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Stephen F. Befort
University of Minnesota Law School, befor001@umn.edu

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Public Sector Bargaining: Fiscal Crisis and Unilateral Change*

Stephen F. Befort**

INTRODUCTION

The brief history of public sector collective bargaining encompasses two periods of economic extreme. Collective bargaining in the public sector emerged in the 1960's and early 1970's, a period of unprecedented growth in state and local government.[1] With normal economic restraints eased by the growth of state and local budgets,[2] inexperienced public employers frequently offered little resistance to the demands of public sector unions.[3] Beginning in the mid-1970's, however,

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** Associate Professor of Law, University of Minnesota Law School. The author wishes to thank Gail Klearman, Christina Clark, and particularly Timothy Yuen Wong for their invaluable help as research assistants.

1. The public sector labor force almost doubled between 1960 and 1980, increasing from 8,353,000 to 16,241,000 during that period. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 31 EMPLOYMENT AND EARNINGS 45 table B-1 (Feb. 1984). The coincidental growth of government employment and public sector unionism is described in a number of articles. *See, e.g.*, Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1, 5-7 (1973); Horton, *Economics, Politics and Collective Bargaining: The Case of New York City*, in PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 183, 183-84 (A. Chickering ed. 1976); Weber, *Prospects for the Future*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 3, 4-5 (A. Knapp ed. 1977); Weitzman, *The Effect of Economic Restraints on Public-Sector Collective Bargaining: The Lessons of New York City*, 2 EMPLOYEE REL. L.J. 286, 288 (1977).

2. State and local government expenditures increased from 8.4% of gross national product in 1957 to 13.2% in 1977. COMMITTEE ON ECONOMIC DEVELOPMENT, IMPROVING MANAGEMENT OF THE PUBLIC WORK FORCE: THE CHALLENGE TO STATE AND LOCAL GOVERNMENT 28-31, 33 (1978), *reprinted in* H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 6 (2d ed. 1979).

3. *See* Weber, *supra* note 1, at 4-5. Some commentators go so far as to suggest that public employers "gave away the store" during this period. *See, e.g.*, Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C.L. REV. 155, 159 (1977); *see also* Raskin, *Conclusion: The Current Political Contest*, in PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SEC-

the economic fortunes of state and local governments suffered a dramatic reversal.[4] Whether viewed as a cause or an effect of the fiscal crisis, taxpayer hostility to ever-increasing budgets accompanied and exacerbated the problem.[5] These financial and political pressures fostered a new aggressiveness among public

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TOR LABOR RELATIONS 203, 205-10 (A. Chickering ed. 1976) (describing public sentiment against concessions to public sector unions in San Francisco and elsewhere). As an example of the economic gains secured by public sector unions during this period, base pay for police officers rose 174% and health insurance costs for each city employee nearly quadrupled in New York City between 1969 and 1975. Schnadig, *Public Sector Collective Bargaining in Times of Fiscal Crisis,* in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 203, 208-09 (A. Knapp ed. 1977).

4. New York City provides a vivid example, with a 20% reduction in workforce and a 21% reduction in total budgetary expenditures during the second half of the 1970's. Anderson & London, *Collective Bargaining and the Fiscal Crisis in New York City: Cooperation for Survival,* 10 FORDHAM URB. L.J. 373, 392 (1982). The fiscal crisis was a virtually universal phenomenon, with budget deficits plaguing a majority of the nation's largest 275 cities during the 1979-1981 period, *Public Worker Outlook Austere; Fiscal Pressures Are Mounting,* 915 GOV'T EMPL. REL. REP. (BNA) 26-27 (June 1, 1981), and, during fiscal year 1982, governments in 44 states resorting to layoffs, *Layoffs, RIFs, and EEO in the Public Sector: A BNA Special Report,* GOV'T EMPL. REL. REP. (BNA) No. 949, at 13 (Feb. 8, 1982).

The fiscal crisis has been attributed to, inter alia, inflation coupled with a general economic recession; reductions in federal revenue sharing; the spiraling cost of providing income maintenance, social, and health services; shrinking tax bases in the Frost Belt; and declining school enrollments. *See* AFSCME, PASSING THE BUCKS: THE CONTRACTING OUT OF PUBLIC SERVICES 11-12 (1984) [hereinafter cited as PASSING THE BUCKS]; Jascourt, *Collective Bargaining and the Impact of Declining Enrollments and Revenues: An Introduction,* 12 J.L. & EDUC. 247, 247 (1983); Sachs, *Public Sector Unions and Fiscal Crisis,* in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 215, 216-17 (A. Knapp ed. 1977); Weitzman, *supra* note 1, at 286. It also has been suggested that public sector unionism and the resulting high cost of labor were themselves significant causes of the fiscal crisis. *See* Schnadig, *supra* note 3, at 203 ("The fact is that past failures by public employers in bargaining have been a major factor in precipitating the urban fiscal crises we now see."). *But see* Anderson, *Local Government—Bargaining and the Fiscal Crisis: Money, Unions, Politics, and the Public Interest,* 27 LAB. L.J. 512, 517 (1976) (maintaining that the cost of labor was not primarily responsible for the fiscal crisis of New York City).

5. *See* Sackman, *supra* note 3, at 159-60; Vaughn & Dozier, *Public Sector Bargaining Issues in the 1980's: A Neutral View,* in PROCEEDINGS OF NEW YORK UNIVERSITY 33RD ANNUAL NATIONAL CONFERENCE ON LABOR 317, 318-19 (R. Adelman ed. 1980). The adoption of taxpayer-initiated referenda limiting property tax revenues in California (Proposition 13), CAL. CONST. art. XIIIA, and Massachusetts (Proposition 2 1/2), MASS. ANN. LAWS ch. 59, § 21C (Michie/Law. Co-op. Supp. 1985), were the best-publicized examples of a nationwide phenomenon that made it "good politics" to oppose union demands. *See Tax-Trimming Measure Passes in Mass.; 6 Other States Nix Similar Referenda,* 889 GOV'T EMPL. REL. REP. (BNA) 12, 12-13 (Nov. 24, 1980).

sector managers, who sought to reduce personnel costs[6] by opposing union demands and attempting to effect retrenchment measures such as reductions-in-force and wage freezes.[7]

These budgetary pressures also forced public employers to become more attentive to the means by which they could effectuate retrenchment measures. Prior to the fiscal crisis in government, most public employers were not overly concerned with the process of implementing changes in employment terms. They usually tended to react to union demands rather than initiating their own management proposals. The few courts in this period that considered the procedural context for implementing management proposals generally adopted private sector rules without revision.[8] These rules prohibit the employer from altering the terms and conditions of employment without first bargaining to impasse or, if the term in question is contained in a collective bargaining agreement, from obtaining the other party's consent to the proposed change.[9] To the newly aggressive public employer, this process frequently was an obstacle to the implementation of measures considered necessary to contend with the fiscal crisis. Although some public sector employers and unions successfully used the collective bargaining process to fashion a mutual response to budgetary problems,[10] many public sector employers sought instead to expand management's prerogative to act unilaterally.

The attempt by public employers to expand their unilateral authority presents issues that go to the very core of collective bargaining in the public sector. Public employers believe that government in a democratic society must have the ability to respond to a genuine fiscal emergency by taking prompt action in the public interest. Public sector unions, however, view unilat-

6. The focus on personnel costs is not surprising since employee wages and benefits constitute more than 60% of most public sector budgets. *See* D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE 120 (1972) (payroll costs constitute 60-70% of municipal budgets); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409, 413 (1973) (employee compensation makes up approximately 65% of public school budgets).

7. *See* Sackman, *supra* note 3, at 159-62; Weitzman, *supra* note 1, at 302-03; *see also* Anderson & London, *supra* note 4, at 381-84, 409-10 (discussing use of productivity bargaining, in which wage increases are tied to productivity).

8. *See, e.g.*, West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 589-601, 295 A.2d 526, 538-43 (1972); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 52-57, 214 N.W.2d 803, 807-10 (1974).

9. *See infra* notes 11-47 and accompanying text.

10. *See, e.g.*, PASSING THE BUCKS, *supra* note 4, at 95-101; Anderson & London, *supra* note 4, at 409-10.

eral employer action, no matter how appropriate in economic terms, as incompatible with the therapeutic process of good faith negotiation that serves as a cornerstone of modern labor relations.

This Article explores the development of unilateral change rules in public sector collective bargaining. It compares the public sector rules with the long-standing unilateral change principles established in the private sector and concludes that the ability of public employers to effectuate unilateral change is, in many jurisdictions, much broader than that of their private sector counterparts. The Article then examines whether this differential treatment is required by the structural and political process considerations inherent in the public sector or is merely indicative of lingering notions of sovereignty and "extra loyalty."

I. UNILATERAL CHANGE IN THE PRIVATE AND PUBLIC SECTORS

An essential prerequisite to understanding unilateral change rules in the public sector is a review of the corresponding private sector rules, which generally place a heavy premium on bargaining over proposed changes in the employment relationship. Although these private sector rules serve as a starting point for determining public sector rules, courts and state labor boards have seized upon real and perceived differences between the two sectors to permit a greater degree of unilateral change in the public sector. The justification for this differential treatment, however, has become increasingly suspect as public sector employment has become more like that in the private sector.

A. THE PRIVATE SECTOR

The statutes and decisions concerning unilateral change in the private sector underscore the role of bilateral negotiation as a condition precedent to the adjustment of terms and conditions of employment.[11] The National Labor Relations Act

11. The rules governing unilateral change in the private sector are relatively well-established. For articles discussing these rules, see Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956); Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1 (1977); Nelson & Howard, *The Duty to Bargain During the Term of an Existing Agreement*, 27 LAB. L.J. 573 (1976); Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133 (1974); Schatzki, *The Em-*

(NLRA) requires employers and labor organizations to bargain in good faith over "wages, hours, and other terms and conditions of employment."[12] As the Supreme Court acknowledged in *NLRB v. Borg-Warner Corp.*,[13] the duty to bargain extends only to those mandatory subjects.[14] Although neither party is forced to make concessions on mandatory subjects,[15] the parties are required to bargain in good faith with a present intention to find a basis for agreement,[16] and it is an unfair labor practice to implement a proposal concerning these subjects without first bargaining to the point of impasse.[17] Conversely, the parties have no obligation to bargain over nonmandatory, or permissive, subjects,[18] and unilateral action generally is lawful absent an agreement to the contrary.[19] Finally, the NLRA[20] and other legislation[21] prohibit the inclusion in a labor agreement of a third class of "illegal" subjects; parties may not condition an agreement on inclusion of such terms even if they relate to wages, hours, or working conditions.[22]

Courts tend to construe the scope of mandatory bargaining broadly and to limit permissive bargaining subjects to topics that do not significantly relate to terms and conditions of em-

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ployer's Unilateral Act—A Per Se Violation—Sometimes, 44 TEX. L. REV. 470 (1966); Stewart & Engeman, *Impasse, Collective Bargaining and Action*, 39 U. CIN. L. REV. 233 (1970).

12. National Labor Relations Act (NLRA) § 8(d), 29 U.S.C. § 158(d) (1982); *see id.* §§ 8(a)(5), 8(b)(3), 29 U.S.C. §§ 158(a)(5), 158(b)(3).

13. 356 U.S. 342 (1958).

14. *See id.* at 349.

15. *See* NLRA § 8(d), 29 U.S.C. § 158(d).

16. *See* NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960); NLRB v. Montgomery Ward & Co., 133 F.2d 676, 683-84 (9th Cir. 1943).

17. *See* NLRB v. Katz, 369 U.S. 736, 741-43 (1962).

18. *See Borg-Warner*, 356 U.S. at 349 (stating that with respect to nonmandatory matters "each party is free to bargain or not to bargain, and to agree or not to agree").

19. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 680-86 (1981); Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187-88 (1971).

20. *See, e.g.*, NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (limiting the extent to which parties may agree to make union membership a condition of employment).

21. *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657, 664-66 (1965) (union's agreement with employer to impose a certain wage scale on other bargaining units not immune from Sherman Act).

22. *See* National Maritime Union (Texas Co.), 78 N.L.R.B. 971, 981-82 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950), *circuit court opinion cited in Borg-Warner*, 356 U.S. 342, 360 (1957) (Harlan, J., concurring in part, dissenting in part).

ployment[23] or that involve managerial concerns going to the "core of entrepreneurial control."[24] In *First National Maintenance Corp. v. NLRB*,[25] the Supreme Court adopted a somewhat more restrictive balancing test designed to determine whether decisions that fall within management's control but that also have an impact on terms and conditions of employment are mandatory bargaining subjects. Specifically, the Court held that bargaining must occur if the benefit of negotiations to labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of the business by limiting the employer's freedom to act unilaterally.[26]

Although the prevailing unilateral change rules for private sector bargaining vary depending on the presence or absence of a collective bargaining agreement, the bargaining obligation predominates in both contexts. In *NLRB v. Katz*,[27] a case that arose in the absence of a collective bargaining agreement, the Supreme Court held that an employer's unilateral implementation of changes in existing wage, sick leave, and merit pay plans without bargaining with the exclusive representative constituted a per se violation of § 8(a)(5) of the NLRA, even in the absence of bad faith.[28] *Katz* does not completely eliminate the possibility of unilateral action, however, since either party[29]

23. *See, e.g.*, Westinghouse Elec. Corp. v. NLRB, 387 F.2d 542, 547-48 (4th Cir. 1967).

24. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

25. 452 U.S. 666 (1981).

26. *See id.* at 679. In applying this test to the facts of *First Nat'l Maintenance*, the Supreme Court concluded that an employer need not negotiate with a certified representative of its employees concerning a decision to close a portion of its business for economic reasons. *See id.* at 686.

The NLRB, in Otis Elevator Co., 269 N.L.R.B. No. 162, 115 L.R.R.M. (BNA) 1281 (1984), recently applied a standard providing for a markedly more restrictive scope of mandatory bargaining. The plurality in *Otis Elevator* apparently dispensed with the balancing approach of *First Nat'l Maintenance*, indicating instead that a relocation decision does not require bargaining unless it is motivated solely by labor costs. *See Otis Elevator*, 115 L.R.R.M. at 1282 n.3; George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 689-91 (1985).

27. 369 U.S. 736 (1962).

28. *See id.* at 743.

29. Unilateral change rules technically apply to the conduct of *both* employers and labor organizations. Of course, employers are more often in a position to effectuate unilateral action, and this Article focuses on their conduct. A few cases, however, have found that unions that force a change in working conditions without bargaining violate NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1982). *See, e.g.*, New York Dist. Council No. 9, Int'l Bhd. of Painters v. NLRB,

may still take unilateral action with respect to nonmandatory bargaining subjects.[30] Moreover, even with respect to mandatory issues, a party, after bargaining to impasse,[31] may implement "unilateral changes that are reasonably comprehended within [its] pre-impasse proposals."[32]

Rules governing unilateral change during the term of a collective bargaining agreement are more complex. In this setting, the NLRA's preference for the bargaining process must be balanced against the stability afforded by adherence to the bargain already struck. Section 8(d) states that the duty to bargain described in that section "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period."[33] The determinative factor is whether a topic is "contained in" the contract. If a bargaining proposal seeks to modify a term contained in the contract, neither party lawfully may insist on bargaining, and the term can be changed only with the mutual consent of the parties.[34] Even if the topic is not already addressed in the contract, neither party may implement a mandatory bargaining proposal without first bargaining to impasse.[35] Again, this preference for resolution through bilateral negotiations is not absolute. Either party may take unilateral

453 F.2d 783, 787 (2d Cir. 1971) (condemning union's unilateral imposition of work quota), *cert. denied*, 408 U.S. 930 (1972).

30. *See First Nat'l Maintenance*, 452 U.S. at 674-75.

31. The Fifth Circuit Court of Appeals has defined an "impasse" as a "state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963).

32. Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *rev. denied*, 395 F.2d 622 (D.C. Cir. 1968), *quoted in* Newspaper Printing Corp., 232 N.L.R.B. 291, 308-09 (1977), *enforced*, 625 F.2d 956 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *see* Bi-Rite Foods, Inc., 147 N.L.R.B. 59, 64-65 (1964).

33. NLRA § 8(d), 29 U.S.C. § 158(d).

34. *See, e.g.*, NLRB v. Lion Oil Co., 352 U.S. 282, 285 (1957); C & S Indus., Inc., 158 N.L.R.B. 454, 460 (1966).

35. *See, e.g.*, Int'l Woodworkers Local 3-10 v. NLRB, 380 F.2d 628, 629-30 (D.C. Cir. 1967). In Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952), a divided NLRB rejected a construction of § 8(d) that would have eliminated the mandatory bargaining obligation during the contract term. Although one Board member expressed the view that the need for stability during the contract term warranted only a voluntary duty to bargain, 94 N.L.R.B. at 1231 (Reynolds, M., concurring and dissenting), the plurality opinion maintained that a mandatory obligation furthered the NLRA's purpose of "encouraging the practice and procedures of collective bargaining." 94 N.L.R.B. at 1217-18. A contrary result, the plurality explained, would "dissipate" goodwill and remove the escape valve for pressures that otherwise would result in industrial strife. *See id.*

action concerning nonmandatory topics[36] and may waive the right to object to unilateral action concerning mandatory topics by "clear and unmistakable" language in the bargaining agreement.[37]

The unilateral change proscription also applies to the period following the expiration of a bargaining agreement, during which time the parties may not alter the status quo concerning mandatory terms governing the employer-employee relationship without first bargaining to impasse.[38] The status quo that the parties must maintain is a dynamic one that encompasses a past pattern of periodic adjustments. Thus, an employer commits an unfair labor practice by refusing to provide regularly scheduled wage or merit increases provided in an expired contract unless bargaining results in either a different agreement or an impasse.[39] This rule is not premised on some notion of contract extension but rather on the affirmative bargaining obligation of the NLRA.[40]

The private sector unilateral change rules therefore emphasize collective negotiation as the preferred process for establishing employment terms.[41] Consistent with this overriding

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36. *See, e.g.*, Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187-88 (1971); Otis Elevator Co., 269 N.L.R.B. No. 162, 115 L.R.R.M. (BNA) 1281, 1283-84 (1984). In *Allied Chemical*, the Court added that unilateral action that modifies a permissive topic contained in the contract does not violate the NLRA's bargaining obligation but that the permissive term nonetheless could be enforced in an action for breach of contract under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). *See* 404 U.S. at 181 n.20.

37. Pepsi-Cola Distrib. Co., 241 N.L.R.B. 869, 869-70 (1979), *enforced*, 646 F.2d 1173 (6th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982); *see* Bancroft-Whitney Co., 214 N.L.R.B. 57, 57-58 (1974).

38. *See, e.g.*, NLRB v. Haberman Constr. Co., 618 F.2d 288, 302 (5th Cir. 1980), *enforced in part*, 641 F.2d 351 (1981); Gordon L. Rayner, 251 N.L.R.B. 89, 90 (1980), *enforced as modified*, 665 F.2d 970 (9th Cir. 1982). Contract terms that govern the employer-union relationship, however, generally do not survive contract expiration. *See* Ogden, Arthur & Smith, *The Survival of Contract Terms Beyond the Expiration of a Collective Bargaining Agreement*, 32 LAB. L.J. 119, 121 (1981).

39. *See* Reed Seismic Co. v. NLRB, 440 F.2d 598, 601 (5th Cir. 1971).

40. *See* Hinson v. NLRB, 428 F.2d 133, 138 (8th Cir. 1970).

41. Although unilateral change rules also promote contract stability and preserve management's right to direct the enterprise, their main objective is the establishment of employment terms through collective negotiation. Except for the management's authority with respect to permissive topics, the parties may not effect unilateral change without first resorting to the bargaining process unless otherwise provided in a collective bargaining agreement, which itself is a product of the bargaining process.

The primacy of the bargaining obligation in this context is not surprising

preference for the bargaining process, the NLRB[42] and courts[43] refuse to recognize economic factors as a justification for unilateral change. In *Oak Cliff-Golman Baking Co.*,[44] for example, the employer unilaterally reduced the wage rates specified in the current collective bargaining agreement in response to a severe economic crisis.[45] In rejecting the employer's economic necessity defense, the NLRB stated that "[n]owhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective."[46] Thus, although economic necessity may justify a particular bargaining posture, it cannot, short of bankruptcy,[47] warrant a repudiation of the bargaining process itself or of the resulting contractual commitments.

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because the "practice and procedure of collective bargaining" is the cornerstone of the NLRA. *See* NLRA § 1, 29 U.S.C. § 151 (1982); *see also* Findling & Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, 51 COLUM. L. REV. 170, 170 (1951) (stating that collective bargaining forms the foundation for the national labor policy). This emphasis on collective bargaining is grounded in the belief that collective bargaining both provides a mechanism for the bilateral resolution of employment disputes and serves a therapeutic function in avoiding labor strife. *See* Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Co., 404 U.S. 157, 187 (1971); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1960); Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1217-18 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952). Unilateral change undermines the collective bargaining process by altering the negotiating balance established by the NLRA and, in the eyes of unit employees, denigrating the ability of the union to serve as an effective representative. *See* NLRB v. Katz, 369 U.S. 736, 744-45 (1962); NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 224-25 (1949).

42. *See, e.g.*, Willis Elec., Inc., 269 NLRB No. 192, 116 L.R.R.M. (BNA) 1045, 1046 (1984); FWD Corp., 257 N.L.R.B. 1300, 1301 (1981); Morelli Constr. Co., 240 N.L.R.B. 1190, 1190 (1979); Airport Limousine Serv., Inc., 231 N.L.R.B. 932, 934 (1977).

43. *See, e.g.*, Arco Elec. Co. v. NLRB, 618 F.2d 698, 700 (10th Cir. 1980).

44. 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975).

45. 207 N.L.R.B. at 1063.

46. *Id.* at 1064.

47. As a result of recent Supreme Court and congressional actions, a limited exception to the *Oak Cliff-Golman* rule has developed in the context of reorganization proceedings under Chapter 11 of the Federal Bankruptcy Code. This bankruptcy exception grew out of the pressures of economic recession experienced by private sector employers and was the subject of considerable debate among the courts and legal commentators. *See, e.g.*, Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983); Levy & Blum, *Limitations on Rejection of Union Contracts Under the Bankruptcy Act*, 83 COM. L.J. 259 (1978);

B. THE PUBLIC SECTOR

Most public sector decisions espouse unilateral change rules similar to those in the private sector.[48] Many decisions

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Comment, *The Collective Bargaining Agreement: Rejection and Its Consequences*, 36 ARK. L. REV. 469 (1983).

In *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984), the Supreme Court held that a bankruptcy court may authorize the rejection of a collective bargaining agreement in a bankruptcy reorganization proceeding if the agreement burdens the employer's estate and the equities balance in favor of rejection. *See id.* at 1196. The Court in *Bildisco* noted that this balancing test, although less stringent than that sought by the union, was more restrictive than the normal "business judgment" standard applied to other executory contracts because of the special nature of collective bargaining agreements. *See id.* at 1195. The Court also rejected the applicability of NLRA § 8(d) in the reorganization context and held that an employer, as a debtor-in-possession following the filing of a bankruptcy petition, does not commit an unfair labor practice by unilaterally altering contract terms prior to the bankruptcy court's formal rejection of the contract. *See id.* at 1199-1200. The Court thus accommodated the conflicting policies of the NLRA and the Bankruptcy Code with respect to unilateral contract modification by giving deference to the heightened employer latitude envisioned by the Bankruptcy Code.

Congress moved quickly to modify the *Bildisco* decision by striking an accommodation that is more consistent with the policies of the NLRA. The 1984 amendments to the Bankruptcy Code retain a modified balancing test for contract rejection but elevate the role of the bargaining process and prohibit unilateral modification without court approval. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 390-91 (to be codified at 11 U.S.C. § 1113). The amendments provide that prior to rejection of a collective bargaining agreement, a debtor-in-possession must make a proposal to the authorized employee representative that outlines those contract modifications necessary to permit reorganization and must confer in good faith in an attempt to reach agreement. *See id.* at 390 (to be codified at 11 U.S.C. § 1113(b)(1)(A)). The bankruptcy court then can reject the labor contract only if the union representative refuses to accept the proposal "without good cause" and the "balance of equities clearly favors rejection." *Id.* at 390 (to be codified at 11 U.S.C. § 1113(c)). Moreover, the amendments prohibit unilateral modification by the debtor-in-possession in the absence of a bankruptcy court determination that the interim changes are "essential to the continuation of the debtor's business or [needed] in order to avoid irreparable damage to the estate." *Id.* at 391 (to be codified at 11 U.S.C. § 1113(e)).

Although Chapter 11 proceedings do provide an exception to the rule of *Oak Cliff-Golman* for certain financially strapped employers, the exception clearly is a limited one. The new legislation accommodates the bargaining and stability concerns that underlie private sector unilateral change rules by making collective bargaining a key element of the reorganization process and prohibiting unilateral change in the absence of court approval. Moreover, the balancing test for contract rejection reflects the special status of collective bargaining agreements and provides a greater scope of protection than that given other types of executory contracts.

48. *See, e.g.*, West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 596-601, 295 A.2d 526, 541-43 (1972); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 53, 214 N.W.2d 803, 808 (1974); General Drivers Union Local 346

also follow *Oak Cliff-Golman* in holding that economic hardship does not justify the unilateral modification of employment terms.[49] Unilateral change is nonetheless far more prevalent in the public sector,[50] with the bases for such expanded unilateral change opportunities corresponding to the perceived differences between collective bargaining in the public and private sectors. Indeed, it has become almost obligatory in contemporary scholarly literature to argue that the theoretical distinctions between the two sectors preclude the possibility of transplanting private sector policies and procedures to the public sector.[51] Nevertheless, the brief history of public sector labor relations is largely a story of how these theoretical distinctions have be-

v. Independent School Dist. No. 704, 283 N.W.2d 524, 527 (Minn. 1979); Lincoln Fire Fighters Ass'n v. City of Lincoln, 198 Neb. 174, 176, 252 N.W.2d 607, 610 (1977); *In re* Cumberland Valley School Dist., 483 Pa. 134, 141, 394 A.2d 946, 950 (1978).

49. *See, e.g.*, Pasco County School Bd. v. Florida Pub. Employees Relations Comm'n, 353 So. 2d 108, 126 (Fla. Dist. Ct. App. 1977); Professional Staff Congress/CUNY v. Board of Higher Educ., 83 Misc. 2d 900, 902, 373 N.Y.S.2d 453, 455 (N.Y. Sup. Ct. 1975); San Francisco Community College Dist. Fed'n of Teachers Local 2121 v. San Francisco Community College Dist., No. SF-CE-201 (Cal. PERB Oct. 12, 1979), *noted in* 839 GOV'T EMPL. REL. REP. (BNA) 11 (Dec. 3, 1979); City of Detroit & Amalgamated Transit Union, 1984 M.E.R.C. Lab. Op. 937, 939, 944 (Mich. ERC Sept. 27, 1984), *noted in* 22 GOV'T EMPL. REL. REP. (BNA) 2227 (Dec. 3, 1984); Oregon Nurses Ass'n v. Polk County, 6 P.E.C.B.R. 5426, 5431-32 (Or. ERB Oct. 27, 1982), *noted in* 21 GOV'T EMPL. REL. REP. (BNA) 176 (Jan. 24, 1983).

50. Although this Article deals primarily with public sector unilateral change in states with comprehensive, NLRA-type bargaining laws, it should be noted that the public employer's authority to take unilateral action is substantially broader in the minority of jurisdictions not having comprehensive bargaining legislation. For example, in Virginia, which has no bargaining law, the Virginia Supreme Court has held that a public employer lacks the authority to enter into binding collective bargaining agreements, even on a voluntary basis. *See* Commonwealth v. County Bd. of Arlington, 217 Va. 558, 581, 232 S.E.2d 30, 44-45 (1977). Similarly, the Missouri Supreme Court interpreted that state's bargaining law, which obligates public employers only to "confer" with an exclusive representative, as reserving authority in public employers to modify any resulting collective agreements on a unilateral basis. *See* Sumpter v. City of Moberly, 645 S.W.2d 359, 363-64 (Mo. 1982).

51. *See, e.g.*, H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 7-32 (1971); Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look Via a Balancing Formula*, 40 MONT. L. REV. 231, 253-57 (1979); Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations*, 30 MD. L. REV. 179, 184-91 (1970); Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25, 165 (1974). *But see* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1156-57 (1974) (noting that "it does not follow from the proposition that collective bargaining in the public and private sectors is different . . . that practices in the private sector cannot be transplanted to the public sector").

come obsolete as labor relations in the public sector increasingly has taken on the attributes of private sector labor relations.[52]

The sovereignty doctrine provided the traditional theoretical constraint on public sector collective bargaining. Emanating from the old English common law notion that the "king can do no wrong," the sovereignty doctrine taught that the state, as the supreme repository of all legal and political authority, could not be compelled to accept an obligation against its will.[53] The doctrine also implied that public employees, as servants of the sovereign, owed a duty of "extra loyalty" to the state.[54] A related barrier to the development of public sector collective bargaining was the delegation doctrine, which prohibited government from delegating to private parties authority concerning matters properly within its legislative discretion.[55] Because collective negotiation was viewed as a threat to the absolute prerogative of the sovereign and the undivided loyalty

52. For an excellent discussion of this trend, see Schneider, *Public-Sector Labor Legislation—An Evolutionary Analysis*, in PUBLIC-SECTOR BARGAINING 191-223 (1979). This evolution toward the private sector model is most vividly illustrated by the fact that the private sector attribute thought to be most incompatible with the public sector, the right to strike, is now legally protected in limited form by legislation in ten states. *See* ALASKA STAT. § 23.40.200 (1984); HAWAII REV. STAT. § 89-12 (1976 & Supp. 1984); ILL. ANN. STAT. ch. 48, § 1617 (Smith-Hurd 1984); MINN. STAT. § 179A.18 (1984); MONT. CODE ANN. § 39-31-201 (1983), *as construed in* State *ex rel.* Dep't of Highways v. Public Employees Craft Council, 165 Mont. 349, 352, 529 P.2d 785, 788 (1974); OHIO REV. CODE ANN. § 4117.03 (Page Supp. 1984); OR. REV. STAT. § 243.726 (1983); 43 PA. CONS. STAT. ANN. §§ 1101.1001-.1003 (Purdon Supp. 1984-1985); VT. STAT. ANN. tit. 21, § 1730 (1978); WIS. STAT. ANN. § 111.70(4)(cm)(6)(c) (West Supp. 1984-1985). In addition, in a recent decision the California Supreme Court, after noting the legislative silence on the issue, held that "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health and safety of the public." County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660, 38 Cal. 3d 564, __, 699 P.2d 835, 850, 214 Cal. Rptr. 424, 439 (1985).

53. For a more detailed description of the sovereignty doctrine and its implications for public sector bargaining, see K. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 14-20 (N.Y. State School of Indus. and Labor Relations, Cornell Univ. 1967), *reprinted in part in* H. EDWARDS, R. CLARK & C. CRAVER, *supra* note 2, at 23, 25-28; J. WEITZMAN, THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT 7-12 (1975); H. WELLINGTON & R. WINTER, *supra* note 51, at 35-41; Kilberg, *supra* note 51, at 181-83.

54. *See* Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 360-61 (1972); Weisenfeld, *Public Employees—First or Second Class Citizen*, 16 LAB. L.J. 685, 686-87 (1965).

55. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.12, at 193-98 (1978); J. WEITZMAN, *supra* note 53, at 10-12.

of public employees, as well as an improper delegation, or abdication, of governmental authority to labor unions,[56] a number of courts during the 1940's held public sector bargaining to be unlawful.[57]

As government's role in society expanded, the overarching concept of absolute governmental supremacy became archaic and unworkable.[58] Government began to assume more ordinary legal responsibilities in its relationship with the public,[59] and the paternalistic "extra loyalty" doctrine declined as its patent unfairness became increasingly apparent.[60] The dra-

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56. In 1937, President Franklin D. Roosevelt expressed the prevailing sentiment of the period in a letter to the President of the National Federation of Federal Employes:

> All government employes should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employe organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employes alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

Letter from Franklin D. Roosevelt to Luther C. Steward (Aug. 16, 1937), *reprinted in* C. RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW 436-37 (1946).

57. *See, e.g.*, Perez v. Board of Police Comm'rs, 78 Cal. App. 2d 638, 650-51, 178 P.2d 537, 545 (1947); Mugford v. Mayor of Baltimore, 185 Md. 261, 270, 44 A.2d 745, 747 (1945); City of Springfield v. Clouse, 356 Mo. 1239, 1251, 206 S.W.2d 539, 545 (1947); Railway Mail Ass'n v. Murphy, 180 Misc. 868, 876, 44 N.Y.S.2d 601, 608 (N.Y. Sup. Ct. 1943), *rev'd on other grounds sub nom.* Railway Mail Ass'n v. Corsi, 267 A.D. 470, 47 N.Y.S.2d 404, *aff'd*, 293 N.Y. 315, 56 N.E.2d 721 (1944), *aff'd*, 326 U.S. 88 (1945); Hagerman v. Dayton, 147 Ohio St. 313, 329, 71 N.E.2d 246, 254 (1947).

58. *See* J. WEITZMAN, *supra* note 53, at 8-12; H. WELLINGTON & R. WINTER, *supra* note 51, at 36-41; Edwards, *supra* note 54, at 359-61.

59. This trend is best illustrated by the abrogation of absolute sovereign immunity. *See* Edwards, *supra* note 54, at 360.

60. The reasons for the collapse of this concept and that of sovereignty in general were summarized by then-Professor, now-Judge, Harry T. Edwards:

> It would seem the extra-loyalty theory is open to the same criticism as the sovereignty theory: it too is vague, conclusory, and not adequately founded in the realities of the modern situation. Based upon an assumed consensus as to the proper role of government in society, it offers no guidance as to what the employee must give up. Further, it puts forth no reason for this sacrifice, save the equation government equals sovereign equals absolute fealty. Such an equation is hardly a viable alternative in our modern society. Indeed, with so many "urgent" demands on the government's admittedly inadequate resources . . . it outrages modern notions of industrial democracy to relegate a large segment of the work force to dependence upon the conscience of

matic growth in public sector unionism that followed[61] made comprehensive bargaining legislation a practical necessity rather than a startling innovation.[62] Early attempts in the legislative formulations to limit public sector unions to only a conferring role gave way to a bargaining duty similar to that required by the NLRA.[63]

This decline of the sovereignty doctrine and the enactment of comprehensive bargaining laws did not, however, result in the wholesale adoption of the private sector model. Instead, courts and commentators formulated a new set of theoretical constraints that, although no longer foreclosing public sector bargaining in its entirety, purportedly required a more limited scope of bargaining and a ban on the right to strike.

These modern constraints on the bargaining obligation are a result of both the structural complexity of government and the demands of the democratic political process.[64] The structural obstacles in the public sector stem from the coexistence of public employee bargaining legislation with a large body of constitutional and statutory provisions that also bear on the employment relationship and that, for the most part, predate the advent of public sector bargaining.[65] The political limitations

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> the government. A degree of self-determinism has become a way of life for the American worker, and nowhere is it more necessary than in the public sector.

Edwards, *supra* note 54, at 361.

61. In 1956, only 915,000 federal, state, and local employees were union members. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 1865, HANDBOOK OF LABOR STATISTICS 1975, 382 table 155 (1975). By 1980, the number of state and local employees that belonged to employee organizations had risen to 5,030,564, or 48.8% of all state and local workers. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR-MANAGEMENT SERVS. ADMIN., NO. 102, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1980, 1 table B (1981).

62. *See* Blair, *supra* note 1, at 5; Schneider, *supra* note 52, at 197. By 1977, 33 states had enacted collective bargaining legislation that covered some or all occupational groups. *See id.* at 192.

63. *See* Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 895-99 (1973).

64. *See* Edwards, *supra* note 54, at 361-64; Kay, *The Need for Limitation Upon the Scope of Negotiations in Public Education II*, 2 J.L. & EDUC. 155, 155 (1973).

Another purported obstacle to the adoption of the private sector model is the concept that government services are "essential" to the public safety, health, and welfare. *See* H. WELLINGTON & R. WINTER, *supra* note 51, at 21-24. Since this notion is primarily of importance to the issue of whether public employees should possess the right to strike, it is not discussed extensively in this Article.

65. *See* Weber, *supra* note 1, at 5 (noting that "public sector unionism and

result from the fear that adopting private sector notions regarding the scope of bargaining and contract enforcement might skew the democratic process by giving public sector unions an inordinate degree of power in comparison with other interest groups.[66] Although these two sets of theoretical constraints are more refined than the sovereignty and "extra loyalty" doctrines they replaced, the history of public sector bargaining during the fiscal crisis indicates that even these newer limitations are frequently overstated and in need of careful reevalution.

II. STRUCTURAL GROUNDS FOR PUBLIC SECTOR UNILATERAL CHANGE

To a far greater extent than in the private sector, collective bargaining in the public sector requires an accommodation between bargaining legislation and a host of other statutes that frequently are not compatible with private sector notions of bargaining. Examples of such conflicting rules include constitutional and statutory provisions that provide for a diffused management structure in which multiple officers or agencies share decision-making authority concerning public employee terms and conditions of employment, causing confusion over which entity is the "public employer."[67] Another difficulty is presented by statutory or regulatory provisions that, instead of delegating to various officials authority to make personnel-related decisions, directly set specific terms and conditions of employment or establish personnel procedures. The problem when confronted with such provisions lies in determining whether they preempt the bargaining obligation.[68] Because the structural problems in both instances are largely statutory in form, however, state legislatures have the authority to structure the personnel function in a manner that does not unduly restrict collective bargaining.

A. DIFFUSED MANAGEMENT AUTHORITY

Although private sector employers tend to be readily iden-

bargaining were superimposed on a well developed, explicit and, indeed, almost ossified alternate personnel system which went under the folkloric term, civil service").

66. *See infra* notes 188-94 and accompanying text.

67. *See infra* notes 72-168 and accompanying text.

68. *See infra* notes 169-87 and accompanying text.

tifiable and possess a clearly delineated managerial structure,[69] statutes in the public sector frequently vest multiple agencies or officials with shared responsibility over employment matters. Identifying the appropriate "public employer" in this context is no easy task.[70] Although diffused management authority occurs in many public sector contexts,[71] perhaps the most troublesome situation is that of a school board or an executive branch agency that has broad statutory authority over terms and conditions of employment but is dependent on another body for funding. Unilateral change possibilities abound when the funding authority either fails to fund a contract negotiated by the first-line "employer" or subsequently reduces an anticipated appropriation.

1. Local Government Level

The Pennsylvania case of *Philadelphia Federation of Teachers, Local No. 3 v. Thomas*[72] illustrates the problem of unilateral change resulting from diffused management authority at the local government level. In *Thomas*, the Philadelphia Board of Education and the teachers' union had negotiated a two-year collective bargaining agreement that provided for wage increases in the second year of the contract.[73] Under the governing constitutional and statutory scheme, the board of education possessed no independent taxing authority and was dependent on the Philadelphia City Council for funding.[74] Due to fiscal difficulties, the city council reduced its appropriation to the board for the second year of the contract. The board thus was unable to finance the wage increases and unilaterally re-

69. *See* Derber, *Management Organization for Collective Bargaining in the Public-Sector*, in PUBLIC-SECTOR BARGAINING 80, 81 (1979).

70. Judge Harry Edwards has observed that other public sector questions "pale by comparison to the problem of attempting to identify the real public 'employer' in any given public sector negotiations." Edwards, *supra* note 63, at 903. For other discussions of the problem of diffused management authority, see Blair, *supra* note 1, at 8-10; Miscimarra, *Inability to Pay: The Problem of Contract Enforcement in Public Sector Collective Bargaining*, 43 U. PITT. L. REV. 703, 705-08, 725-29 (1982).

71. For example, a county sheriff or juvenile court judge may possess hiring and firing responsibilities while the county board of commissioners has authority over financial terms of employment. *See, e.g.*, General Drivers, Local 346 v. Aitkin County Bd., 320 N.W.2d 695, 699 (Minn. 1982) (county sheriff); Circuit Court v. AFSCME Local 502-A, 295 Or. 542, __, 669 P.2d 314, 316 (1983) (juvenile court judge).

72. 62 Pa. Commw. 286, 436 A.2d 1228 (1981).

73. *See id.* at 288-89, 436 A.2d at 1229-30.

74. *Id.* at 290, 436 A.2d at 1230.

scinded that portion of the agreement.[75] The Pennsylvania Commonwealth Court sustained the board's action, holding that no binding contract existed for the second year of the contract term.[76] The court explained that the dependent funding scheme made the contract severable in nature, with each year of the contract subject to an implied condition precedent that adequate funding be forthcoming.[77] Since this condition was not fulfilled, the second year of the contract never came into existence, and the board was not obligated to abide by the agreement.[78]

The approach of the court in *Thomas*, although not unique,[79] is subject to criticism on both legal and policy grounds. A multiple-year collective bargaining agreement, such as the one between the board of education and teachers' union in *Thomas*, is not merely a series of separate contracts but instead an integrated document in which reduced benefits for one period typically are traded for increased benefits in another.[80] The condition precedent approach of *Thomas*, however, permits the unilateral modification of this integrated document without any showing of fiscal necessity and leaves open the possibility of collusion between the two management entities.[81] The judi-

75. *Id.* at 289, 436 A.2d at 1230.

76. *See id.* at 296, 436 A.2d at 1233.

77. *See id.*

78. *Id.* at 296-97, 436 A.2d at 1233.

79. The Maryland Court of Appeals also upheld a school board's unilateral elimination of a midterm wage adjustment under circumstances nearly identical to those in *Thomas*. *See* Montgomery County Council of Supporting Servs. Employees, Inc. v. Board of Educ., 354 A.2d 781, 788 (Md. 1976). The Florida Public Employees Relations Commission, although rejecting the conditional term theory, recently held that a school board did not commit an unfair labor practice when, acting as a legislative body, it refused to appropriate funds for a pay raise that the same board previously had agreed to while acting in its alter ego as an employing entity. *See* Holmes County Teacher's Ass'n v. School Bd., 9 F.P.E.R. ¶ 14,207, at 400-01 (Fla. PERC May 24, 1983), *noted in* 3 PUB. EMPL. BARGAINING REP. (CCH) ¶ 43,797. For other decisions that have discussed the *Thomas* line of reasoning favorably, see South Bend Community School Corp. v. Nat'l Educ. Ass'n—South Bend, 444 N.E.2d 348, 351-52 (Ind. Ct. App. 1983); Boston Teachers Union, Local 66 v. School Comm. of Boston, 370 Mass. 455, 470, 350 N.E.2d 707, 718 (1976). The Maryland and Washington teacher bargaining laws also appear to permit such midterm modifications. *See* MD. EDUC. CODE ANN. § 6-511 (1978) (expressly sanctioning midterm modifications); Wash. Rev. Code Ann. §§ 41.59.935, 28A.58.095 (Supp. 1985) (voiding all school employee pay increases to the extent they exceed annual appropriations).

80. *See* Sonoma County Org. of Public Employees v. County of Sonoma, 23 Cal. 3d 296, 312-13, 152 Cal. Rptr. 903, 912, 591 P.2d 1, 10 (1979).

81. *See* Miscimarra, *supra* note 70, at 705-08, 725-29.

cial interjection of an implied condition precedent also ignores the fact that the parties themselves failed to provide for an express condition precedent even though a reduced appropriation should have been a foreseeable event.[82]

More important than the reasoning in *Thomas*, which subsequently has been questioned by the Pennsylvania Supreme Court,[83] is the evident lack of legislative guidance in resolving issues of diffused management. In the absence of clearly defined roles and procedures, the complexities of diffused management authority are left to ad hoc judicial resolution.[84] This approach necessarily results in unpredictability and the very real possibility of unmet employee expectations, which, as the teachers' strike in *Thomas* illustrates,[85] provide a natural catalyst for labor unrest. Although public policy and management efficiency justify the centralization of fiscal control in elective legislative bodies,[86] these considerations do not justify the absence of an articulated process that could promote predictability and binding agreements while still retaining legislative body review.

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82. By implying a funding condition precedent in *Thomas*, the commonwealth court appears to have equated financial hardship with impossibility of performance. Williston explains that financial hardship or insolvency is a "perfect illustration" of foreseeable, subjective impossibility, which, unlike objective impossibility, does not ordinarily excuse contract performance. *See* 18 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 1932, at 10 (3d ed. 1978).

83. A recent decision of the Pennsylvania Supreme Court, although not expressly mentioning the *Thomas* case, clearly disagreed with the commonwealth court's rationale. *See* International Bhd. of Firemen & Oilers, Local 1201 v. Board of Educ., 500 Pa. 474, 457 A.2d 1269 (1983). The *Local 1201* case arose out of the same funding reduction as did *Thomas*. Relying on the rationale of the earlier *Thomas* decision, the commonwealth court in *Local 1201* vacated an arbitration award that ordered the board of education to pay second-year contract adjustments to certain nonteaching employees. *See* Board of Educ. v. International Bhd. of Firemen & Oilers, 71 Pa. Commw. 497, 500, 455 A.2d 738, 741, *rev'd*, 500 Pa. 474, 457 A.2d 1269 (1983). The Pennsylvania Supreme Court reinstated the award, holding that the board could be excused from performance of the contract only if the funding condition precedent was expressly stated in the contract or the board established that performance was impossible under any circumstances. *See Local 1201*, 500 Pa. at 479, 457 A.2d at 1271.

84. For decisions illustrating the inherent difficulties of ad hoc judicial resolution of the diffused management problem, see Fort Wayne Patrolman's Benevolent Ass'n v. City of Fort Wayne, 408 N.E.2d 1295, 1299 (Ind. Ct. App. 1980); Rochester Educ. Ass'n v. City of Rochester, 116 N.H. 402, 403, 359 A.2d 640, 641 (1976); Koenig v. Morin, 90 Misc. 2d 185, 188, 393 N.Y.S.2d 653, 655 (N.Y. Sup. Ct.), *aff'd sub nom.* Healy v. Morin, 59 A.D.2d 644, 398 N.Y.S.2d 342 (1977); Ortblad v. State, 85 Wash. 2d 109, 110, 530 P.2d 635, 636 (1975).

85. *See Thomas*, 62 Pa. Commw. at 288-92, 436 A.2d at 1230-31.

86. *See* Summers, *supra* note 51, at 1183-85.

Diffused management authority is primarily a problem of conflicting statutory provisions. State legislatures possess the authority to impose a statutory solution by reorganizing employee relations in a coherent, predictable manner. Unfortunately, many bargaining statutes fail to provide any guidance to minimize the problem of diffused management authority.[87] Although most states with comprehensive bargaining laws require legislative body approval of bargaining agreements,[88] many fail to detail procedures in the event of rejection.[89] Some states do mandate renegotiation in the event of legislative body disapproval but do not set time guidelines for legislative action or do not address the possibility of midterm funding shortages for multiple-year contracts.[90] Other states attempt to coordinate the negotiation and budget-setting processes by specifying time or notice requirements for bargaining.[91] Although this measure alone is insufficient to resolve the diffused management problem, three more fundamental legislative approaches are available.

One solution to the diffused management problem is to define the immediate employer and the funding entity as joint employers. Both parties participate in negotiations and are

87. *See, e.g.*, DEL. CODE ANN. tit. 19, §§ 1301-1312 (1979); MICH. COMP. LAWS §§ 423.201-.216 (West 1978 & Supp. 1983); 43 PA. CONS. STAT. ANN. §§ 1101.101-.2301 (Purdon 1984).

88. *See, e.g.*, KAN. STAT. ANN. § 75-4330(c) (1977); MASS. ANN. LAWS ch. 150E, § 7(b) (Michie/Law. Co-op. 1976). Although most statutes require legislative approval only for items that necessitate funding, *see, e.g.*, N.H. REV. STAT. ANN. § 273-A:3b (1978), a few mandate legislative review of the entire contract, *see, e.g.*, MINN. STAT. § 179A.22(4) (1984); S.D. CODIFIED LAWS ANN. §§ 3-18-7 to -8 (1980).

89. *See, e.g.*, N.Y. CIV. SERV. LAW § 204a (McKinney 1983); S.D. CODIFIED LAWS ANN. §§ 3-18-7 to -8 (1980).

90. *See, e.g.*, ALASKA STAT. § 23.40.215 (1984); HAWAII REV. STAT. § 89-10(b) (1982); N.H. REV. STAT. ANN. § 273-A:3(II)(b) (1978). The Iowa bargaining law requires that negotiated agreements provide for either an automatic reduction in benefits or renegotiation in case of insufficient funding. *See* IOWA CODE ANN. § 20.17 (West 1978 & Supp. 1983). Some state statutes expressly preclude renegotiation and provide that the legislative determination of the amount of funds available for employee salaries is binding. *See, e.g.*, FLA. STAT. ANN. § 447.309(2) (West 1981).

91. Such provisions may require that negotiations begin a certain number of days before the budget submission date, *see, e.g.*, CONN. GEN. STAT. ANN. § 10-153d(b) (Supp. 1983) (180 days for teachers); ME. REV. STAT. ANN. tit. 26, § 965(1) (1974 & Supp. 1983) (120 days for municipal employees), that they begin *sometime* before the budget deadline, *see e.g.*, CAL. GOV'T CODE § 3543.7 (West 1980) (public school employees); HAWAII REV. STAT. 89-9a (1976), or that they conclude prior to budget adoption, *see, e.g.*, IOWA CODE ANN. § 20.17(10) (West 1978).

bound with respect to agreements relating to their respective spheres of authority. A drawback of this approach is that the joint employers may have divergent views on bargaining proposals that can seriously undermine a unified management presence at the bargaining table.[92] This is particularly true with respect to financial items, on which the authority of the joint employers may overlap. Moreover, since legislative bodies seldom possess the time or expertise to participate directly in labor negotiations,[93] agreements typically are negotiated by representatives and thus still require independent legislative review. Although a handful of opinions have endorsed this joint employer approach,[94] its inefficiency has resulted in a decline in popularity.[95]

The less complex and perhaps more effective of the two remaining approaches is to define the public employer as the entity having final authority over fiscal matters. The Minnesota bargaining law, for example, defines the public employer of municipal employees as the entity possessing "final budgetary approval authority."[96] This body must consult with other agencies or officials having responsibility over employment terms but has full authority to enter into agreements that are binding

92. *See* Labor Relations Comm'n v. Natick, 369 Mass. 431, 439, 339 N.E.2d 900, 905 (1976) ("The selectmen and a chief may disagree on which of them should make concessions in order to come to an agreement . . . . Moreover, chiefs as negotiators might have a conflict of interest because their own salaries may be affected by the salaries negotiated.").

93. *See* Henkel & Wood, *Collective Bargaining by State Workers: Legislatures Have the Final Voice in the Appropriation of Funds*, 11 J. COLLECTIVE NEGOTIATIONS 215, 221-22 (1982).

94. *See, e.g.*, AFSCME v. County of Lancaster, 196 Neb. 89, 96, 241 N.W.2d 523, 526 (1976); County of Ulster v. CSEA Unit of Ulster County Sheriff's Dep't, 37 A.D.2d 437, 439, 326 N.Y.S.2d 706, 709 (1971); Costigan v. Local 696, Philadelphia Fin. Dep't Employees, 462 Pa. 425, 434-35, 341 A.2d 456, 461 (1975). The Hawaii bargaining law adopts a unique version of the joint employer approach by assigning a proportionate number of votes to multiple employing entities. *See* HAWAII REV. STAT. § 89-6(b) (1976). For example, the "employer" of workers in the statewide firefighters' unit is defined as the governor, who is entitled to four votes, together with the mayors of each of Hawaii's four counties, each of whom is entitled to one vote. *Id.*

95. *See, e.g.*, Labor Relations Comm'n v. Town of Natick, 369 Mass. 431, 439, 339 N.E.2d 900, 905 (1976); General Drivers, Local 346 v. Aitkin County Bd., 320 N.W.2d 695, 700-01 (Minn. 1982). The Pennsylvania Supreme Court has noted that rejection of the joint employer approach "avoids the potential difficulties of having too many decision-makers, none with full authority to reach an agreement, on the public side of the bargaining table." Ellenbogen v. County of Allegheny, 479 Pa. 429, 436, 388 A.2d 730, 734 (1978).

96. MINN. STAT. § 179A.03(15)(c) (1984).

on management as a whole for the duration of the contract.[97] This single-tier approach is simple and predictable. It also focuses the labor relations function in the most publicly accessible forum. This solution, however, may be politically unacceptable in some jurisdictions because it necessarily results in a reallocation of governmental authority.[98]

The final approach is to transform the two-tiered approach that exists in most states into a more coherent process that mandates immediate review by the funding authority and binds both management entities upon legislative body approval.[99] The Connecticut Municipal Employee Relations Act, for example, defines "municipal employer" broadly as "any political subdivision,"[100] which necessarily includes those subdivisions without independent funding authority. Agreements negotiated by the employer that require funding from another source must be submitted to the appropriate legislative body within fourteen days.[101] The legislative body then has thirty days to accept or reject the funding request. If rejected, the contract is returned to the parties for renegotiation. If approved, or if no action is taken within the thirty-day period, the legislative body is obligated to appropriate all funds required to comply with the agreement, notwithstanding any statutory limitation that may otherwise exist.[102]

A helpful supplement to this two-tiered approach would be a provision in the bargaining statute that both binds the legislative body for the term of the contract and limits the contract duration to a reasonable length.[103] Ideally, the contract term and the budget cycle should coincide.[104] The absence of such a provision leaves open the possibility of midterm modifications when the initial funding approval does not cover the entire con-

97. *Id.*; *see* General Drivers, Local 346 v. Aitkin County Board, 320 N.W.2d 695, 700 (Minn. 1982).

98. *See* Miscimarra, *supra* note 70, at 727-28.

99. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-474(b), (c) (West 1972 & Supp. 1983) (municipal employees); MASS. ANN. LAWS ch. 150E, § 7 (Michie/Law. Co-op. 1984); OHIO REV. CODE ANN. § 4117.10(B) (Page Supp. 1984).

100. CONN. GEN. STAT. ANN. § 7-467(1) (West Supp. 1983).

101. *Id.* § 7-474(b) (West 1972).

102. *Id.*

103. A maximum contract term of two or three years would be preferable. A longer duration may impair the public employer's ability to respond to changing financial circumstances, whereas a shorter term would restrict bargaining flexibility and necessitate almost continuous negotiations.

104. Some bargaining laws expressly coordinate the term of public employee contracts with the budgetary period. *See, e.g.*, NEB. REV. STAT. § 48-837 (1978); WIS. STAT. ANN. § 111.92(3) (West 1974).

tract term. In *Boston Teachers Union, Local 66 v. School Committee of Boston*,[105] for example, the Boston School Committee contended that the second- and third-year salary provisions of a collective bargaining agreement were unenforceable because the city council had appropriated sufficient funds for only the first year of the contract.[106] The Massachusetts Supreme Judicial Court rejected this argument, holding that the city council's appropriation for the first year of the contract served as an approval of the entire contract and bound the council to appropriate the necessary funds for the entire contract term.[107] Although the Massachusetts court reached a desirable result, advance clarification by statute would have been preferable.

The problem of diffused management authority thus can be ameliorated by a carefully drafted statutory response. There is little justification for sanctioning an unpredictable midterm modification by a body that already has had the opportunity to review a collective bargaining agreement. The Minnesota[108] and Connecticut[109] statutes illustrate how this unnecessary basis for public sector unilateral change can be eliminated while still preserving the safeguard of legislative review.

2. State Government Level

Structural problems are more complex on the state level than on the local level. Although the structure of local governmental units is under the control of the state legislature, which is free to organize personnel administration by statute,[110] state governmental structure is determined to a considerable degree by state constitutional provisions.[111] Two aspects of this constitutionally mandated structure of state government—the legislature's authority over monetary appropriations and its function as the supreme law-making body of state government—have important implications for the unilateral alteration of collective bargaining agreements.

105. 386 Mass. 197, 434 N.E.2d 1258 (1982). The case arose even though the Massachusetts bargaining law contains a legislative approval provision similar to that of Connecticut. *See* MASS. ANN. LAWS ch. 150E, § 7 (Michie/Law. Co-op. 1984).

106. 386 Mass. at 203, 434 N.E.2d at 1263.

107. *See id.* at 204, 434 N.E.2d at 1263.

108. *See supra* notes 96-98 and accompanying text.

109. *See supra* notes 99-102 and accompanying text.

110. 2 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 4.03a-4.04 (3d ed. 1979).

111. Bosworth, *Policy Making*, in THE 50 STATES AND THEIR LOCAL GOVERNMENTS 297, 301 (J. Fesler ed. 1967).

a. *The Appropriations Function*

Virtually every state constitution contains a provision that vests exclusive authority over appropriations in the state legislature.[112] State bargaining laws, however, usually define the "employer" of public employees in a manner that excludes the legislature.[113] This diffusion of authority at the state level creates the potential for unilateral change if the legislature fails to appropriate all of the funds necessary to implement a contract negotiated by the executive branch. As of 1982, twenty of the thirty states with bargaining laws applicable to state employees contained language subjecting the monetary terms of bargaining agreements to the appropriations process of the legislature.[114] In those states with bargaining laws that are silent or unclear on this issue, courts consistently have refused to enforce the financial provisions of state employee agreements in the absence of an express legislative appropriation.[115] Statutory guidance thus is needed to maximize predictability and fairness.

The constitutional dimension of the diffused authority problem at the state level, however, restricts the available statutory alternatives. The single-tiered approach adopted in Minnesota for municipal employees[116] is not feasible at the state level since a number of state court decisions have held that the legislature may not delegate its constitutional authority over appropriations to the executive branch.[117] Even if the delegation problems could be avoided, a statutory enactment cannot bind a future legislature to a waiver of constitutional authority.[118] Similarly, direct legislative control of the negotiation

112. *See, e.g.*, MINN. CONST. art. XI, § 1; W. VA. CONST. art. X, § 3.

113. *See* Blair, *supra* note 1, at 11.

114. Henkel & Wood, *supra* note 93, at 217, 218-20 table 1.

115. *See, e.g.*, California State Employees Ass'n v. Flournoy, 32 Cal. App. 3d 219, 236, 108 Cal. Rptr. 251, 264, *cert. denied*, 414 U.S. 1093 (1973); State v. AFSCME, Local 1726, 298 A.2d 362, 372 (Del. Ch. 1972); United Faculty of Florida, Local 1880 v. Board of Regents, 365 So. 2d 1073, 1078 (Fla. Dist. Ct. App. 1979); State v. State Troopers Fraternal Ass'n, 91 N.J. 464, 471-72, 453 A.2d 176, 180 (1982). The Minnesota Supreme Court has held that impasse arbitration awards, *see infra* note 281, as well as voluntary agreements, are unenforceable absent a specific legislative appropriation. *See* Minnesota Educ. Ass'n v. State, 282 N.W.2d 915, 918 (Minn. 1979), *appeal dismissed*, 444 U.S. 1062 (1980).

116. *See supra* notes 96-98 and accompanying text.

117. *See, e.g.*, California State Employees Ass'n v. Flournoy, 32 Cal. App. 3d 219, 234, 108 Cal. Rptr. 251, 262-63, *cert. denied*, 414 U.S. 1093 (1973); State v. AFSCME, Local 1726, 298 A.2d 362, 364 (Del. Ch. 1972).

118. 1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 22.02, at 107 (4th ed. 1972); *see also* Minnesota Educ. Ass'n v. State, 282 N.W.2d 915, 919

process is administratively untenable.[119] The only realistic solution is a two-tiered approach similar to that of the Connecticut Municipal Employee Relations Act,[120] which expressly alerts the parties to the necessity of prompt legislative review. A model act applicable to state employees that follows the Connecticut approach should limit the duration of the contract to the state appropriations cycle.[121] Although at the local level, legislation or judicial construction can commit the legislative body to future funding upon initial contract approval,[122] at the state level nothing short of an appropriation for the entire contract term will remove the possibility of subsequent legislative repudiation.

The likelihood of contract rejection and its accompanying dislocation can be reduced further by providing channels of communication between the legislative and executive branches. The bargaining laws of California and Minnesota include innovative provisions for legislative involvement. The California Higher Education Employer-Employee Relations Act, which defines "employer" as the governing board of each institution,[123] authorizes the governor, the speaker of the assembly, and the senate rules committee to have a representative present during negotiations and directs the negotiating employers to maintain a close liaison with the legislature on financial matters.[124] Nevertheless, the confusion resulting from the presence at the bargaining table of multiple management representatives and the fact that there are different employers for each institution diminishes the likelihood of establishing a unified management stance. A better approach is Minnesota's pure consultation model. Under the Minnesota bargaining law, a twelve-person legislative committee acts as a consultative body[125] to the Com-

(Minn. 1979) ("As the source of sovereign governmental power, the Legislature is able to bind all other groups except a subsequent legislature . . . ."); City of Camden v. Byrne, 82 N.J. 133, 148-49, 411 A.2d 462, 469-70 (1980) (legislature can disregard prior fiscal enactments by not appropriating money to fund them).

119. *See* Henkel & Wood, *supra* note 93, at 221-22.

120. *See supra* notes 99-102 and accompanying text. The Connecticut State Employees Relations Act contains a legislative review process similar to that provided for municipal employees. *Compare* CONN. GEN. STAT. ANN. § 5-278(b) (West Supp. 1983) (state employees) *with id.* § 7-474(b) (West 1972) (municipal employees).

121. *See, e.g.*, WIS. STAT. ANN. § 111.92(3) (West 1974).

122. *See supra* notes 103-07 and accompanying text.

123. *See* CAL. GOV'T CODE § 3562 (West Supp. 1983).

124. *See id.* § 3572.

125. *See* MINN. STAT. § 3.855 (1984).

missioner of Employee Relations, the sole designated "employer" of all state employees.[126] Contracts negotiated by the commissioner are first reviewed by the legislative committee and, if approved, submitted to the legislature as a whole.[127]

b. *The Law-Making Function*

Although the legislature's appropriations authority in state government is one basis for unilateral change, a more far-reaching one is the legislature's general law-making function. As the supreme law-making body of state government, the legislature, subject only to constitutional restraints, retains the authority to amend its own collective bargaining legislation and to enact superseding statutes governing employment matters. Such actions were not uncommon during the recent period of fiscal retrenchment.

The decision of the Minnesota Supreme Court in *AFSCME, Council 6 v. Sundquist*[128] illustrates that the unilateral modification of public sector bargaining agreements by substantive law-making raises serious constitutional, as opposed to statutory, issues. In *Sundquist* the Minnesota Supreme Court upheld a statute passed by the Minnesota legislature adopting, inter alia,[129] a new leave-of-absence policy for state employees.[130] Although the court acknowledged that the adoption of this policy resulted in the unilateral alteration of employment terms established in existing collective bargaining agreements,[131] it held that the new statutory provision could not be challenged as an unfair labor practice because the Minnesota Public Employment Labor Relations Act, like most other state bargaining laws,[132] did not include the legislature within its def-

126. *See id.* § 179A.22(2).

127. *See id.* §§ 3.855(2), 179A.22(4).

128. 338 N.W.2d 560 (Minn. 1983).

129. Actually, the principal legislative action challenged in *Sundquist* was a requirement that various state and local employees contribute an additional two percent of their salaries to their pension funds during 1983. *See id.* at 565. The court upheld this provision on the grounds that the legislature's modification of contribution rates did not abridge any contract rights, *see id.* at 567-69, and that pension matters are illegal topics of bargaining under Minnesota's bargaining law, *see id.* at 575-76.

130. Specifically, the Act provided that through the first half of 1983, state employees taking unpaid leaves of absence could continue to accrue most of their fringe benefits as if they had been working during the period of their leaves. *See id.* at 565.

131. *See id.* at 577.

132. *See supra* note 113 and accompanying text.

inition of a "public employer."[133] The court explained that the "[p]ublic employees' sole avenue of relief for a unilateral legislative change in the terms and conditions of employment under an existing collective bargaining agreement is to proceed under state and federal constitutional provisions."[134] Thus, unilateral action that would be an unfair labor practice if undertaken by any other public or private employer is lawful if done by the state legislature as long as the action is not unconstitutional.

The contract clause[135] is the principal constitutional limitation on the legislature's authority to modify existing collective bargaining agreements. Although the contract clause literally proscribes any impairment of contract, the United States Supreme Court has long recognized that a state, in the exercise of its police powers, may protect the public interest in an emergency by the enactment of reasonably tailored legislation.[136] After many years of deferring to state legislative impairments,[137] however, the Court in 1977 revitalized the contract clause in *United States Trust Co. v. New Jersey*.[138] In that case, the Court invalidated a New Jersey statute that retroactively repealed a covenant between the state and certain bondholders that limited the use of revenues pledged as security.[139]

In striking down the New Jersey statute in *United States Trust*, the Supreme Court adopted an exacting standard for scrutinizing laws that impair public[140] contracts, stating that

133. *See* 338 N.W.2d at 577. Minnesota's bargaining law provides that the Commissioner of Employee Relations is the "employer" of all state employees. *See* MINN. STAT. § 179A.22(2) (1984).

134. 338 N.W.2d at 577.

135. U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . law impairing the Obligation of Contracts . . . .").

136. *See, e.g.*, El Paso v. Simmons, 379 U.S. 497, 508-09 (1965); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434-35 (1934).

137. Prior to 1977, the Court had not invalidated a state statute on contract clause grounds since Wood v. Lovett, 313 U.S. 362 (1941). *See* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 140-42 (14th ed. 1978). The Court explained its deference to state enactments: "Once we are in the domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' " East New York Savings Bank v. Hahn, 326 U.S. 230, 233 (1945) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

138. 431 U.S. 1 (1977).

139. *See id.* at 9-14.

140. A year later, the Court also increased, to a somewhat lesser degree, its scrutiny of *private* contracts. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242-50 (1978) (Minnesota statute imposing a "pension funding charge" on certain employers terminating their plan or leaving the state unconstitutionally changes employers' contract obligations). More recent decisions, how-

"complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[141] The impairment of public contracts is constitutional, the Court stated, only if "reasonable and necessary to serve an important public purpose."[142] The Court noted that an impairment is "reasonable" only if the parties did not foresee at the time of contracting the possibility of changed circumstances[143] and is "necessary" only if there are no less drastic alternatives available for safeguarding the public interest.[144] Despite the strictness of this standard, however, its application by state courts in the context of public sector bargaining has been inconsistent and imprecise, as illustrated by two recent decisions by the high courts in New York and California.

In *Subway-Surface Supervisors Association v. New York City Transit Authority*,[145] the New York Court of Appeals upheld the validity of the 1975 Financial Emergency Act for the City of New York, an act that suspended all employee wage increases for a one-year period.[146] The statute impaired the collective bargaining agreement covering a unit of city transit workers by eliminating a five percent wage increase for the second year of a two-year contract.[147] Although it invoked the *United States Trust* standard, the court did not examine independently the foreseeability of the fiscal crisis or the availability of alternatives less drastic than the elimination of contractual wage increases.[148] Moreover, the court noted that

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ever, reflect the older policy of substantial deference to legislative action. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176, 187-94 (1983) (Alabama statute increasing severance tax on oil and gas not in violation of contract clause); Energy Reserves Group, Inc. v. Kansas Power & Light, 459 U.S. 400, 409-19 (1983) (Kansas statute limiting ceiling prices on natural gas sold intrastate consistent with contract clause).

141. 431 U.S. at 26. The Court continued:

> If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the contract clause would provide no protection at all.
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> . . . .
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> . . . [A] state is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.

Id. at 26, 30-31.

142. *Id.* at 25.

143. *See id.* at 31-32.

144. *See id.* at 29-31.

145. 44 N.Y.2d 101, 375 N.E.2d 384, 404 N.Y.S.2d 323 (1978).

146. *See id.* at 107, 375 N.E.2d at 387, 404 N.Y.S.2d at 326.

147. *Id.*

148. *See id.* at 109-13, 375 N.E.2d at 388-91, 404 N.Y.S.2d at 328-30. Instead, the court simply affirmed the legislature's finding that a fiscal emergency ex-

the impact of the act was merely prospective in nature; the suspended future increases were considered unearned and not vested since the employees had the right to quit in response to the legislative modification.[149] Finally, the court held that the preferential treatment it previously had given the contract rights of municipal bondholders[150] did not create an equal protection problem because the bondholders' rights had vested and the impairment of their rights would have had a significantly greater impact than would impairing employee rights in terms of worsening the city's credit rating.[151]

The California Supreme Court took an approach more respectful of the contract rights of public employees in *Sonoma County Organization of Public Employees v. County of Sonoma*.[152] In response to Proposition 13,[153] which eliminated approximately seven billion dollars in property tax revenues that would have been available to municipal governments, the California legislature enacted a bill that distributed five billion dollars in surplus state funds to local entities on the condition that no wage increases be implemented for the 1978-1979 fiscal year.[154] Like the act in *Subway-Surface Supervisors*, this action modified several collective bargaining agreements providing for second-year wage adjustments. The *Sonoma* court, in holding that the action of the California legislature unconstitutionally impaired the employees' right to contract, distinguished *Subway-Surface Supervisors* on several grounds. It noted that New York City's fiscal crisis was more severe than California's[155] and that the impairment in the New York case

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isted, stating, "Here, little deference is required, when the circumstances themselves so clearly demonstrate that the Legislature's conclusion was a valid one." *Id.* at 112, 375 N.E.2d at 390, 404 N.Y.S.2d at 329. Although this undoubtedly was factually accurate, the existence of a budgetary emergency does not itself justify impairment under the *United States Trust* test.

149. *See id.* at 112-13, 375 N.E.2d at 390-91, 404 N.Y.S.2d at 330.

150. *See* Flushing Nat'l Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976).

151. *See Subway-Surface Supervisors*, 44 N.Y.2d at 113-14, 375 N.E.2d at 391, 404 N.Y.S.2d at 330-31.

152. 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

153. CAL. CONST. art. XIIIA. For a description of Proposition 13, see Swimmer, *The Impact of Proposition 13 on Public Employee Relations: The Case of Los Angeles*, 11 J. COLLECTIVE NEGOTIATIONS 13 (1982).

154. *See* 23 Cal. 3d at 302, 309-10, 591 P.2d at 3, 8, 152 Cal. Rptr. at 905, 910-11.

155. Although everyone acknowledged the severity of the fiscal crisis in New York City, the crisis created in California by Proposition 13 was largely ameliorated by the legislature's subsequent distribution of surplus funds. *See* 23 Cal. 3d at 310-12, 591 P.2d at 8-9, 152 Cal. Rptr. at 910-11. Because the gov-

was less burdensome because it merely deferred, rather than eliminated, the wage increases.[156] In addition to drawing these factual distinctions, the California court rejected the supposition in *Subway-Surface Supervisors* that the elimination of future wage increases provided for in a contract abridged only prospective, nonvested rights.[157] The court instead found that a multiple-year contract constitutes an indivisible whole for which employees render consideration from the time of its commencement.[158]

The concept of vesting relied on by the New York court in *Subway-Surface Supervisors* and rejected by the California court in *Sonoma* is typical of that used by courts permitting legislative bodies to adjust employee compensation established by statute as long as it is not done retroactively to alter benefits already earned through performance.[159] The introduction of collective bargaining in the public sector, however, changes both the nature and timing of the employee's property interest. Although employee compensation in the absence of collective bargaining is conferred voluntarily by statute and a property right arises only on an employee's acceptance of this offer by performance,[160] employee compensation under a collective bargaining agreement is established by contract. The New York court thus failed to recognize that the contract itself, once validly executed and ratified, gives rise to a vested obligation for

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ernment failed in *Sonoma* to establish the existence of a true emergency, the court did not rule on the union's contention that any emergency resulting from the adoption of Proposition 13 was created by the state's voluntary conduct in limiting its taxing authority and, therefore, could not justify an impairment of contract. The court did indicate, however, that it found this argument "appealing." *See id.* at 313, 591 P.2d at 10, 152 Cal. Rptr. at 912.

156. *See id.* at 312, 591 P.2d at 9, 152 Cal. Rptr. at 911-12.

157. *See id.* at 312-13, 591 P.2d at 9-10, 152 Cal. Rptr. at 912.

158. *See id.* The court explained:

> [W]e seriously question the New York court's rationale. A contract must be viewed as a whole; it cannot be fractured into isolated components. The anticipated wage increases during the second year thereof may have affected the employees' wage demands for the first year of the contract, and undoubtedly many employees rendered their services in the first year in anticipation of their contractual right to the second year increase. It is doubtful, therefore, that the New York court was correct in its conclusion that the employees had not rendered consideration for the second year of the contract when the freeze was imposed.

Id. at 312-13, 591 P.2d at 10, 152 Cal. Rptr. at 912.

159. *See, e.g.*, Grant v. Nellius, 377 A.2d 354, 357-58 (Del. 1977); Personnel Div. v. St. Clair, 10 Or. App. 106, 109-11, 498 P.2d 809, 811-12 (1972).

160. *See* Personnel Div. v. St. Clair, 10 Or. App. 106, 109, 498 P.2d 809, 811 (1972).

the duration of the contract term.[161]

More disturbing, however, is the New York court's view that public sector bargaining agreements are less deserving of protection than are other contractual obligations.[162] The court's comparison of the respective rights of public employees and municipal bondholders is reminiscent of the paternalistic notion that public employees owe a duty of "extra loyalty" to the state.[163] This perception stands in marked contrast to the new Bankruptcy Code amendments, which give private sector collective bargaining agreements a greater degree of protection against impairment than they do other types of contractual obligations.[164] In spite of its deficiencies, however, *Subway Surface Supervisors* is more representative of the current case law than is *Sonoma*.[165]

The reconciliation of the legislature's law-making function and the contract clause limitation requires a delicate balancing. The legislature is not merely an employing entity like a private company or even a public school board. It is charged with the constitutional responsibility of protecting the public interest through the enactment of legislation and must retain the capability of responding to fiscal emergencies. In this sense, legisla-

161. *See* Labor Relations Comm'n v. Dracut, 374 Mass. 619, 628, 373 N.E.2d 1165, 1171 (1978).

162. *See supra* notes 150-51 and accompanying text.

163. *See supra* note 54 and accompanying text.

164. *See supra* note 47.

165. The Washington Supreme Court recently relied simply on the legislature's assessment of a financial emergency to dismiss a contract clause challenge to a statute that modified a contract provision governing layoff procedures for community college employees. *See* Washington Educ. Ass'n v. State, 97 Wash. 2d 899, 907-08, 652 P.2d 1347, 1351-52 (1982). The Court of Appeals for the First Circuit, in upholding a state statute that altered impasse arbitration procedures contained in a collective bargaining agreement, went a step further by holding that the "stricter 'review' approach" of *United States Trust* is applicable only to the impairment of the substantive financial provisions of a public contract, not to mere procedural modifications. *See* Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 642 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). Other public sector decisions resemble *Subway-Surface Supervisors* in that they give public bargaining contracts a subordinate status in interpreting the reach of the contract clause. *See, e.g.*, Patrolmen's Benevolent Ass'n v. City of New York, 41 N.Y.2d 205, 210, 359 N.E.2d 1338, 1342, 391 N.Y.S.2d 344, 547-48 (1976) (Jasen, J., dissenting) ("The intimate relationship between government and its employees permits [legislative] flexibility of a kind that is absent from agreements between private parties . . . [or] between government and its creditors."); *see also* South Bend Community School Corp. v. Nat'l Educ. Ass'n—South Bend, __ Ind. App. __, __, 444 N.E.2d 348, 353 (1983) (noting that public bodies may have a narrower scope of bargaining authority than do private businesses).

tive action serves a purpose similar to the limited escape valve afforded private sector employers by the bankruptcy laws.[166] But just as the bankruptcy exception to the *Oak Cliff-Golman* rule that economic necessity does not justify unilateral change is a limited one,[167] the legislature's authority to modify contracts also requires appropriate restrictions. The *United States Trust* standard as applied in *Sonoma* represents a proper balancing of these considerations by recognizing the appropriateness of legislative intervention in an emergency as well as the need to give public sector collective bargaining agreements a status at least equal to that afforded any other public contract.[168]

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166. *See supra* note 47. Municipal employers also may resort to financial reorganization in bankruptcy under Chapter 9 of the Federal Bankruptcy Code, 11 U.S.C. §§ 901-946 (1982), which contains standards and procedures that closely parallel those provided under Chapter 11 for private employers. *See* Note, *Executory Labor Contracts and Municipal Bankruptcy*, 85 YALE L.J. 957, 958 n.7 (1976) (applying Chapter 11 standards to interpret Chapter 9). It remains to be seen whether Chapter 9 will evolve beyond a theoretical escape valve to become a common basis for public sector unilateral change. At this point, public employers appear reluctant to submit the conduct of government affairs to federal bankruptcy court supervision. *See Supreme Court Ruling on Bankrupt Employer's Contract May Apply to Public Sector*, 22 GOV'T EMPL. REL. REP. (BNA) 470, 470 (Mar. 5, 1984).

In 1983, the San Jose School District became the first governmental entity to file for bankruptcy in 40 years. *San Jose School District Files for Bankruptcy; Seeks to Toss Out Pacts*, 21 GOV'T EMPL. REL. REP. (BNA) 1579, 1580 (Aug. 1, 1983). The bankruptcy court initially upheld the elimination of certain wage adjustments specified in the collective bargaining agreement, *Bankrupt San Jose, Calif., Schools Open on Time; Teachers Lose Raise*, 21 GOV'T EMPL. REL. REP. (BNA) 1925, 1926 (Sept. 26, 1983), but the petition subsequently was dismissed, with the school board voluntarily agreeing to restore the wage cuts, *San Jose Schools Seek Dismissal of Bankruptcy Case Under Pacts*, 22 GOV'T EMPL. REL. REP. (BNA) 1081, 1081 (June 4, 1984).

167. *See supra* note 47.

168. A question not yet addressed by the courts is whether the contract clause limits legislation that implements new employment terms in the absence of bargaining as well as legislation that modifies existing contract terms. A literal interpretation of the contract clause arguably does not reach this conduct since it does not impair an express contract provision. Such an interpretation, however, would leave no limitation at all on this type of unilateral change because state legislatures typically are not deemed to be "public employers" and hence their actions are not circumscribed by statutory unfair labor practices provisions. *See supra* notes 131-35 and accompanying text. That a contract clause approach still may be available in such cases is suggested by a number of recent decisions that interpret public employer pension statutes as creating an implied contractual obligation. *See, e.g.*, Opinion of the Justices, 364 Mass. 847, 856-63, 303 N.E.2d 320, 324-28 (1973); Christensen v. Minneapolis Mun. Employees Retirement Bd., 331 N.W.2d 740, 746, 749-50 (Minn. 1983). State bargaining laws that prohibit the implementation of new employment terms in the absence of bargaining should be similarly interpreted as creating

B. STATUTORY PREEMPTION

Statutes and rules that establish substantive employment terms independent of the collective bargaining law pose a further structural obstacle. Examples range from civil service and teacher tenure laws to a multitude of less comprehensive provisions.[169] If these provisions are interpreted as preempting the collective bargaining agreement, a party can avoid agreed-upon contract terms and thereby effect unilateral change simply by pointing to a conflicting statute or rule.[170]

Although some bargaining laws provide no guidance to resolve this conflict,[171] most contain provisions that give blanket preemptive effect to either the collective bargaining agreement[172] or, more frequently, the competing statute or rule.[173] Because the majority approach of preempting the bargaining agreement has the potential to limit substantially the scope of bargaining, an emerging trend in court decisions is to accord preemptive effect only to "statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer."[174] Under this test, the statute will

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an implied contractual obligation that cannot be impaired without contract clause scrutiny.

169. *See, e.g.*, MASS. ANN. LAWS ch. 71, § 42 (Michie/Law. Co-op. 1978) (teacher tenure law); MINN. STAT. §§ 44.01-.16 (1984) (municipal civil service law).

170. For discussions of the statutory preemption issue, see Alleyne, *Statutory Restraints on the Bargaining Obligation in Public Employment*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 100, 109-11 (A. Knapp ed. 1977); Sackman, *supra* note 3, at 169-72, 179-81; Schmedemann, *The Scope of Bargaining in Minnesota's Public Sector Labor Relations: A Proposal for Change*, 10 WM. MITCHELL L. REV. 213, 229-39, 253-58 (1984).

171. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 423.201-.216 (West 1978 & Supp. 1984-1985); N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1983). Legislative silence on the preemption issue necessarily results in uncertainty, and the courts of various jurisdictions are split with respect to the proper scope of mandatory bargaining under such circumstances. *See* Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685, 740 & n.195.

172. *See, e.g.*, HAWAII REV. STAT. § 89-10(d) (1976); WIS. STAT. ANN. § 111.93(3) (West Supp. 1984-1985) (state employees).

173. *See, e.g.*, CAL. GOV'T CODE § 3540 (West 1980) (education employees); IOWA CODE ANN. § 20.28 (West Supp. 1984-1985); MINN. STAT. § 179A.20(2) (1984); 43 PA. CONS. STAT. ANN. § 1101.703 (Purdon 1985); VT. STAT. ANN. tit. 3, § 904 (1984); *see also* Wesclin Educ. Ass'n v. Board of Educ., 30 Ill. App. 3d 67, 76-77, 331 N.E.2d 335, 341-42 (1975) (judicial determination that statutory dismissal procedures preempt terms of collective bargaining agreements).

174. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233, 246 (1978). For other cases following this approach, see San Mateo City School Dist. v. Public Employment Relations Bd., 33 Cal. 3d 850, 864-67, 663

prevail if it expressly sets an employment term but not if it merely establishes minimum standards or vests discretion in an official to determine terms and conditions of employment.[175]

The problem with the blanket preemption approach is that it focuses attention on formalistic questions concerning the existence of a conflict between a statute and a bargaining agreement rather than on whether public policy supports the unilateral or bilateral determination of a specific aspect of the employment relationship.[176] Some employment terms, such as teacher tenure criteria or pension contribution rates, may be so infused with public policy or uniformity considerations that statutory resolution is desirable. Other topics, such as job transfer and layoff procedures, lack these strong public policy concerns and are more appropriately determined through the bargaining process. The blanket preemption approach not only fails to address these variable policy considerations, but also fosters unpredictability by encouraging litigation to test the enforceability of contract provisions to which a party no longer wishes to be bound.

One statutory response to the weaknesses of the blanket preemption approach is to provide that the contract supersedes conflicting statutes once the legislative body has reviewed and approved the contract.[177] This approach has the advantage of permitting the legislative body to determine the preemption issue in a specific, policy-oriented context. It works well, however, only at the state employee level, where the legislative body reviewing the contract also possesses law-making authority. Few states are likely to permit local legislative bodies to nullify statutory provisions on an ad hoc basis. Although this legislative approval approach eliminates the possibility of midterm modification on preemption grounds, unpredictability remains since the parties cannot identify accurately which subjects are appropriate for bargaining until the legislature acts on the contract.

P.2d 523, 532-34, 191 Cal. Rptr. 800, 809-11 (1983); Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 129, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23 (1972); Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 510, 337 A.2d 262, 270 (1975); Glendale Professional Policemen's Ass'n v. City of Glendale, 83 Wis. 2d 90, 103-06, 264 N.W.2d 594, 601-02 (1978).

175. *See, e.g.,* State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82, 393 A.2d 233, 246-47 (1978).

176. *See* Schmedemann, *supra* note 170, at 232-33.

177. *See, e.g,* CONN. GEN. STAT. ANN. § 5-278(e) (West Supp. 1984-1985) (state employees).

A better approach, used in three states, minimizes the unpredictability of the legislative approval approach by expressly listing those statutes that are superseded by the bargaining obligation.[178] Such advance legislative determination requires the legislature to balance competing policy considerations. It also enhances predictability by delineating the range of bargainable subjects and ensuring contract enforcement. Although this approach may initially be more burdensome for the legislature, in the long run it is more efficient than one that continually spawns litigation.

Special problems arise, however, when preemptive effect is given to a municipal ordinance or an administrative regulation adopted by a body that is also the public employer. When a municipality or an administrative body acts in this dual capacity of regulator and employer, preemption effectively permits it to alter unilaterally both the scope of bargaining and its own contract obligations by the adoption of an ordinance or rule.[179] In *Council of New Jersey State College Locals v. State Board of Higher Education*,[180] for example, the board adopted regulations specifying layoff procedures in case of financial emergency without bargaining with the representatives of affected unions.[181] The New Jersey Supreme Court sustained this action even though layoff procedures were a mandatory topic of bargaining under New Jersey law[182] and the regulations modified layoff procedures already established by contracts entered

178. *See* CAL. GOV'T CODE § 3517.6 (West Supp. 1985) (state employees); CONN. GEN. STAT. ANN. § 7-474(f) (West 1972) (municipal employees); MASS. ANN. LAWS ch. 150E, § 7(d) (Michie/Law. Co-op. 1984). The California statute is the most farsighted of the three in that it combines both alternatives to the blanket preemption model. It first lists more than 120 statutory provisions that are preempted by the bargaining obligation and then provides that contract terms supersede other statutory provisions only upon legislative approval of the bargaining agreement. *See* CAL. GOV'T CODE § 3517.6 (West Supp. 1985).

179. *See* Local 1383, Int'l Ass'n of Fire Fighters v. City of Warren, 411 Mich. 642, 667, 311 N.W.2d 702, 711 (1981) (municipal regulatory preemption would convert the Michigan bargaining law into a "local-option law"); Schmedemann, *supra* note 170, at 233 (local legislative preemption allows local bodies "to opt out of the collective bargaining system altogether"). For an example of a case allowing a municipality to circumvent state bargaining law in this manner, see Gust v. Village of Skokie, 125 Ill. App. 3d 102, __, 465 N.E.2d 696, 698-700 (1984) (state law mandating advisory arbitration of fire-fighter disputes superseded by village ordinance prohibiting arbitration of such disputes even though the ordinance was adopted after the union demanded arbitration).

180. 91 N.J. 18, 449 A.2d 1244 (1982).

181. *Id.* at 23, 449 A.2d at 1246.

182. *See id.* at 32-33, 449 A.2d at 1251-52.

into by the board.[183] The court acknowledged the potential for abuse in this context but held that preemption was appropriate because the union failed to show that the regulations were adopted in bad faith or to avoid negotiation on mandatory subjects.[184] Fortunately, most states, by either statute[185] or case law,[186] reject the New Jersey approach and deny preemption to self-serving rules or ordinances adopted by an employing entity.[187]

As with other structural constraints, the problem with the prevailing blanket preemption analysis is that it provides an opportunity for unilateral change beyond that justified by public policy considerations. The answer lies in a clear and comprehensive statutory response that preserves the integrity of legislative decision making on matters of fundamental policy without unnecessarily thwarting legitimate employee expectations.

III. POLITICAL PROCESS CONSTRAINTS ON PUBLIC SECTOR COLLECTIVE BARGAINING

In addition to structural obstacles, the political nature of governmental decision making limits the scope of public sector bargaining. The view championed by Professors Harry H. Wellington and Ralph K. Winter,[188] and followed by many courts[189]

183. *See id.* at 23 n.1, 449 A.2d at 1246 n.1.

184. *See id.* at 28-30, 449 A.2d at 1249-50.

185. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-474(f) (West 1972) (municipal employees); HAWAII REV. STAT. § 89-19 (1976); MASS. ANN. LAWS ch. 150E, § 7(d) (Michie/Law. Co-op. Supp. 1985); MINN. STAT. § 179A.07(2) (1984); WASH. REV. CODE ANN. § 41.59.910 (Supp. 1985) (education employees).

186. *See, e.g.*, Local 1383, Int'l Ass'n of Fire Fighters v. City of Warren, 411 Mich. 642, 667, 311 N.W.2d 702, 711 (1981).

187. A troublesome variation of the local preemption issue occurs when the conflict involves a local charter or civil service law amendment adopted pursuant to a voter referendum. Jurisdictions are divided as to whether the bargaining law or the referendum provision prevails in this context. *Compare* San Francisco Fire Fighters, Local 798 v. Board of Supervisors, 96 Cal. App. 3d 538, 548-50, 158 Cal. Rptr. 145, 150-51 (1979) (amendment to city charter approved by referendum takes precedence over bargaining law) *with* AFSCME Council 75, Local 350 v. Clackamas County, 69 Or. App. 488, ___, 687 P.2d 1102, 1108-11 (1984) (bargaining law prevails over civil service law providing that changes in employment conditions be approved in a local referendum).

188. *See* H. WELLINGTON & R. WINTER, *supra* note 51, at 7-32.

189. *See, e.g.*, Charles City Community School Dist. v. Public Employment Relations Bd., 275 N.W.2d 766, 769-71 (Iowa 1979); Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 161-62, 393 A.2d 278, 286-87 (1978); Unified School Dist. No. 1 v. Wisconsin Employment Relations Comm'n, 81 Wis. 2d 89, 99-100, 259 N.W.2d 724, 730-31 (1977).

and commentators,[190] is that public sector collective bargaining must be circumscribed in order to safeguard the democratic political process from a misallocation of political power to public sector unions at the expense of other interest groups. Wellington and Winter maintain that this misallocation is possible because the public sector lacks the economic restraints that naturally limit bargaining in the private sector.[191] The relatively inelastic demand for government services, many of which are essential to the public safety and welfare,[192] coupled with the public's inability to discern the practical impact of negotiation proposals,[193] provides public employers with less incentive to oppose union demands. Moreover, other commentators point out that public sector bargaining limits the political access of potentially adverse interest groups by excluding them from the bilateral negotiation process.[194] Although avoiding distortion of the democratic political process is a laudable objective, the development of public sector labor relations during the fiscal crisis suggests that the political process concerns have been exaggerated.

A. THE SCOPE OF BARGAINING: UNILATERAL IMPLEMENTATION

Political process considerations sometimes are embodied in statutes that either reserve certain matters for management determination[195] or restrict mandatory bargaining to certain enumerated items.[196] More often, however, such limitations are

190. *See* authorities cited *supra* note 51; Note, *The Scope of Negotiations Under the Iowa Public Employment Relations Act*, 63 IOWA L. REV. 649, 653-59 (1978).

191. *See* H. WELLINGTON & R. WINTER, *supra* note 51, at 15-17, 21-23, 30-31.

192. *See id.* at 21-24, 30-31.

193. *See id.* at 23.

194. *See* Corbett, *supra* note 51, at 255-56; Summers, *supra* note 51, at 1164, 1195.

195. Professor B.V.H. Schneider reported in 1979 that bargaining laws in 28 states contain "management rights" provisions that remove matters relating to program formulation and personnel organization from the bargaining obligation. *See* Schneider, *supra* note 52, at 211. Although not infrequently seized upon by courts to justify a broder range of exclusions, *see, e.g.*, Pennsylvania Labor Relations Bd. v. State College Area School Dist., 9 Pa. Commw. 229, 238, 306 A.2d 404, 409-10 (1973), *rev'd*, 461 Pa. 494, 337 A.2d 262 (1975), these provisions do little to narrow the scope of bargaining since the topics excluded generally relate to entrepeneurial matters similarly reserved for management in the private sector, *see* Alleyne, *supra* note 170, at 105-09.

196. Such statutes limit the scope of bargaining by expressly listing mandatory topics of bargaining, *see, e.g.*, CAL. GOV'T CODE ANN. § 3543.2 (West Supp. 1985) (education employees); IOWA CODE ANN. § 20.9 (West 1978); NEV.

the result of restrictive judicial interpretations of NLRA-type "scope of bargaining" provisions. Whatever the origin of such limitations, reducing the number of mandatory bargaining topics permits public sector employers to implement a broader range of measures free of the obstacles imposed by the bargaining process.

Most state bargaining laws[197] contain language patterned after that of section 8(d) of the NLRA, which mandates bargaining regarding "wages, hours, and other terms and conditions of employment."[198] A handful of state court decisions, most of which were decided prior to the fiscal crisis in government, construed these state statutes in light of NLRA precedent and found that they contemplated a comparably broad scope of bargaining.[199] Now, however, the vast majority of state courts recognize a more limited bargaining obligation in the public sector because of political process concerns.[200] Indeed,

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REV. STAT. § 288.150 (1979), an approach usually interpreted by the courts as excluding those subjects not explicitly mentioned, *see, e.g.*, Charles City Community School Dist. v. Public Employment Relations Bd., 275 N.W.2d 766, 771-72 (Iowa 1979). *But see* San Mateo City School Dist. v. Public Employment Relations Bd., 33 Cal. 3d 850, 858-62, 663 P.2d 523, 528-31, 191 Cal. Rptr. 800, 805-08 (1983) (mandatory negotiation is not strictly limited to subjects listed in the Educational Employment Relations Act but includes matters logically and reasonably related to the listed subjects).

197. *See, e.g.*, MASS. ANN. LAWS ch. 150E, § 6 (Michie/Law. Co-op. 1976); MICH. COMP. LAWS ANN. § 423.215 (West 1982); WIS. STAT. ANN. § 111.70(a) (West Supp. 1984-1985); *see also* Helburn, *The Scope of Bargaining in Public Sector Negotiations: Sovereignty Reviewed*, 3 J. COLLECTIVE NEGOTIATIONS 147, 156 (1974) (70 of 81 public sector laws studied used language similar to that in the NLRA to define the scope of bargaining) (citing Sabghir, *The Scope of Collective Bargaining in the Public Sector*, 33 PUBLIC EMPL. REL. LIBR. 7 (Public Personnel Assoc. 1971)).

198. NLRA § 8(d), 29 U.S.C. § 158(d).

199. *See, e.g.*, Fire Fighters, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 615-17, 526 P.2d 971, 975-77, 116 Cal. Rptr. 507, 511-13 (1974); Kerrigan v. City of Boston, 361 Mass. 24, 27-28, 278 N.E.2d 387, 390 (1972); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 52-53, 214 N.W.2d 803, 807-08 (1974). Some courts even suggested that the scope of bargaining should be broader in the public sector because of the absence of the right to strike. *See, e.g.*, Van Buren Public School Dist. v. Wayne Circuit Judge, 61 Mich. App. 6, 27, 232 N.W.2d 278, 288 (1975).

200. *See, e.g.*, Kenai Peninsula School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416, 418-23 (Alaska 1977); Charles City Community School Dist. v. Public Employment Relations Bd., 275 N.W.2d 766, 769-73 (Iowa 1979); School Comm. v. Boston Teachers Union, Local 66, 378 Mass. 65, 70-71, 389 N.E.2d 970, 973-74 (1979); Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 499-502, 337 A.2d 262, 264-65 (1975). For discussions of this more restrictive approach, see Sackman, *supra* note 3, at 181-87; *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1686-93 (1984) [hereinafter cited as *Developments*].

some of the "scope of bargaining" tests adopted by state courts are quite restrictive. The North Dakota Supreme Court, for example, interpreted a state teacher bargaining law as excluding from the scope of mandatory negotiation all terms and conditions of employment except those relating to salary, hours, and contract administration.[201]

State courts increasingly have adopted a balancing test that attempts to weigh the respective interests of employees and management concerning a specific bargaining proposal.[202] The Pennsylvania Supreme Court, for example, held that the question of mandatory negotiation turns on "whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole."[203] If policy concerns predominate, as in the determination of a school curriculum[204] or the conditions under which a police officer may use deadly force,[205] the topic is not a mandatory subject of bargaining. The balancing approach thus recognizes that employee working conditions and governmental policy concerns are not mutually exclusive and provides a mechanism to resolve conflicts that arise between the two on a case-by-case basis.[206]

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201. *See* Fargo Educ. Ass'n v. Fargo Public School Dist. No. 1, 291 N.W.2d 267, 271 (N.D. 1980); *see also* Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972) (mandatory topics "include only those matters directly affecting the teacher's welfare"); Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 88 S.D. 127, 133, 215 N.W.2d 837, 841 (1974) (mandatory topics limited to subjects that "materially affect" wages, hours, and working conditions).

202. Clark, *The Scope of the Duty to Bargain in Public Employment*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 81, 92-95 (A. Knapp ed. 1977); *see, e.g.*, National Educ. Ass'n v. Board of Educ., 212 Kan. 741, 753, 512 P.2d 426, 435 (1973); Sutherlin Educ. Ass'n v. Sutherlin School Dist. No. 130, 25 Or. App. 85, 88, 548 P.2d 204, 205 (1976); City of Beloit v. Employment Relations Comm'n, 73 Wis. 2d 43, 54-55, 242 N.W.2d 231, 236 (1976).

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

204. *See* West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 581, 586, 295 A.2d 526, 534, 537 (1972); Corbett, *supra* note 51, at 272-74.

205. *See* San Jose Peace Officers Ass'n v. City of San Jose, 78 Cal. App. 3d 935, 947-49, 144 Cal. Rptr. 638, 646-47 (1978).

206. Many commentators endorse this balancing approach because it focuses on the competing policy interests relating to a specific bargaining proposal rather than on whether a topic fits within some rigid, predetermined category. *See, e.g.*, Clark, *supra* note 202, at 92-95; Corbett, *supra* note 51, at 250-67; Schmedemann, *supra* note 170, at 259-62. *But cf.* Alleyne, *supra* note 170, at 109, 114 (suggesting that a statutory list of bargainable subjects is preferable to the balancing approach because the latter permits an almost wholly subjective determination of the scope issue).

Although the balancing approach represents a reasonable, policy-oriented method of dispute resolution, its application by state courts too frequently tips the balance against negotiability. The 1982 decision of the New Jersey Supreme Court in *Local 195, IFPTE v. State*[207] exemplifies this tendency. Even though the United States Supreme Court had held that in the private sector the subcontracting of unit work to another firm for financial reasons is a mandatory subject of bargaining,[208] the New Jersey court ruled that such a decision is not a mandatory topic in the public sector because of the public employer's "unique responsibility to make and implement public policy."[209] The proper approach to such problems, the court stated, is to balance the interests of the public employees and employer.[210] The court, however, obviated any need to balance the competing interests by concluding that a topic is not negotiable even though it "intimately and directly affects the work and welfare of public employees" if it also infringes on "government's managerial prerogative to determine policy."[211] The court thus rejected the majority approach[212] and denied negoti-

207. 88 N.J. 393, 443 A.2d 187 (1982).

208. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964). Subcontracting has received considerable attention over the past decade as a means to provide public services at a reduced cost. For a criticism of subcontracting, see PASSING THE BUCKS, *supra* note 4.

209. 88 N.J. at 402, 443 A.2d at 191.

210. *See id.* at 404-05, 443 A.2d at 192.

211. *Id.* at 404-05, 443 A.2d at 192-93.

212. A slight majority of state courts rejects the conclusion of *Local 195* and mandates bargaining on the financial subcontracting issue. *See, e.g.*, Van Buren Public School Dist. v. Wayne County Circuit Judge, 61 Mich. App. 6, 22-23, 232 N.W.2d 278, 290-91 (1975); General Drivers Union Local 346 v. Independent School Dist. No. 704, 283 N.W.2d 524, 527 (Minn. 1979); Saratoga Springs City School Dist. v. Public Employment Relations Bd., 68 A.D.2d 202, 208, 416 N.Y.S.2d 415, 419 (1979); Pennsylvania Labor Relations Bd. v. Mars Area School Dist., 480 Pa. 295, 301, 389 A.2d 1073, 1075 (1978). These jurisdictions agree with the Wisconsin Supreme Court's view that "[t]he decision to subcontract . . . [does] not represent a choice among alternative social or political goals or values." Unified School Dist. No. 1 v. Wisconsin Employment Relations Comm'n, 81 Wis. 2d 89, 102, 259 N.W.2d 724, 732 (1977).

Nonetheless, a significant and apparently growing minority of states does agree with the New Jersey court's position in *Local 195* that public employers need not negotiate regarding the decision to contract out. *See, e.g.*, Colonial School Bd. v. Colonial Affiliate, NCCEA, 449 A.2d 243, 248 (Del. 1982); State Employees' Ass'n v. Public Employee Labor Relations Bd., 118 N.H. 885, 889-90, 397 A.2d 1035, 1037-38 (1978); AFSCME Local 1116 v. Adams County, 6 C.I.R. 367, 371-75 (Neb. Comm'n Indus. Rel. Dec. 21, 1982), *noted in* 21 GOV'T EMPL. REL. REP. (BNA) 901 (Apr. 25, 1983); *see also* San Mateo City School Dist. v. Public Employment Relations Bd., 179 Cal. Rptr. 647, 657-58 (Cal. Ct. App. 1981) (contracting out not negotiable), *vacated*, 33 Cal. 3d 850, 867, 663

ability based on its determination that "[i]t is a matter of general public concern whether governmental services are provided by government employees or by contractual arrangements with private organizations."[213]

The New Jersey court's approach in *Local 195* is flawed because it fails not only to balance the interests of public employees against those of the employer, but also to articulate significant policy considerations that require insulating the subcontracting decision from the bargaining process. A proposal to subcontract school transportation services as a cost-saving measure, for example, does not implicate policy choices such as whether to provide transportation services in the first instance or how to accomplish that task most safely. Instead, the issue merely involves substituting private employees for public employees in order to save money. Budgetary issues of this type are tailor-made for collective bargaining.[214] The public employee union may present a proposal that will satisfy the employer's economic concerns while preserving unit work. If the employer is not convinced, the decision to subcontract can still be implemented after bargaining to impasse.

The approach of the court in *Local 195* accords too much deference to the political process limitation. Although political democracy should not be sacrificed in an attempt to emulate the private sector model, the experience of the fiscal crisis illustrates that the feared imbalance in political power is considerably exaggerated and that significant political constraints on public sector bargaining do exist. Indeed, over the past decade taxpayers pressured public sector managers to resist union demands in virtually every jurisdiction. The political clout of taxpayers repeatedly dwarfed that of public sector unions as management bargaining stances hardened and wage freezes re-

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P.2d 523, 534, 191 Cal. Rptr. 800, 811 (1983) (indicating that the lower court's test for determining mandatory bargaining subjects was too restrictive but not specifically reaching the subcontracting issue). With respect to federal employees, the Civil Service Reform Act of 1978 excludes subcontracting decisions from the scope of mandatory bargaining. *See* 5 U.S.C. § 7106(a)(2)(B) (1982).

213. 88 N.J. at 407, 443 A.2d at 194. The New Jersey court stated that although the parties could agree to discuss a subcontracting decision based solely on fiscal considerations, since New Jersey does not recognize permissive subjects of bargaining, *see infra* notes 231-37 and accompanying text, they could not agree to bargain with respect to the decision. *See id.* at 409, 443 A.2d at 195.

214. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213-14 (1964); Unified School Dist. No. 1 v. Wisconsin Employment Relations Comm'n, 81 Wis. 2d 89, 102-03, 259 N.W.2d 724, 732 (1977).

placed cost-of-living adjustments.[215] Even the notion of an inelastic demand for government services was at least partially debunked as government responded to public demand by reducing its level of services.[216] The experience of those states recognizing a limited right to strike for public employees similarly indicated that not all governmental services are of an "essential" nature.[217]

The public access concerns underlying the political process limitation also appear to be overstated. In the absence of collective bargaining, public officials do not hold a referendum on each issue they confront. Instead, they typically make decisions unilaterally with input from various interest groups.[218] The introduction of collective bargaining does not eliminate the access of other groups to public officials. Although the public does not participate directly in negotiation sessions,[219] it still has input through lobbying, political action committees, and elections.[220] Most states also require that elected legislative bodies review and approve collective bargaining agreements,[221] with sunshine laws mandating that this action occur in open, public meet-

215. *See supra* notes 4-7 and accompanying text.

216. *See* Anderson & London, *supra* note 4, at 381-84; Edwards, *supra* note 54, at 362-63.

217. *See* County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660, 38 Cal. 3d 564, __, 699 P.2d 835, 845-46, 214 Cal. Rptr. 424, 434-35 (1985); Feuille, *Selected Benefits and Costs of Compulsory Arbitration*, 33 INDUS. & LAB. REL. REV. 64, 67 (1979); *Developments*, *supra* note 200, at 1713-14. Even Professors Wellington and Winter concede that not all public employees perform services that are essential to the public welfare. *See* H. WELLINGTON & R. WINTER, *supra* note 51, at 25. As Professor John F. Burton, Jr. and Charles Krider note, there is little to distinguish a strike by publicly paid sanitation workers from one by privately paid sanitation workers in terms of the essential nature of the services they perform. *See* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 426 (1970).

218. *See* Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058, 1066 (1984) ("Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear."). Commentators disagree, however, over how much influence interest groups have on day-to-day decision making. *Compare* H. WELLINGTON & R. WINTER, *supra* note 51, at 24 (in the normal political process an active interest group typically can make itself heard in the decision-making process) *with* Kay, *supra* note 64, at 155-56 (in the absence of collective bargaining, government decisions are made by a bureaucracy isolated from both public opinion and elected officials).

219. *See* Talbot v. Concord Union School Dist., 114 N.H. 532, 536, 323 A.2d 912, 914 (1974). A few state statutes, however, require public access to bargaining sessions. *See, e.g.*, FLA. STAT. ANN. § 447.605(2) (West 1981).

220. *Developments*, *supra* note 200, at 1693.

221. *See supra* note 88 and accompanying text.

ings.[222] Some state statutes also contain innovative provisions that require the parties to present their initial negotiation proposals at a public forum.[223] Most significant, state and local governments generally have restructured their personnel function during the past decade in order to cope with the combined pressures of public sector unionism and budgetary shortfalls. This reorganization has resulted in a centralization of management authority in more publicly accountable elected officials instead of less accessible administrators and civil service commissions.[224]

This is not to say that political process considerations are irrelevant in determining the scope of public sector bargaining. To the contrary, the emerging balancing test used by courts in determining the proper scope of bargaining recognizes the importance of political and policy concerns and provides a mechanism to weigh them against the therapeutic benefits of collective bargaining. The critical issue, as painfully demonstrated by the New Jersey court in *Local 195*, is determining what placement of the fulcrum best effectuates an accurate balancing of these competing interests.

B. THE SCOPE OF BARGAINING: DENIAL OF CONTRACT ENFORCEMENT

Although in the private sector[225] and in the public sector in most jurisdictions[226] the parties are bound by contract provisions relating to permissive topics of bargaining even though there is no obligation to bargain over them in the first instance, political process concerns have led a growing number of jurisdictions to restrict the enforcement of such terms. One group of states rejects the permissive bargaining category entirely and refuses to enforce any nonmandatory contract provision.[227] An-

222. *See, e.g.*, FLA. STAT. ANN. § 286.011 (West Supp. 1985); MINN. STAT. § 471.705(1) (1984).

223. *See, e.g.*, CAL. GOV'T CODE ANN. § 3523 (West 1980); WIS. STAT. ANN. § 111.70(4)(cm)(2) (West Supp. 1984-1985).

224. *See* Derber, *supra* note 69, at 90-91.

225. *See, e.g.*, Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971); Turner v. Local 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1224-25 (9th Cir. 1979).

226. *See, e.g.*, Board of Educ. v. Yonkers Fed'n of Teachers, 40 N.Y.2d 268, 271, 353 N.E.2d 569, 570, 386 N.Y.S.2d 657, 658 (1976); Springfield Educ. Ass'n v. Springfield School Dist. No. 19, 24 Or. App. 751, 759-60, 547 P.2d 647, 650-51 (1976); Scranton School Bd. v. Scranton Fed'n of Teachers, 27 Pa. Commw. 152, 156, 365 A.2d 1339, 1341 (1976).

227. *See infra* notes 229-37 and accompanying text.

other group recognizes the validity of some provisions relating to permissive subjects but refuses to enforce others on public policy grounds.[228] The result under either approach is to expand the range of illegal bargaining subjects in the public sector and increase the likelihood of unilateral contract modification.

At least four states have eliminated the permissive bargaining category for the public sector by either statute[229] or decision.[230] For example, in the New Jersey case of *Ridgefield Park Education Association v. Ridgefield Park Board of Education*,[231] the collective bargaining agreement at issue contained a provision designed to minimize involuntary transfers and reassignments.[232] After the board of education involuntarily reassigned a number of teachers, the union filed grievances alleging noncompliance with the contract. The board refused to submit the grievances to arbitration, claiming that the contract provision covered a nonmandatory topic and, therefore, was invalid.[233] The Public Employment Relations Commission acknowledged the nonmandatory nature of the topic but asserted the majority rule that a contract provision relating to a permissive subject is nonetheless enforceable.[234] The New Jersey Supreme Court reversed, construing the state bargaining law as encompassing only two categories of bargaining subjects: mandatory topics and nonnegotiable matters of governmental policy.[235] The court held that subjects falling within the second category were beyond the scope of bargaining, making contract terms pertaining to them unenforceable even if voluntarily

228. *See infra* notes 238-49 and accompanying text.

229. *See* CAL. GOV'T CODE ANN. § 3543.2(a) (West Supp. 1985) (stating that those subjects not specifically enumerated in the statute "are reserved to the public school employer and may not be a subject of meeting and negotiating"); HAWAII REV. STAT. § 89-9(d) (Supp. 1984) (although not expressly banning permissive bargaining, accomplishing essentially the same result by listing a multiplicity of subjects regarding which bargaining is prohibited).

230. *See* Colonial School Bd. v. Colonial Affiliate, NCCEA, 449 A.2d 243, 248 (Del. 1982); Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 162, 393 A.2d 278, 287 (1978).

231. 78 N.J. 144, 393 A.2d 278 (1978).

232. *Id.* at 150, 393 A.2d at 280-81.

233. *Id.* at 150-51, 393 A.2d at 281.

234. *Id.* at 152-53, 393 A.2d at 281-82. The Commission's decision was based, in part, on an interpretation of legislative amendments enacted after an earlier case, Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1978), in which the New Jersey Supreme Court had rejected the permissive category. *See Ridgefield Park*, 78 N.J. at 152, 393 A.2d at 282.

235. *See Ridgefield Park*, 78 N.J. at 162, 393 A.2d at 287.

agreed upon by the parties.[236] The court maintained that the alternative of leaving such issues to government negotiators would strip the public of its proper oversight role and thereby endanger "the very foundation of representative democracy."[237]

The courts in Massachusetts and New York recognize a similar but less restrictive limitation on contract enforcement. In these jurisdictions, the permissive category is not entirely abolished, but contract enforcement is denied if, as the Massachusetts Supreme Judicial Court put it, "the ingredient of public policy in the issue subject to dispute is . . . comparatively heavy."[238] This "ingredient of public policy," although typically found in a statutory delegation of managerial authority to a public employer,[239] also may be derived from other statutes, case law, or nonlegal sources.[240] The Massachusetts and New York courts have relied on the public policy limitation during the past decade to deny enforcement of a considerable number of contract terms, including a just cause standard for the dismissal of nontenured teachers,[241] job security clauses,[242] and an agreement limiting access to teacher personnel files.[243] When

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236. *See id.*

237. *Id.* at 163, 393 A.2d at 287. The court explained:

> A private employer may bargain away as much or as little of its managerial control as it likes. . . . However, the very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiation, where citizen participation is precluded. This Court would be most reluctant to sanction collective agreement on matters which are essentially managerial in nature, because the true managers are the people. Our democratic system demands that governmental bodies retain their accountability to the citizenry.

Id. (citation omitted).

238. School Comm. v. Boston Teachers Union, Local 66, 378 Mass. 65, 71, 389 N.E.2d 970, 973 (1979).

239. *See, e.g.*, Port Jefferson Station Teachers Ass'n v. Brookhaven-Comsewogue Union Free School Dist., 45 N.Y.2d 898, 899, 383 N.E.2d 553, 554, 411 N.Y.S.2d 1, 2 (1978); Note, *The Emerging Public Policy Limitation on Public Sector Collective Bargaining*, 42 ALB. L. REV. 121, 132 (1977).

240. *See, e.g.*, School Comm. v. Curry, 369 Mass. 683, 685, 343 N.E.2d 144, 145 (1976); Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n, 37 N.Y.2d 614, 616-17, 339 N.E.2d 132, 133, 376 N.Y.S.2d 427, 429 (1975).

241. *See* School Comm. v. West Bridgewater Teachers' Ass'n., 372 Mass. 121, 122, 360 N.E.2d 886, 887 (1977); Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 775, 358 N.E.2d 878, 879, 390 N.Y.S.2d 53, 54 (1976).

242. *See* Boston Teachers Union, Local 66 v. School Comm., 386 Mass. 197, 212, 434 N.E.2d 1258, 1267 (1982); School Comm. v. Curry, 369 Mass. 683, 685, 343 N.E.2d 144, 145 (1976).

243. *See* Board of Educ. v. Areman, 41 N.Y.2d 527, 534, 362 N.E.2d 943, 948, 394 N.Y.S.2d 143, 148 (1977).

public policy concerns are not so "comparatively heavy," however, nonmandatory contract terms have been enforced.[244]

In *Boston Teachers Union, Local 66 v. School Committee*,[245] the Supreme Judicial Court of Massachusettts explained the public policy limitation on the public employer's scope of bargaining authority as being "necessary in order that the collective actions of public employees do not distort the normal political process for controlling public policy."[246] The collective bargaining agreement in *Boston Teachers Union* contained a job security clause prohibiting the dismissal of any tenured teacher or nurse for a two-year period, admittedly a nonmandatory topic of bargaining.[247] The Massachusetts court concluded that the provision impermissibly restricted the ability of the School Committee to determine the size of its teaching staff on an annual basis and refused to enforce the contract provision as written.[248] The court did, however, hold that the job security provision was enforceable for a one-year period, explaining that the public interest in protecting the managerial prerogative diminishes after the annual budget is established.[249] The net result was a revised contract term never agreed on by the parties but judicially imposed based on the court's own conception of desirable public policy.

These restrictions on contract enforcement have a superficial, theoretical appeal that has found increasing support in the scholarly literature.[250] Commentators note that private sector

244. *See, e.g.*, School Comm. v. Boston Teachers Union, Local 66, 372 Mass. 605, 613-16, 363 N.E.2d 485, 489-91 (1977) (educational policy aspects of arbitration award relating to appointment of trustees to teachers' health and welfare fund, resolving dispute over severance pay, and providing for remedial reading program not so heavy as to preclude its enforcement); Onteora Central School Dist. v. Onteora Non-Teaching Employees Ass'n, 56 N.Y.2d 769, 771-75, 437 N.E.2d 281, 282-84, 452 N.Y.S.2d 22, 23-24 (1982) (upholding arbitral award compensating union members for the wages foregone because of the district's use of voluntary custodial help and contracting out of certain bus runs for athletic events).

245. 386 Mass. 197, 434 N.E.2d 1258 (1982).

246. *Id.* at 211, 434 N.E.2d at 1266. Similarly, the New York Court of Appeals has stated that "[b]oards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent." Board of Educ. v. Areman, 41 N.Y.2d 527, 531, 362 N.E.2d 943, 946, 394 N.Y.S.2d 143, 146 (1977).

247. *See Boston Teachers Union*, 386 Mass. at 200-01, 434 N.E.2d at 1261.

248. *See id.* at 212, 434 N.E.2d at 1267.

249. *See id.* at 213, 434 N.E.2d at 1267-68.

250. A number of commentators disapprove of the permissive category in public sector bargaining. *See, e.g.*, Kilberg, *supra* note 51, at 189; Sackman,

contract enforcement rules applicable to nonmandatory terms cannot be transplanted to the public sector because the principal limitation on public sector bargaining is political rather than economic.[251] Although a private employer's voluntary agreement to negotiate on a matter of managerial prerogative affects only the employer's economic self-interest in managing the enterprise, a public employer's agreement to negotiate on a topic excluded from mandatory negotiation as a matter of fundamental policy concern represents a waiver of the public's right to have such issues determined through the normal political process. Using such reasoning, commentators contend that nonmandatory topics infused with public policy concerns should be excluded from voluntary as well as mandatory negotiation.[252]

Despite this attempted theoretical justification, the contract enforcement limitations are perhaps the most objectionable of all the expanded unilateral change possibilities in the public sector. Judicial application of the contract enforcement limitations in the midcontract setting raises serious fairness questions because such limitations undermine legitimate employee expectations without requiring any showing as to the necessity or reasonableness of the modification. Contract terms obtained through concessions on other bargaining proposals are simply invalidated on nebulous public policy grounds with no opportunity for renegotiation. As illustrated by the *Boston Teachers* decision, the practical result of these enforcement restrictions is the substitution of judicially imposed contract terms for those negotiated by the parties.[253]

Quite apart from the fairness issues, however, the contract enforcement limitations increase uncertainty in bargaining. Because of the imprecise balancing standard for determining the scope of mandatory bargaining, public employers and employees have little guidance in ascertaining whether a contract term will survive an enforcement challenge. This problem is aggra-

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supra note 3, at 189-90; Summers, *supra* note 51, at 1193-94. Professor William L. Corbett, who instead favors an approach similar to that adopted in Massachusetts and New York, differentiates nonmandatory topics that should be voluntarily negotiable because they affect only the managerial interests of the public employer from those topics that should be excluded entirely from the negotiation process because they involve matters of general public interest. *See* Corbett, *supra* note 51, at 275-78.

251. *See, e.g.*, Sackman, *supra* note 3, at 189.

252. *See id.*; Corbett, *supra* note 51, at 275-77; Summers, *supra* note 51, at 1193.

253. *See supra* notes 245-49 and accompanying text.

vated in Massachusetts and New York, where enforcement depends on a highly subjective judicial assessment of whether public policy concerns are "comparatively heavy."[254] As the concurring opinion in one New York decision pointed out, the public policy limitation "hold[s] out an 'open sesame' of hope to those who would have the court contravene the well-recognized statutory preference for bargaining and arbitrating . . . and will but encourage proliferation of litigation rather than composition of differences in public employment disputes."[255]

These enforcement limitations also have a detrimental impact on the role of the public employer in terms of decreased management flexibility. For example, a public employer may find it advantageous to accept a limited job security provision in exchange for a reduced compensation package. The potential invalidity of the nonmandatory job security clause, however, effectively removes this flexibility. If an elected official or legislative body close to the negotiation process believes that such a trade-off is in the public interest, it is difficult to understand why a contrary judicial assessment of the same policy question should have preemptive effect.

Reduced to their essence, the contract enforcement restrictions are grounded in the paternalistic notion that public sector managers are incapable of representing the public interest in collective bargaining.[256] Admittedly, many public sector managers were not prepared to cope with the initial onslaught of public sector unionism in the 1960's and early 1970's.[257] But this difficulty had less to do with inherent political process limitations than with the prevailing inefficiency of public sector personnel management, characterized as it was by diffused management authority and an archaic civil service system.[258] Public employers have made great strides during the past decade to improve personnel management. In order to contend with public sector unionism and financial retrenchment, gov-

254. *See supra* notes 238-44 and accompanying text.

255. Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n., 37 N.Y.2d 614, 618, 339 N.E.2d 132, 135, 376 N.Y.S.2d 427, 431 (1975) (Fuchsberg, J., concurring) (citations omitted).

256. *See, e.g.*, H. WELLINGTON & R. WINTER, *supra* note 51, at 22-23, 31; Sackman, *supra* note 3, at 189-90.

257. *See* Raskin, *supra* note 3, at 203-05.

258. *See* Derber, *supra* note 69, at 80-90; Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 UCLA L. REV. 867, 870 (1972); Wollett, *State Government—Strategies for Negotiations in an Austere Environment: A Management Perspective*, 27 LAB. L.J. 504, 505 (1976).

ernmental bodies restructured and centralized management authority,[259] trained negotiators, and developed comprehensive bargaining strategies.[260] The pressures of economic scarcity thus led to a management approach in the public sector that more closely parallels that of the private sector.[261] Restrictions on contract enforcement inhibit this trend toward more efficient and accountable personnel management and relegate both public employers and employees to a second-class status.

State and local government officials are entrusted with considerable responsibility in deciding issues of health, safety, and welfare with a minimum of judicial interference. If an elected school board contracts for educational supplies, the courts will not invalidate the contract on abstract policy grounds in the absence of a constitutional or statutory violation. The willingness of the courts to adopt a more interventionist role with respect to public employee contracts suggests that the sovereignty and "extra loyalty" doctrines are far from extinct.

C. POSTCONTRACT UNILATERAL CHANGE

Virtually all jurisdictions carry over to the public sector the private sector rule extending the unilateral change proscription to the postcontract setting, prohibiting an employer from unilaterally altering the status quo concerning mandatory bargaining topics, whether established by an expired contract or by past practice, without first bargaining to impasse.[262] The fiscal crisis, however, has led to a reexamination of whether the private sector notion of a "dynamic" status quo should apply in the public sector and of the appropriate timing for implementing adjustments in employment terms.

Public sector unilateral change in the postcontract setting was first addressed comprehensively by the New York Public Employment Relations Board (PERB) in *Triborough Bridge & Tunnel Authority*.[263] In *Triborough*, the parties had entered

259. *See* Derber, *supra* note 69, at 90-93; Kay, *supra* note 64, at 160-61.

260. *See* Anderson & London, *supra* note 4, at 409-10; Horton, *supra* note 1, at 199-200; Weisberger, *supra* note 171, at 709.

261. *See* Horton, *supra* note 1, at 201.

262. *See, e.g.*, Lane v. Board of Directors, 447 A.2d 806, 809-10 (Me. 1982); Galloway Township Bd. of Educ. v. Galloway Township Educ. Ass'n, 78 N.J. 25, 48-49, 393 A.2d 218, 230 (1978); Appeal of Cumberland Valley School Dist., 483 Pa. 134, 142-43, 394 A.2d 946, 950-51 (1978). Some state bargaining laws expressly require the maintenance of expired contract terms during negotiations for a successor agreement. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-475 (West Supp. 1984) (municipal employees).

263. 5 P.E.R.B. ¶ 3037 (N.Y. PERB July 28, 1972). For discussions of the

into a series of two-year collective bargaining agreements providing for annual incremental salary increases.[264] Following expiration of one of these contracts, the Bridge and Tunnel Authority maintained the salary levels effective on the date the contract expired, refusing to grant salary increases during negotiations for a new agreement.[265] In holding that the Authority's conduct violated the statutory bargaining obligation, the PERB embraced the private sector rule that an employer must maintain the status quo concerning mandatory topics even after expiration of the contract.[266] The PERB noted that, as in the private sector,[267] the status quo had to be viewed dynamically; an employer is obligated not only to maintain benefit levels reached at the time the contract terminates, but also to provide periodic adjustments as contemplated by the expired contract.[268] The PERB further explained that the presence of mandatory impasse resolution procedures in the public sector delays the point at which the employer can take unilateral action because an employer must exhaust such mandatory procedures as mediation and fact-finding before a true impasse occurs.[269]

A minority of jurisdictions refuses to follow the *Triborough* approach.[270] In fact, the dynamic status quo mandate of *Tribor-*

Triborough decision and its subsequent application in New York, see Boyce, *New York's Triborough Doctrine: Unilateral Changes in the Terms and Conditions of Employment During a Contractual Hiatus in the Public Sector*, 9 J. COLLECTIVE NEGOTIATIONS 361 (1980); Note, *The Effect of New York's Triborough Law on Public Sector Labor Negotiations*, 48 ALB. L. REV. 459 (1984).

264. *Triborough*, 5 P.E.R.B. at 3064.

265. *Id.*

266. *See id.* at 3064-65. The PERB decision affirmed the ruling of the hearing officer, who contended that the duty to refrain from unilateral change during negotiations should be applied more stringently in the public sector than in the private sector because of the absence of the right to strike in the former. *See* Triborough Bridge & Tunnel Auth., 5 P.E.R.B. ¶ 4505, 4522 (N.Y. PERB Apr. 24, 1972).

267. *See supra* notes 38-40 and accompanying text.

268. *See Triborough*, 5 P.E.R.B. at 3065.

269. *See id.*

270. *See, e.g.*, M.S.A.D. No. 43 Teachers' Ass'n v. M.S.A.D. No. 43 Bd. of Directors, 432 A.2d 395, 397 & n.3 (Me. 1981) (quoting Easton Teachers Ass'n v. Easton School Comm., M.L.R.B. No. 79-14 (1979)); Pinellas County Police Benevolent Ass'n v. City of St. Petersburg, 3 F.P.E.R. 205, 208 (Fla. PERC 1977), *discussed in* City of Ocala v. Marion County Police Benevolent Ass'n, 392 So. 2d 26, 29 (Fla. Dist. Ct. App. 1980); *see also* New Castle County Vocational Technical Educ. Ass'n v. Board of Educ., 451 A.2d 1156, 1163-64 (Del. Ch. 1982) (denying temporary injunction sought to restrain employer from failing to pay insurance premium increases because plaintiff did not demonstrate irreparable harm).

ough was temporarily rejected in New York itself. In *Board of Cooperative Educational Services v. New York Public Employment Relations Board (BOCES)*,[271] the New York Court of Appeals stated that although maintenance of the status quo is one thing, "to say that the *status quo* includes a change and means automatic increases in salary is another."[272] Concerned with the fiscal pressures plaguing public sector employees, the court noted that "[t]he concept of continual successive annual increments . . . is tied into either constantly burgeoning growth and prosperity . . . or a continuing generally inflationary spiral" and that such automatic increases are inappropriate during times of "escalating costs and diminishing tax bases."[273] Continuing to give salary increases during the negotiation process, the court observed, would tip the balance of power in favor of employees because of the practical difficulty of recouping or limiting increases already received, thereby reducing employee incentive to negotiate a successor agreement.[274] A recent statutory modification of New York bargaining law, however, apparently has undercut the holding in *BOCES*.[275]

Those courts and state labor boards adhering to the *Triborough* view emphasize that the policy reasons supporting the dynamic status quo rule in the private sector apply equally in the public sector.[276] For example, in both sectors the elimination of

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271. 41 N.Y.2d 753, 363 N.E.2d 1174, 395 N.Y.S.2d 439 (1977).

272. *Id.* at 758, 363 N.E.2d at 1177, 395 N.Y.S.2d at 443.

273. *Id.* at 758, 363 N.E.2d at 1177, 395 N.Y.S.2d at 442-43.

274. *See id.*

275. A 1982 amendment to New York's Taylor Act made it an improper practice for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated." N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 1983). The ambiguous wording of this amendment could have been interpreted either as codifying existing law or as overruling the *BOCES* decision by mandating maintenance of a dynamic status quo. New York's PERB adopted the later interpretation, and its decision has been affirmed by the New York courts. *See* Cobleskill Cent. School Dist., 16 P.E.R.B. ¶ 4501, at 4506 (N.Y. PERB 1983), *aff'd*, 105 A.D.2d 564, 481 N.Y.S.2d 795 (1984), *appeal denied*, 64 N.Y.2d 1071, 478 N.E.2d 248, 489 N.Y.S.2d 903 (1985); Note, *supra* note 263, at 481-90.

276. *See, e.g.*, Appeal of Cumberland Valley School Dist., 483 Pa. 134, 141, 394 A.2d 946, 950 (1978). The dynamic status quo concept has been applied to require wage increases consistent either with an expired contract, *see, e.g.*, Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n, __ Ind. __, __, 456 N.E.2d 709, 713 (1983); Local 1467, Int'l Ass'n of Firefighters v. City of Portage, 134 Mich. App. 466, 474, 352 N.W.2d 284, 288 (1984); Galloway Township Bd. of Educ. v. Galloway Township Educ. Ass'n, 78 N.J. 25, 51-52, 393 A.2d 218, 232 (1978), or with past practice, *see, e.g.*, City of Ocala v. Marion County Police Benevolent Ass'n, 392 So. 2d 26, 30-31 (Fla. Dist. Ct. App. 1980), and to require the increased employer premium contribu-

anticipated compensation adjustments during the negotiation process is disruptive of labor peace, tips the balance of bargaining power in favor of the employer, and frustrates the objective of establishing terms and conditions of employment through bargaining.[277] Moreover, the potential for economic hardship, which is present in both sectors, should be addressed directly through the bargaining process rather than used as an excuse to avoid bargaining. Public sector employers, like their private sector counterparts, can protect their economic interests through tough bargaining stances and contract provisions that expressly limit compensation adjustments to the contract period.[278]

In at least one respect, however, the public and private sectors differ substantially. Most public sector bargaining laws contain mandatory impasse resolution procedures as a partial replacement for the right to strike.[279] Many of these statutory schemes are quite elaborate, requiring sequential resort to mediation, fact-finding, and arbitration.[280] If, as in *Triborough*, the exhaustion of these procedures is a prerequisite to unilateral action, an employer's ability to alter prior contractual arrangements may be delayed significantly. In fact, in those jurisdictions with compulsory impasse arbitration,[281] the power of

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tions needed to maintain existing employee insurance coverage, *see, e.g.*, Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328, 338 (Tenn. 1984).

The Oregon Employment Relations Board has required that during the contract hiatus period employers absorb the cost of increased insurance provisions, *see* Multnomah County Educ. Serv. Dist. & MCESD Educ. Ass'n, 6 P.E.C.B.R. 5341, 5348-49 (Or. ERB Aug. 4, 1982), *noted in* 986 GOV'T EMPL. REL. REP. (BNA) 19 (Nov. 1, 1982), but not that of merit pay increases, *see* Oregon Nurses Ass'n v. Polk County, 6 P.E.C.B.R. 5426, 5433 (Or. ERB Oct. 27, 1982), *noted in* 21 GOV'T EMPL. REL. REP. (BNA) 176 (Jan. 24, 1983).

277. *See* Galloway Township Bd. of Educ. v. Galloway Township Educ. Ass'n, 78 N.J. 25, 49-50, 393 A.2d 218, 230-31 (1978); Multnomah County Educ. Service Dist. & MCEDS Educ. Ass'n, 6 P.E.C.B.R. 5341, 5349 (Or. ERB Aug. 4, 1982), *noted in* 986 GOV'T EMPL. REL. REP. (BNA) 19 (Nov. 1, 1982).

278. *See* M.S.A.D. No. 43 Teachers' Ass'n v. M.S.A.D. No. 43 Bd. of Directors, 432 A.2d 395, 398 (Me. 1981) (describing contract provision that specifically limits duration of salary schedule to contract term).

279. *See* Schneider, *supra* note 52, at 200-07.

280. *See, e.g.*, IOWA CODE ANN. §§ 20.19-.22 (West 1978); WIS. STAT. ANN. § 111.70(4)(c) (West 1974 & Supp. 1984-1985) (municipal employees).

281. Impasse, or interest, arbitration occurs when the parties at the bargaining table are unable to agree to the terms of a new contract and the matter is submitted to an arbitrator. This should be distinguished from the more traditional grievance arbitration, which involves the determination of the rights of the parties under an existing contract. H. EDWARDS, R. CLARK & C. CRAVER, *supra* note 2, at 666.

unilateral implementation may be completely eliminated.[282] Recent decisions in Massachusetts and California illustrate two contrasting responses to the problem posed by lengthy impasse resolution procedures.

In *Massachusetts and Massachusetts Organization of State Engineers and Scientists*,[283] the Massachusetts Labor Relations Commission held that an employer's unilateral implementation of new "work rules" after a deadlock in negotiations, but prior to the completion of fact-finding procedures, did not violate the duty to bargain.[284] The Commission explained that the exhaustion of mediation and fact-finding typically occurs several months, and occasionally years, after the parties are genuinely deadlocked.[285] To delay unilateral action for such an extended period would unduly restrict the employer's ability to act.[286] On appeal, the Supreme Judicial Court of Massachusetts affirmed the Commission's conclusion, noting that many private sector decisions recognize that the use of economic weapons to resolve an impasse is not inconsistent with a good faith willingness to bargain.[287] The court thus viewed unilateral change in the impasse resolution context as a pressure tactic permitted in the public sector just as strikes and lockouts are in the private sector.

The California Court of Appeals took a different view of the propriety of unilateral change as a response to the delay resulting from impasse resolution procedures in *Moreno Valley Unified School District v. Public Employment Relations Board*.[288] The California court rejected the argument that post-

282. *See* Edwards, *supra* note 63, at 923-27.

283. No. SUP-2497 (Mass. LRC Mar. 22, 1982), *noted in* 966 GOV'T EMPL. REL. REP. (BNA) 20 (June 7, 1982).

284. *See id.*, slip op. at 12-15. The Michigan Employment Relations Commission followed a similar approach in upholding a college's implementation of its last best wage offer after talks had come to an impasse but before a fact-finding hearing was held. *See* Southwestern Mich. College and Local 586, SEIU, 1979 M.E.R.C. Lab. Op. 908, 909-11, 916-19 (Mich. ERC Oct. 22, 1979), *noted in* 847 GOV'T EMPL. REL. REP. (BNA) 18 (Feb. 4, 1980). The MERC, however, recently overruled its decision in *Southwestern Mich. College* and adopted the majority rule that an employer acts unlawfully by implementing a change in employment terms prior to the completion of fact-finding procedures. *See* County of Wayne and Council 25, AFSCME, Case Nos. C83 G-206, C83 H-253, slip op. at 2 (Mich. ERC Dec. 12, 1984).

285. *See Massachusetts Org. of State Engineers*, No. SUP-2497, slip op. at 12.

286. *See id.* at 12-13.

287. *See* Massachusetts Org. of State Engineers & Scientists v. Labor Relations Comm'n, 389 Mass. 920, 928, 452 N.E.2d 1117, 1122 (1983).

288. 142 Cal. App. 3d 191, 191 Cal. Rptr. 60 (1983); *accord* Wasco County v. AFSCME, Local No. 2752, 46 Or. App. 859, 865-66, 613 P.2d 1067, 1071 (1980)

contract unilateral change is the equivalent of such other economic weapons as strikes or lockouts.[289] The court recognized that unilateral change does not merely exert pressure on the other party to reach agreement, but effectively forecloses bargaining on the disputed issue by imposing the desired result.[290] Although acknowledging that postimpasse unilateral change is lawful in the private sector, the court explained that the California mandatory impasse procedures at issue constituted a continuation of the bilateral negotiation process.[291] Unilateral change prior to the exhaustion of the postimpasse procedures thus frustrates the goal of resolving employment disputes through collective bargaining just as it does in the preimpasse setting.[292] Finally, the court observed that unilateral action tips the negotiating balance in favor of the employer and thus reduces the employer's incentive to participate actively in the impasse resolution process.[293]

Although the existence of mandatory impasse procedures places public employers at a disadvantage relative to their private sector counterparts, the majority approach exemplified by *Triborough* appears to be the superior one. So long as mandatory impasse procedures are used to extend the public sector negotiation process, it is difficult to justify unilateral action prior to exhaustion. An obvious solution would be for more states to give employees a limited right to strike[294] rather than relying on fact-finding and arbitration. This approach not only would permit public employers to implement unilateral action at an earlier point, but would ease concerns about the chilling effect of compulsory arbitration[295] and its lack of polit-

(affirming cease and desist order barring county from implementing its last proposed wage increase before completion of fact-finding); *see supra* note 284 (describing switch to this position in Michigan).

289. *See Moreno Valley,* 142 Cal. App. 3d at 197-98, 191 Cal. Rptr. at 64-65.

290. *See id.* at 197-98, 191 Cal. Rptr. at 65; *see also* NLRB v. Katz, 369 U.S. 736, 747 (1962) ("Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.").

291. *See* 142 Cal. App. 3d at 199; 191 Cal. Rptr. at 65-66.

292. *See id.*

293. *See id.* at 198-200, 191 Cal. Rptr. at 65-66.

294. *See supra* note 52.

295. Many commentators suggest that the availability of arbitration as a "safety net" and the tendency of arbitrators to adopt compromise solutions inhibits the voluntary resolution of labor disputes through negotiation. *See, e.g.,* H. WELLINGTON AND R. WINTER, *supra* note 51, at 179-80; Feuille, *Final Offer Arbitration and the Chilling Effect,* 14 INDUS. REL. 302, 304 (1975); Wheeler,

ical accountability.[296]

CONCLUSION

Although most jurisdictions apply the core private sector unilateral change principles to the public sector, the opportunities for unilateral change in the public sector clearly exceed those available in the private sector. Some of these restrictions on public sector bargaining are, of course, appropriate. Government must be able to take prompt action in the public interest during a fiscal emergency. Considerations of both governmental structure and political accountability justify a two-step contract ratification process for public sector management that focuses increased responsibility in elected legislative bodies. Admittedly, topics in which fundamental policy concerns overshadow employee interests are best determined outside of the bilateral collective bargaining process. Nonetheless, public sector unilateral change during the fiscal crisis exceeded the legitimate bounds of the structural and political process constraints. In the structural context, some of the problem lies in a lack of legislative attention to appropriate roles and procedures. In the political process context, the presence of genuine, although frequently overemphasized, concerns with the fiscal integrity of government is partly responsible for this differential treatment.

More disturbing than these justifications, however, is the recurring theme in cases sanctioning public sector unilateral change that public sector bargaining is an aberration that need be tolerated only when convenient or when its results are not too painful. This view seems to underlie decisions that provide a lesser degree of protection to public employee contracts than to other contracts made by the government. A similar attitude emanates from decisions that attempt to justify unilateral action because of the special relationship between government and its employees or the inability of public employers to represent the public interest in collective negotiations. These perspectives afford both public employees and employers a second-class status and suggest that incantations of public policy rationales too frequently mask a reinvigoration of the sovereignty

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How Compulsory Arbitration Affects Compromise Activity, 17 INDUS. REL. 80, 84 (1978).

296. *See* Dearborn Fire Fighters Union, Local No. 412 v. City of Dearborn, 394 Mich. 229, 241-42, 231 N.W.2d 226, 228 (1975); Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CAL. L. REV. 678, 680-83 (1976).

and "extra loyalty" theories, long viewed as paternalistic and outmoded.

The current trend with respect to unilateral change in the public sector appears to be headed in two opposite directions. Structural constraints on contract enforcement are ebbing as an increasing number of state legislatures seek to eliminate unnecessary conflicts between collective bargaining laws and other statutory provisions. Unilateral change based on political process grounds, however, is on the rise, although this trend is not universal. A definite gulf is emerging between some states, such as New Jersey, in which limitations on public sector bargaining are proliferating, and other states, such as California, which govern public sector unilateral change according to rules resembling those applicable in the private sector. This diversity reflects not only varying degrees of commitment to public sector bargaining, but also economic reality, with the more financially troubled states of the industrial northeast showing a greater receptiveness to unilateral change.

Although the fiscal crisis provided much of the impetus for the expansion of unilateral change on political process grounds, the practical experience of this period undermines much of the theoretical basis for this phenomenon. The taxpayer revolt and the shrinking clout of public sector unions during the fiscal crisis illustrate that definite constraints on bargaining do exist in the public sector. The aggressive response of public sector management and the increasing centralization of authority in more publicly visible officials belie the notion that public employers cannot represent the public interest in collective bargaining. Just as the explosive growth in public sector unionism during the 1960's and early 1970's largely discredited the sovereignty and "extra loyalty" doctrines, the practical experience gained during the painful decade of financial retrenchment now challenges much of the validity of the more modern theoretical constraints on the public sector bargaining process. Public sector bargaining matured during the fiscal crisis into a closer approximation of the private sector model, and public sector unilateral change rules should be reexamined accordingly.