued under previous contracts); *see* Robinson v. Lorrilard Corp., 444 F.2d 791, 799 (4th Cir. 1971); *cf.* Ferro v. Railway Express Agency Inc., 296 F.2d 847, 851 (2d Cir. 1969) (employer dismissed from suit in absence of allegation that employer had acted with a motivation to discriminate or with knowledge that the union was discriminating).

benefits.

A. The Right of Retirees to Bargain for Themselves

Retirees undoubtedly would fare best if they had an official voice in developing and approving collective bargaining agreements. Under the law, however, "subject to reasonable rules and regulations," only union members are guaranteed the right to equal participation in union affairs, including collective bargaining matters.[48] Thus, unions, in their capacity as collective bargaining agents, may exclude non-members they represent from official participation in decisions affecting collective bargaining.[49] Furthermore, unions are free to set their own conditions of membership.[50] Because unions generally deny membership to retirees, retirees are effectively denied official participation in union affairs bearing upon collective bargaining.

An alternative supported strongly by some advocates for retirees[51] is to amend the law to allow retirees to bargain directly with employers. Presumably, retirees and active workers would be members of separate bargaining units, and each bargaining unit would be free to choose its own bargaining agent.

Such a structure raises troublesome technical questions including who would be included in a retiree unit, would the unit include only retirees actually receiving pensions, or would it also include retirees who had never qualified for pensions but felt they should be entitled to them, and if those in the latter category are to be included, is there to be some minimum duration of employment with the employer prerequisite to inclusion in the unit? These questions have more than a theoretical importance. If retirees are empowered to choose their own bargaining agent, membership in the unit will determine who is to vote on that choice.

A more fundamental problem is that separate bargaining units with the right to separate representation would institutionalize an adversial relationship in which retirees and active workers overtly compete for benefits. Under such a structure, retirees

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[48] Title IV, 401, LMRDA, 29 U.S.C. § 411(a)(1) (1976).

[49] Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808, 811 (D.C. Cir. 1979) (deciding upon the terms of a collective bargaining agreement is a union function "from which non-union employees properly may be excluded").

[50] *See* note 11 *supra.*

[51] *See Collective Bargaining for Retired Employees: Hearings on H.R. 13535 before the Subcomm. on Labor-Management Relations of the House Education and Labor Comm.*, 95th Cong., 2d Sess. 63-64 (1978) (testimony of Jay W. Tower).

would be at a severe disadvantage. By striking, active workers can directly shut down an employer's operations. Retirees cannot command such direct action in support of their demands. Thus, common sense dictates that an employer should resolve separate and competing demands made upon it in favor of active workers.

Retirees dissatisfied with an employer's offer would be forced to rely upon indirect pressures, perhaps in the form of consumer boycotts and informational picketing. However, consumer boycotts are difficult to mount, and informational picketing is a relatively weak form of pressure. Moreover, the public would almost certainly become confused by conflict between retirees and active workers, further diminishing the effectiveness of these tactics. In the event active workers were still on the job when retirees reached impasses with an employer, retirees might picket job sites in the hope active workers would walk out in sympathy. Yet retirees and active workers would be competing for benefits. By walking off the job, active workers would gain nothing for themselves, and they would lose their paychecks. The incentives to ignore retiree pickets would be substantial.[52]

Commonly, unions negotiating simultaneously with an employer coordinate their efforts. Bargaining and striking in tandem enhances their strength while bargaining and striking separately dilutes their strength. Therefore, cooperation measurably increases the chances for success. Little reason exists, however, for a union representing active workers to agree to coordinate bargaining with retirees. Retirees, having no jobs, can neither participate in a joint strike, nor detract from the strength of unilateral action by active workers. Because retirees can do little to help or hurt active workers and are competing with them for benefits, a union representing active workers probably would not agree to coordinate bargaining with retirees.

B. Increased Retiree Role in the Process of Union Bargaining

To guarantee retirees an official voice in union decisions on collective bargaining would require novel and massive intrusions into the traditional legal hegemony accorded to unions over conditions of membership and execution of their duties as bargain-

[52] This leaves aside questions concerning the legality of such picketing which need not be discussed here. The basic point is that sympathy strike efforts would probably be unsuccessful in any event.

ing agents. Nothing, however, prohibits the imposition of an explicit duty upon unions to consult with retirees they represent before and during collective bargaining negotiations. The position that unions should consult non-members is already inherent in existing judicial precedent. The Supreme Court in *Steele*, stated:

> 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. *Whenever 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 them notice of an opportunity for hearing upon its proposed action.*[53]

Greater involvement by retirees in the bargaining process would not, by itself, insure larger or more frequent benefit adjustments. In fact, greater involvement in the bargaining process would mean little if the union, after consultation with retirees, did not make retirees' interests a high priority. To insure that unions make the interests of retirees a high priority in bargaining, a higher than ordinary standard of fair representation to the negotiation of benefits for retirees might be appropriate.

C. A Higher than Ordinary Standard of Fair Representation

Some precedent exists for higher than ordinary standards of fair representation in two lines of analogous cases involving racially discriminatory contractual provisions[54] and union representation of non-members.[55] The two principles embodied in these cases are complementary and conjoined in their applicability to retirees.

One line of decisions relies upon the applicability of the Civil Rights Act of 1964, which prohibits unions from encouraging

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[53] *Steele*, 323 U.S. at 204 (emphasis added).

[54] *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976).

[55] *See, e.g.*, Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974).

employers to discriminate on a racial basis.[56] Several circuits have required unions, not merely to refrain from racial discrimination, but to negotiate actively for equal treatment of racial minorities.[57] The principle common to these cases is that the vindication of important public policies must take precedence over the union's normal right to compromise and trade off interests of groups it represents during bargaining. Pension stability, like equal opportunity for minorities, is a paramount public concern. When passing the Employee Retirement Income Security Act of 1974 (ERISA),[58] Congress found that:

> [T]he growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations . . . .[59]

Under ERISA, Congress has protected the soundness of private pension plans "by requiring them to vest the accrued benefits of employees with significant periods of service, to meet the minimum standards of funding, and by requiring plan termination insurance."[60] Yet, without measures such as a special standard of fair representation adequate to ensure the stability of pension values over time, these protections are meaningless.

In the second line of cases, courts have indicated that union representation of non-members, especially those to whom union membership is categorically denied, is subject to special scrutiny.[61] Because unions have little institutional motivation to promote the interests of nonmembers, efforts in behalf of non-members should be subject to close review.

Retirees generally are not members of the unions representing them. Even where retirees are union members, they have limited

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[56] Title VII, § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c)(3) (1976).

[57] Patterson v. American Tobacco Co., 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973); *see also* United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973).

[58] 29 U.S.C. §§ 1001 *et seq.* (1976).

[59] *Id.* § 1002(a).

[60] Title I, § 2(c), ERISA, 29 U.S.C. § 1001(a) (1976).

[61] Berault v. Local 40, Super Cargoes & Checkers, I.L. & W.U., 445 F. Supp. 1287, 1295 (D.Ore. 1978) (unions must be especially careful to represent interests of those to whom they categorically deny membership); *see* Jones v. Trans World Airlines, Inc., 495 F.2d 790, 797 (7th Cir. 1974).

bonds with the union representing them. The Supreme Court recognized this in *Pittsburgh Plate Glass* and grounded its conclusion that retirees were not "bargaining unit members" upon the lack of a real "community of interests" between active workers and retirees which might tempt unions to favor the interests of active workers.[62] The Supreme Court relied upon this lack of a community of interests to deny retirees effective bargaining representation, ruling that unions could not force employers to negotiate over retiree benefits. However, the Supreme Court's logic is curious. Concluding that because retirees might not receive adequate representation from unions, the Supreme Court ruled they do not have to receive any. The lack of strong bonds between unions and retirees more logically leads to the opposite conclusion — that unions should be held to higher than ordinary standards of representation to insure proper advocacy of retiree interests.

A special standard of representation for retirees rights might take the form of a "rebuttable presumption." A rebuttable presumption would set a particular standard which a union would be required to meet in its attempts to negotiate benefits for retirees. If the union failed to negotiate benefit levels which met that standard, in the absence of justification for its failure, the union would be found to have breached its duty of fair representation to retirees.

1. Defining a higher standard of fair representation— Assuming a higher than ordinary standard of fair representation for measuring bargaining conduct affecting retirees, and assuming a rebuttable presumption, a specific "yardstick" against which fair bargaining conduct can be measured would be in order. Such a yardstick might require unions to strive for retiree benefit increases sufficient to offset the effects of inflation over the preceding contract, or if increases at this level would outstrip those to which active workers would be entitled, to attempt at a minimum to achieve benefit increases equal to wage increases negotiated for active workers.[63] Benefits not meeting this standard would be presumptively invalid and require a union to justify its actions by reference to some legitimate union objective. Deciding what constitutes a "legitimate union objective" is open to controversy and would vary with the circumstances. It suffices to say that the union would be required to demonstrate

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[62] Pittsburgh Plate Glass, 404 U.S. at 173.

[63] Defining the criteria for "increases sufficient to offset the effects of inflation" and "increases proportionate to wage increases" is beyond the scope of this article.

specifically why it could not comply with the presumptive standard. There is precedent for applying such a presumption to union bargaining conduct. Several cases hold that where a union attempts to cancel or reduce benefits already conferred upon a minority in a pre-existing agreement, the union breaches its duty of fair representation to the minority unless it demonstrates "some objective justification for its conduct."[64] The equity of this requirement is applicable to pension increases negotiated for retirees because in a very real way union failure to attempt to adjust pensions for inflation on some equitable basis erodes pension value, denying "accrued" benefits to retirees.

2. *Applying the standard to employers*— Even with a buttressed right to fair representation, retirees would have little real protection if employers were allowed at will to refuse to agree to union proposals complying with the presumptive standard, or were allowed to agree to inadequate union proposals. As discussed in Part II C above, ample precedent exists for holding bargaining employers liable to vindicate employee rights involving important public policy, such as racial equality. The presumptive standard should extend to cover employers bargaining over issues affecting pension stability. In opposition, arguably, the imposition of a presumptive formula for pension increases, which interferes directly with financial management, infringes upon an employer's legitimate business interests in a way that a duty to refrain from racial discrimination does not. However, a presumptive standard dictates only the shape — not the size — of settlements. Furthermore, the standard could allow for deviations, which in the case of employers could include those deviations justified by legitimate business concerns. Holding employers liable for breaching a duty to negotiate adequate pension increases for retirees would allow the courts to spread the risk of damages where inadequate increases were negotiated. Such risk spreading would lessen the possibility that courts would have to choose between awarding adequate compensation to retirees and crippling a union financially, rendering it unable to function effectively in the future as a bargaining agent.

3. *A yardstick for compensation*— A presumptive standard that benefits for retirees should be enough to offset inflation or, in the alternative, equal benefits negotiated for active workers would provide an objective criterion against which to measure damages. This would prevent courts from engaging in the unbri-

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[64] Barton Brands, Ltd. v. NLRB, 529 F.2d 793, 800 (7th Cir. 1976); Deboles v. Trans World Airlines, Inc., 552 F.2d 1005, 1016 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

dled speculation as to what should have been negotiated. Using the presumptive standard as a yardstick does not mean that the courts would award damages equivalent to the presumptive standard in every case. Rather, the presumptive standard would be a starting point for deliberation, and the courts would be free to award lesser damages or no damages, after taking into account mitigating conditions confronting the union and employer at the time of bargaining.

D. Automatic Cost-of-Living Adjustments

Another alternative to relying on the collective bargaining process to yield ad hoc benefit adjustments to protect pension values is to make automatic adjustments in retiree benefits which are indexed either to inflation or wage increases for active workers.

Automatic cost-of-living wage protection (COLA) has long been a goal of unions. Today, while many labor contracts, contain some form of automatic wage adjustment process, COLA protection for retirement benefits has not been as high a priority. Why this is so is open to some speculation. One theory holds that the collective bargaining process itself places a premium on the ad hoc adjustment process. Ad hoc adjustments permit both parties to an agreement to demonstrate that improvements have been granted. Evidence of this is the fact most collectively bargained private sector pension plans are of the flat-benefit type rather than the final-pay type. Final-pay plans provide for automatic increases in the benefit levels in a pension plan as the salaries or wages of the participants increase. Neither type of plan, however, protects against value loss due to inflation after retirement.

In its February 1981 Final Report, the President's Commission on Pension Policy concluded that steps should be taken regarding tax policy to encourage individuals, companies, and unions to make voluntary arrangements for cost-of-living protection. While the Commission did not believe that a recommendation for mandatory cost-of-living protection was appropriate at this time, its tax proposals reflected the awareness on the part of the Commission of the need for cost-of-living protection.[65] Whether these proposals would affect the bargaining process in the future is a matter for future research and public comment.

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[65] *See generally* PRESIDENT'S COMM. ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY (1981).

CONCLUSION

Reliance solely upon the current collective bargaining structure to assure pension increases adequate to offset inflation is probably misplaced for three reasons. First, even where a union vigorously pursues the interests of retirees at the bargaining table, the employer is under no legal obligation to discuss the issue of pension increases for retirees. Second, the dynamics dictated by the internal structures of most unions do not encourage special attention to the needs of retirees. Third, prevailing standards of fair representation, even assuming their eventual applicability to retirees, are inadequate to enforce a level of representation for retirees that would produce consistent protection from inflation.

One suggestion to strengthen the bargaining position of retirees has been to allow retirees to bargain for themselves. While independent bargaining would put retirees in charge of their own fate, it would also put them in overt competition with active workers for benefits. Because in comparison to active workers retirees have little power to enforce their demands, this suggestion is probably self-defeating. Another possibility is to grant retirees the right to participate in official union decision-making processes connected with the formulation of bargaining demands and the approval of collective bargaining agreements. Undoubtedly this would enhance greatly the control that retirees have over collective bargaining deliberations which vitally affect their welfare. Nevertheless, to extend this right to retirees would require Congress to infringe directly upon the hegemony over internal affairs traditionally accorded to unions.

A less drastic alternative, which nevertheless would increase the bargaining strength of retirees, would be to require union officials to consult with retirees before making collective bargaining decisions affecting them. Holding unions to a higher than normal standard of fair representation would reinforce this consultative role for retirees. In addition, under certain circumstances, employers could be made jointly liable with unions for depriving retirees of adequate pension increases. Whether these innovations would be sufficient to maintain pension values is, at this time, purely speculative. Consequently, serious consideration should be given also to additional or alternative reforms outside the collective bargaining process — such as required automatic cost-of-living adjustments for pensions — which directly

support the living standards of retirees without reliance upon intermediaries.