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The Duty of Fair Representation Under the Taylor Law: Supreme Court Development, New York State Adoption and a Call for Independence

Cover Page Footnote
Assistant Professor of Law, Albany Law School, Union University. This article is based on a presentation delivered to the Conference on the Taylor Law: Twenty-Five Years of Public Sector Collective Bargaining, sponsored by the Albany Law Schools Government Law Center, May, 1992. The author is indebted to Karina Thomas whose thorough research and good ear were essential to the conference presentation, the Kathryn L. Clune who skillfully and expeditiously helped draft the background section in preparation for publication, and to Emily Pedro who cheerfully and patiently typed the manuscript. Finally, my wife Karen's encouragement is always critical; and this is for Richie, our middle son, who always helps in his special way.

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The duty of fair representation was born in Supreme Court case law both as an antidote to racial discrimination in employment and as an essential concomitant to the exclusivity of union representation in the collective bargaining process. It later became as much a prescription for deference to union discretion as a source of protection for individual employees against arbitrary union rule. Currently, it is more a minimal safeguard against wholly irrational and invidious union conduct than a significant guarantee of competent, committed and equal representation.

It has been nearly half a century since the Supreme Court first recognized the duty of fair representation in federal labor law. Almost a quarter century thereafter, in 1967, the New York legislature enacted the Taylor Law — officially the Public Employees' Fair Employment Act. In the twenty-five years since then, the federal doctrine of fair representation has been adopted and adapted for application under...
that statute to public sector labor relations in New York. Indeed, a recent amendment to the Taylor Law makes the duty of fair representation explicit. The amendment does not define the duty, however. It can only be determined, if at all, from an examination of the decisional law of New York's Public Employment Relations Board ("PERB") and of the state's courts.

The purpose here is not to provide a definition, but to identify the definitional sources in federal and state case law and to offer a proposal. Part II of this Article will present background history behind both the National Labor Relations Act and the Taylor Law. Part III will outline the Supreme Court's decisions articulating standards for the duty of fair representation. Part IV will trace the incorporation and application of the duty of fair representation in New York decisions resolving disputes under the Taylor Law. The Article will conclude with a prescription for Taylor Law independence from federal labor law, with particular emphasis on standards of fair representa-

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8. PERB is the administrative adjudicatory authority under the Taylor law. See N.Y. CIV. SERV. LAW § 205 (McKinney 1983 & Supp. 1993).
tion based on New York State policies, principles and purposes under-
lying the Taylor Law, rather than on Supreme Court standards based
on corresponding federal considerations in private sector labor.

II. Historical Background of Relevant Statutes

To lend perspective to the examination of the duty of fair represen-
tation, it might be helpful briefly to review the historical background
and public policy considerations underlying the enactment of the Na-
tional Labor Relations Act ("NLRA") and the Taylor Law. Throughout the nineteenth and early decades of the twentieth centu-
ries, industrial strife plagued the United States. In the early 1800's,
coal miner activity was considered a common law conspiracy, punishable by criminal prosecution. The turn of the century,
however, marked the use of the "cease and desist" orders in state courts as a more effective weapon against union activity. Simultaneously, fed-
eral courts provided employers with additional ammunition to fight unionization in the form of the antitrust statutes.

A turning point in the labor movement was the gradual change in
both the judicial and legislative attitudes towards employee rights. Federal legislation especially reflected this growing sensitivity. In 1935, Congress enacted the NLRA, affirmatively declaring that em-
ployees' rights included: "the right to self-organize, to form, join or
assist labor organizations, to bargain collectively through representa-
tives of their choosing, and to engage in concerted activities for the
purpose of collective bargaining or other mutual aid or protection."

10. The general overview in this section relies heavily upon the following sources: RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW (1990); JEROME LEFKOWITZ, PUBLIC SECTOR LABOR AND EMPLOYMENT LAW (1988); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING (1976).
12. The activity, in the form of strikes, picketing and boycotts of employers or their products, was in support of demands for higher wages and improved working conditions. See supra note 10, at 1.
13. See id.
14. See id. Temporary restraining orders were readily obtainable in ex parte proceed-
ings based solely upon the employer's affidavit. Such orders were usually sufficient to destroy a union's strength. Id. at 1-2.
15. The Sherman Act of 1890 and the Clayton Act of 1914 were deemed to provide federal courts with federal question jurisdiction over "combinations" of workers that inter-
terfered with interstate commerce; treble damages were available. See supra note 11.
16. Id.
17. Id. at 3-4.
18. Otherwise known as the Wagner Act of 1935. See supra note 11.
The declared policy of the statute was to prevent the obstruction of interstate commerce through the use of strikes or other concerted activity "by encouraging practices fundamental to the friendly adjustment of industrial disputes rising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." By statutorily protecting the right to engage in concerted activities, Congress strengthened the employees' voice in the collective bargaining process. The NLRA also created the National Labor Relations Board ("NLRB"), an administrative agency charged with oversight and enforcement of the statutory mandates.

Following the enactment of the NLRA and the end of World War II, the United States witnessed an escalation in both union membership and labor disputes. In 1946, more than five million employees struck in 4,630 reported work stoppages, affecting every basic industry. Amidst this wholesale industrial disruption nationwide, unrest in New York State's public sector became problematic. Strikes interrupted vital government services, causing the public to grow intolerant of striking government employees. Congress responded to this public sentiment by explicitly prohibiting strikes by federal employees in the Taft-Hartley Act of 1947. A week-long strike by 2,400 schoolteachers in Buffalo finally triggered the New York State Legislature to enact its own tough anti-strike statute, the Condon-Wadlin Act. In his memorandum of approval for the bill, Governor Dewey wrote: "[e]very liberty enjoyed in this Nation exists because it is protected by Government which functions uninterruptedly. . . . A strike . . .

20. Id. § 151.
21. Private employees have the right to engage in concerted activities, while "[p]rivate employers have countervailing rights: they may lock out their employees or go out of business entirely. . . . [These] opposing economic pressures . . . exert reciprocal pressures upon the parties to modify their position . . . to bring about a private agreement." Lefkowitz, supra note 10, at 49.
24. Id.
25. Id.
26. In early 1946, the New York City Transport Worker's Union threatened to strike if the city proceeded with the sale of power plants that supplied power to the city's rail system. Later that year, Rochester city employees engaged in a strike which resulted in a dismissal of 489 workers. Approximately 30,000 organized workers joined in solidarity to support the discharged workers. The strike resulted in Governor Dewey intervening to settle the dispute. Id. at 2-3.
28. Lefkowitz, supra note 10, at 8; Donovan, supra note 10, at 3.
against government would be successful only if it could produce paralysis of government. This no people can permit and survive.\footnote{29}

The purpose of the Condon-Wadlin Act was to prevent public employee strikes by mandating severe penalties.\footnote{30} Although the Condon-Wadlin Act remained in force for twenty years, its penalties proved difficult to enforce and were rarely invoked.\footnote{31}

In the early 1960's, several attempts were made to amend or repeal the Condon-Wadlin Act.\footnote{32} In 1965, critics of the statute blamed the severity of its penalties as the primary obstacle to the settlement of the welfare workers' strike in New York City, the longest strike in the City's history.\footnote{33} In 1963, Governor Nelson Rockefeller promised to appoint a committee to "make an intensive study and recommendations for improving personnel policies and practices in the public services."\footnote{34} But it took a devastating strike by the New York City Transport Workers Union in 1966\footnote{35} before Governor Rockefeller finally formed the Taylor Committee.\footnote{36}

The Taylor Committee's function was "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees."\footnote{37} It recommended that:

the Condon-Wadlin Act should be repealed and replaced by a statute which . . . would (a) grant to public employees the right of organization and representation, (b) empower the state, local governments and other political subdivisions to recognize, negotiate

\footnote{29} Donovan, supra note 10, at 5 (citations omitted).

\footnote{30} The penalties included: termination of employment or reinstatement upon the condition that the employee not receive any increase in compensation for three years and remain on probation for five years. Id. at 6.

\footnote{31} Lefkowitz, supra note 10, at 8-9; Donovan, supra note 10, at 5-6.

\footnote{32} A temporary amendment was enacted in 1963, reducing the penalties to a more realistic level. Lefkowitz, supra note 10, at 9; Donovan, supra note 10, at 6-8.

\footnote{33} The entire welfare program in New York City was affected for several weeks. Lefkowitz, supra note 10, at 10.

\footnote{34} Donovan, supra note 10, at 11 (citations omitted).

\footnote{35} The Transport Workers commenced the strike on January 1st, paralyzing public transportation in the city for 12 days, at a loss of approximately $100 million a day. Lefkowitz, supra note 10, at 11; Donovan, supra note 10, at 18-20. For more information regarding the strike, see Weinstein v. New York City Transit Auth., 267 N.Y.S.2d 111 (Sup. Ct. 1966).

\footnote{36} Governor Rockefeller's committee consisted of five collective bargaining experts: George W. Taylor of the University of Pennsylvania, Chair; David L. Cole of Patterson, New Jersey; John T. Dunlop of Harvard; E. Wight Bakke of Yale; and Frederick H. Harbison of Princeton. Lefkowitz, supra note 10, at 11; Donovan, supra note 10, at 24-25.

\footnote{37} Donovan, supra note 10, at 23 (citing New York State Governor's Committee on Public Employee Relations, Final Report 9 (1966)).
with and enter into written agreements with employee organizations representing public employees, (c) create a Public Employment Relations Board to assist in resolving disputes between public employees and public employers and (d) continue the prohibition against strikes by public employees and provide remedies for violations of such prohibition.\(^8\)

As the legislative history makes clear, the Taylor Law was intended to promote "harmonious and cooperative relationships between government and its employees"\(^3\) while at the same time preventing interruption of public services by prohibiting employee strikes. Moreover, the Taylor Committee recognized that a necessary concomitant to protecting the public from public service strikes\(^4\) was to insure "other ways and means for dealing with claims of public employees for equitable treatment."\(^4\) In short, the Committee saw fundamental distinctions between private and public employment\(^4\) that necessitated a wholly independent statutory scheme informed by such distinctions.\(^4\)

These "fundamental distinctions" between private and public employment have been variously identified.\(^4\) They can be summarized briefly. First, unlike private sector employment, where the terms and conditions of employment are influenced by market forces, "terms and conditions of [public] employment are decided through a process responsive to majority will."\(^4\) Government workers are then vulnerable to the voting public whose economic interests, "both as taxpayers and as users of public services, run directly counter to the economic interests of public employees."\(^4\) For these and like reasons, it is especially critical to public employees that there be some mechanism to ensure that their interests receive adequate consideration in the political process.\(^4\)

Second, the legal and practical restrictions on the authority of government agencies to negotiate with their employees similarly distinguish public employment, especially at the collective bargaining

\(^8\) Id.; see generally Lefkowitz, supra note 10, at 39.
\(^3\) Report from the Taylor Committee to Governor Rockefeller, reprinted in Lefkowitz, supra note 10, at 45.
\(^4\) Id.
\(^4\) See generally Lefkowitz, supra note 10, at 43-85.
\(^4\) Id.
\(^4\) Id.
\(^4\) Id.
\(^4\) Id.
\(^4\) Id.
For example, public employees, like other interest groups in the political process, are competing for funds within limited budgets which the employing agencies cannot exceed.\textsuperscript{49} Hence, the public employees’ budget share depends upon their ability to bargain in competition with the other interest groups.\textsuperscript{50} This competition in the political arena, unknown or only indirectly present in the private sector, is a fact of public sector labor life. It places unique difficulties upon the government workers’ bargaining representative in pressing for an optimum agreement. Such peculiarities of public sector collective bargaining surely ought not be disregarded when courts interpret the Taylor Law.

Finally, and perhaps most crucial, public employees are barred from engaging in strikes.\textsuperscript{51} To be sure, this significantly reduces bargaining power. The Taylor Committee noted that in the private sector, the employer and the employee exert “reciprocal pressures”\textsuperscript{52} to reach a modified collective bargaining agreement. Because of the absence of similar pressures in the public sector, the Committee concluded that “effective collective negotiation in the public service . . . cannot be achieved by transferring collective bargaining as practiced in the private sector into the governmental sector. \emph{New procedures have to be created.”}\textsuperscript{53}

Fully cognizant of the significance of the foregoing, the Taylor Committee and, ultimately, the New York State Legislature, attempted to fashion a statutory scheme that reflected the unique features of public sector labor. As explicitly provided in the Taylor Law,
no federal or state law "applicable wholly or in part to private employment"54 should have binding or controlling precedential value.55

III. Supreme Court Development of the Duty of Fair Representation

A. Pre-Vaca Case Law

In the seminal case of Steele v. Louisville & Nashville R.R. Co.,56 the Supreme Court recognized a duty on the part of exclusive collective bargaining agents to act on behalf of all the employees in the bargaining unit, nonmembers as well as members, blacks as well as whites. In Steele, the bargaining representative of a unit of railroad firemen excluded blacks from its membership. The union negotiated an agreement with several railroads that would ultimately eliminate all blacks from railroad service. The Court upheld the complaint of the black firemen alleging breach of the union's duty to exercise its authority as exclusive representative without hostile discrimination.57

Inferring such an equal or fair representation duty from the Railway Labor Act,58 under which the case arose, the Court said:

[T]he organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. . . . We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. . . . [T]he aim of Congress [was] to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.59

The Court elaborated that the exclusive representative is not barred from making contracts that treat employees differently on the basis of relevant considerations, such as seniority, competence and skill. But discrimination not based on such relevant considerations are forbidden, the Court added, and "discriminations based on race alone are obviously irrelevant and invidious."60 Explaining that fair representa-

55. Id.
56. 323 U.S. 192 (1944).
57. Id. at 203.
59. Steele, 323 U.S. at 202-03.
60. Id. at 203.
tion is an essential condition of exclusive representation, the Court summed up the rule as follows:

So long as a labor union assumes to act as the statutory representative of a craft, it can not rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft... without hostile discrimination, fairly, impartially, and in good faith.61

In Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,62 a companion case to Steele also involving the Railway Labor Act and racial discrimination, the Court declared the union duty of fair representation to be "a federal right implied from the statute and the policy which it has adopted."63 In Wallace Corp. v. NLRB,64 decided the same day as Steele and Tunstall, the Court extended the duty of fair representation — at least implicitly — to the NLRA in a case not involving racial discrimination. In Wallace, the Court upheld an NLRB order nullifying a union shop contract that resulted in the discharge of employees who had been members of a rival union. The Court, applying the reasoning of Steele, ruled that the exclusive bargaining representative under the NLRA acts on behalf of all the employees, not just its members, and thus is "charged with the responsibility of representing their interests fairly and impartially."65

Nine years later, in Ford Motor Co. v. Huffman,66 the Court made explicit what was implied in Wallace. The duty of fair representation, as set forth in Steele and Tunstall, is indeed essential to the NLRA's scheme of majority rule through an exclusive bargaining agent, just as it is to the comparable scheme under the Railway Labor Act. "The statutory obligation [of bargaining representatives] to represent all members of an appropriate unit," the Court stated, "requires them to make an honest effort to serve the interests of all of those members, without hostility to any."67

In Huffman, the union entered into an agreement providing seniority credit for pre-employment military service — a benefit not covered by the federal statute already requiring seniority credit for military service that interrupted employment. A group of unfavorably affected employees, nonveterans as well as veterans with post-employment mil-

61. Id. at 204 (emphasis added).
63. Id. at 213.
64. 323 U.S. 248 (1944).
65. Wallace, 323 U.S. at 255 (emphasis added).
67. Id. at 337.
itary service, challenged the contractual provision as discriminatory and hostile to their seniority interests. The Court, insisting that the union "is responsible to, and owes complete loyalty to, the interests of all whom it represents," 68 nevertheless upheld the seniority provision as wholly consistent with the public policy and fairness of allowing credit for time spent in the armed forces. 69 Then, explaining that not all differential treatment of employees is impermissible, the Court elaborated on the parameters of the duty of fair representation:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 70

Four years after Huffman, in the 1957 case of Conley v. Gibson, 71 the Supreme Court extended the duty of fair representation beyond the negotiation stages of collective bargaining. The Court sustained the cause of action of wrongfully discharged black railroad employees who complained that the union had refused to process their grievances on account of race. Holding that a bargaining representative's responsibility applies to daily contract adjustments, problem solving and worker-rights protection, as well as to contract negotiation, the Court explained the continuing nature of the duty of fair representation:

The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end . . . with the making of an agreement between union and employer. Collective bargaining is a continuous process. . . . A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit. 72

In its 1964 decision in Humphrey v. Moore, 73 the Court returned to issues of seniority and resulting differential treatment, and upheld the

68. Id. at 338.
69. Id. at 340.
70. Id. at 338 (emphasis added).
72. Id. at 46 (citations omitted).
73. 375 U.S. 335 (1964).
union's action based on what the Court deemed to be "wholly relevant considerations, not upon capricious or arbitrary factors."74 In Humphrey, two trucking companies whose employees were represented by the same union were merged. The union agreed to dovetail the seniority lists of the two companies; consequently, the employees of the younger company lost seniority. The Supreme Court, relying on its two prior duty of fair representation cases under the NLRA, Wallace and Huffman, found that the union acted "honestly, in good faith and without hostility or arbitrary discrimination," and thus deferred to the union's "wide range of reasonableness . . . in the exercise of its discretion."75

Moreover, the Court rejected the argument that the duty of fair representation was incompatible with representing employees having somewhat conflicting interests:

[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.76

Three years later, in Vaca v. Sipes,77 the Court articulated the now-standard three-prong formulation: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."78 In Vaca, an employee filed a grievance against the employer after being discharged for poor health in alleged violation of the collective bargaining agreement. The union, however, chose not to take the grievance to arbitration, because it failed to obtain medical evidence favorable to the employee. The Supreme Court, finding no evidence of any personal hostility toward the employee, nor evidence of anything other than good faith on the part of the union, held that the duty of fair representation was not breached regardless of the merits of the employee's grievance.79 As the Court explained:

[I]f a union's decision that a particular grievance lacked sufficient

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74. Id. at 350.
75. Id. (emphasis added).
76. Id. at 349-50.
77. 386 U.S. 171 (1967).
78. Id. at 190 (emphasis added).
79. Id. at 194-95.
merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.  

Thus, the Court concluded, an individual employee does not have an absolute right to have his grievance pursued by the union, as long as the union has made its decision "in good faith and in a non-arbitrary manner." Nevertheless, the Court did reaffirm the fundamental purpose of the duty of fair representation to serve as a "bulwark to prevent arbitrary union conduct." Indeed, the Court perhaps went further in reinforcing that "bulwark" than it had before. It explicitly "accept[ed] the proposition" not only that a "union may not arbitrarily ignore a meritorious grievance," but also that a union violates the duty of fair representation if it processes a grievance "in perfunctory fashion."  

In fact, the Court volunteered that the union in Vaca "might well have breached its duty . . . had it processed the grievance in a perfunctory manner." In sum, while the Court made clear that bargaining representatives must be accorded a wide range of discretion, and that the duty of fair representation precludes only arbitrary, discriminatory and bad faith union conduct, the Court evidently approved the notion that a mere "perfunctory" exercise of the union's discretion would constitute a violation of that standard.

B. Post-Vaca Case Law

Having thus seemingly lowered the threshold for a duty of fair representation violation, the Court appeared to raise it again, and substantially so, a few years later in its 1971 decision in Motor Coach Employees v. Lockridge. There the Court, in the course of deciding that punitive damages were unavailable for a breach of the duty of fair representation, held that "[t]here must be 'substantial evidence of fraud, deceitful action or dishonest conduct'" to prove such a
breach.

The *Lockridge* standard has, at least impliedly, been rescinded by the Court in subsequent opinions. In *Hines v. Anchor Motor Freight, Inc.*, the *Vaca* standard was revived, and in fact, the Court applied the pro-employee “perfunctory” test. In the course of ruling that an arbitration award can be vacated if a breach of the duty of fair representation is shown, the Court strongly suggested that a “knowingly” or even “negligently” inadequate investigation of an employee’s grievance would constitute impermissible union conduct. Neither *Lockridge* nor its formulation were mentioned in *Hines*. Likewise, *Lockridge* was ignored in the Court’s subsequent discussions of the duty of fair representation criteria. Moreover, the “perfunctory” test — absent any indication of *Lockridge*’s required fraud, deceit or dishonesty — provided the sole basis in several later cases for sustaining charges of breach of the duty of fair representation.

But the precise contours of the “perfunctory” test were anything but certain. If fraudulent, deceitful or dishonest union conduct was unnecessary to establish a charge of unfair representation, was simple negligence sufficient? In its 1990 decision in *United Steelworkers of America v. Rawson*, the Supreme Court answered with a resolute “no.”

In *Rawson*, the union was sued for breach of the duty of fair representation for its allegedly negligent performance of mine-safety activities undertaken pursuant to the collective bargaining agreement. The Court, restating the *Vaca* requirement of arbitrary, discriminatory or bad faith conduct, held that “mere negligence, even in the enforcement of a collective-bargaining agreement, [does] not state a claim for breach of the duty of fair representation. . .”

The Court did not attempt to apply the “perfunctory” test — previously applied to processing employee grievances — to the activities at issue in *Rawson*. In fact, the notion that the union might have “perfunctorily” attended to mine-safety was, apparently, entirely irrelevant. According to the Court, absent some specific contractually-

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89. *Id.* at 568-69.
90. *Id.* at 569-71.
91. *Id.* at 569.
95. *Id.* at 372-73.
created obligation, duty of care is simply no part of the union's duty of fair representation. The Court explained:

The doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees.96

Finally, in the 1991 decision in Airline Pilots Ass'n v. O'Neill,97 a unanimous Supreme Court effectively raised even higher the threshold for finding unfair representation. While the Court in Rawson rejected negligence as a basis for a duty of fair representation violation, in O'Neill it reaffirmed Vaca and rejected anything short of wholly irrational or invidiously discriminatory conduct.98

In O'Neill, a bitter dispute between an airline and the union representing its pilots was resolved when the union agreed, inter alia, to end the strike, to settle all pending litigation and to accept a reallocation of positions between working pilots and returning strikers. Former striking pilots charged the union with unfair representation for negotiating an agreement that, in their view, arbitrarily discriminated against them. In denying the pilots' claim, the Court, at the outset, held that the "rule announced in Vaca . . . applies to all union activity, including contract negotiation."99 But, under that rule — prohibiting arbitrary, discriminatory and bad faith conduct — the union did not breach its duty of fair representation.

The Court of Appeals for the Fifth Circuit had refused to dismiss the duty of fair representation claim, holding that the union's conduct might well have been "arbitrary." The court relied on the fact that the negotiated agreement left the striking pilots in a worse position than if they had unconditionally surrendered and unilaterally ended the strike — at least then, said the appeals court, the strikers would have been entitled to complete priority on all the positions in question.100 But the Supreme Court rejected the Fifth Circuit's "refinement of the arbitrariness component" because it invited too much judicial review:

96. Id. at 374 (citations omitted).
98. Id. at 1136-37.
99. Id. at 1130 (emphasis added) (citations omitted).
100. Id. at 1132.
Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.\textsuperscript{101}

Hence, continued the Court, the bargaining agreement negotiated by the union could amount to a duty of fair representation violation only if "so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'"\textsuperscript{102} Even a bad settlement — one worse than a unilateral termination of the strike — would not meet that test, the Court stated.\textsuperscript{103} The "strong policy favoring the peaceful settlement of labor disputes" must be considered, explained the Court, as well as the "facts and the legal climate" confronting the negotiators when an agreement is reached.\textsuperscript{104} The settlement reached by the union in \textit{O'Neill} assured prompt access to at least some of the pilot positions, and the costs and risks of litigation were avoided.\textsuperscript{105} Nor did the agreed-upon reallocation of positions constitute impermissible discrimination against the striking pilots. The duty of fair representation, the Court concluded, only bars "invidious 'discrimination,'" not a "rational compromise."\textsuperscript{106}

Though the Court in \textit{O'Neill} did not return to the \textit{Lockridge} standard requiring fraud, deceit or dishonesty, it nonetheless did — even more so than in \textit{Rawson} — significantly increase the difficulty of proving unfair representation. It thereby effectively diluted the duty owed to employees by their exclusive agents. While ostensibly applying the now-quarter century old \textit{Vaca} standard, the Court in fact did some not insubstantial recasting of the duty of fair representation. Formerly, an exclusive bargaining representative was responsible to avoid all arbitrary, discriminatory and bad faith conduct, even "perfunctory" conduct.\textsuperscript{107} Under the Court's most recent decisions, especially \textit{O'Neill}, that responsibility has been reduced to no more than an obligation to avoid wholly irrational and invidious behavior. That standard is surely a far cry from \textit{Huffman}'s requirement of "complete

\begin{itemize}
\item \textsuperscript{101} \textit{Id.} at 1135 (emphasis added).
\item \textsuperscript{102} \textit{O'Neill}, 111 S. Ct. at 1136 (emphasis added) (citation omitted).
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.} at 1137.
\item \textsuperscript{106} \textit{Id.} (emphasis added).
\item \textsuperscript{107} \textit{Vaca} v. \textit{Sipes}, 386 U.S. 171, 190-91 (1967).
\end{itemize}
good faith,"\textsuperscript{108} and it hardly resembles the "bulwark" against unfair union behavior that the duty of fair representation was intended to be.\textsuperscript{109}

IV. New York's Development of the Duty of Fair Representation Under the Taylor Law

Whatever the Supreme Court's standard currently might be, the basic concept of the duty of fair representation that developed in federal case law has become an integral part of New York's Taylor Law. As a matter of state case law — and since 1990, a matter of state legislative mandate\textsuperscript{110} — public employee unions covered by the Taylor Law are obligated to unit employees in much the same way as are private employee unions under federal labor law.

The precise contours of that obligation under the Taylor Law are not spelled out in the case law and are not even intimated in the new statutory provision. Though the duty of fair representation is a settled part of the Taylor Law, it is not entirely clear how closely that duty conforms to the established federal standards. Nor is it clear whether the duty of fair representation under the Taylor Law has a life of its own or simply follows wherever the Supreme Court leads. What is clear, however, is that Taylor Law duty of fair representation was derived directly from Supreme Court decisions, and little consideration has been given by the New York courts to possible differences.

PERB, the administrative adjudicatory authority under New York's statute,\textsuperscript{111} has over the last twenty-five years articulated criteria for determining whether public employees have been fairly represented for purposes of the Taylor Law.\textsuperscript{112} The state courts, however, have not been receptive. PERB's criteria have not been definitively rejected by the Court of Appeals, New York's highest court.\textsuperscript{113} But neither have they — nor any other criteria providing meaningful employee protection — been endorsed. Hence, while the existence of a duty of fair representation under the Taylor Law is now beyond dispute, review of the administrative and judicial decisions reveals that —except perhaps in some PERB adjudications — the contours and substance of that duty under the state statute remain ill-defined.

\textsuperscript{108} Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).
\textsuperscript{109} \textit{Vaca}, 386 U.S. at 182.
\textsuperscript{112} See infra notes 114-28 and accompanying text.
\textsuperscript{113} See infra notes 147-53 and accompanying text.
A. Administrative Adjudications

Within a few years of the Taylor Law's enactment in 1967, the duty of fair representation was presumed in administrative adjudications. In 1971, in *In re United Federation of Teachers, Local 2,* the Vaca standard was applied to dismiss an improper practice charge claiming that the union wrongfully refused to process an employee grievance. The union had satisfied its obligation to the employee, the hearing officer held, when it "considered the merits" of the grievance and "made an informed and not unreasonable judgment not to process it."115

A few years later, in *In re Professional Staff Congress of CUNY,* the hearing officer noted that PERB had not yet "had occasion to define the requirements (or, indeed, even the existence) of the duty of 'fair representation.'"117 Without citation to any state or federal decisional law, the hearing officer noted that a breach of that duty would seem to require "discrimination based on lack of union membership or 'arbitrary or invidious treatment' of a specific group of members."118 There being no evidence of such union misconduct, the improper practice charge was dismissed.

That same year, 1974, in *In re Plainview-Old Bethpage Central School District,* PERB explicitly recognized the duty of fair representation under the Taylor Law. Finding no factual merit to a charge that certain employees received lower raises because of their nonmembership in the union, the Board proceeded to add that:

> the collective negotiating representative of public employees has a duty to represent all of the employees in the negotiating unit fairly and impartially. It would be a breach of its duty of fair representation if an employee organization were to discriminate against employees because such employees were not members. . . . In the instant case, [the wage agreement was] not the result of some invidious motive on the part of [the union] or the employer. Rather, as it appears from the evidence in the record, it was a result achieved in good faith negotiations.120

In its 1977 decision in *In re Brighton Transportation Ass'n,* PERB held that the union's "casual" decision not to process an em-

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115. *Id.* at 4653.
117. *Id.* at 4592.
118. *Id.*
120. *Id.* at 3096-97.
ployee grievance did not amount to a breach of the duty of fair representation. Applying the language it had used three years earlier in Plainview-Old Bethpage School District, PERB explained that the union was obligated to administer grievances "fairly, impartially and in good faith." But now, in dismissing the employee's charge, PERB relied on the lack of proof that the union's conduct was "improperly motivated or so negligent or irresponsible" as to constitute a violation of the duty of fair representation.

Several months later, in In re Nassau Educational Chapter, PERB applied the criteria it had relied upon in Brighton Transportation Ass'n to uphold a charge of unfair representation. Elaborating on those criteria, PERB explained: "the obligation [of fair representation] is violated when an employee organization, either by reason of improper motives or of grossly negligent or irresponsible conduct, has failed to consider or evaluate a grievance complaint presented to it."

Having thus defined a duty of fair representation violation, PERB had little difficulty concluding that one had been committed where the union failed to process, or even evaluate, a wrongful discharge grievance for thirteen months, during which time the union misled the employee into believing that the grievance was being attended. PERB found that the "utter lack of serious attention and response" to the grievance for such an extended period "manifested grossly irresponsible conduct" in violation of the duty of fair representation.

In later cases, the Nassau Educational Chapter test was reaffirmed repeatedly; it soon became settled PERB doctrine.

B. Judicial Decisions

In 1976, two years after PERB explicitly recognized the duty of fair representation under the Taylor Law in Plainview-Old Bethpage School District, a state appellate court, in Jackson v. Regional

122. See supra notes 119-20 and accompanying text.
123. 10 P.E.R.B. at 3154 (emphasis added).
124. Id. at 3155 (emphasis added).
126. Id. at 3020 (emphasis added).
127. Id.
129. See supra notes 119-20 and accompanying text.
Transit Service,\textsuperscript{130} held that the Supreme Court's \textit{Vaca} standard was fully applicable to public employee unions under the statute. While acknowledging that federal decisions governing private employment do not control the state's public sector labor law, the Fourth Department ruled that "the public employee union has the same duty of fair representation as the private employee union."\textsuperscript{131} To afford the union "unfettered discretion" and thereby to leave employees without some protection against "\textit{wrongful or perfunctory union conduct}," the court explained, would be "contrary to the public policy relating to public as well as private sectors of employment."\textsuperscript{132} Hence, the court in \textit{Jackson} found that the union had violated the duty of fair representation by its failure, without reason, to process an employee's grievance in the manner required by the collective bargaining agreement.

The \textit{Jackson} decision seemed to equate mere negligence in processing an employee grievance with a violation of the duty of fair representation.\textsuperscript{133} Though that proposition has since been rejected under federal law,\textsuperscript{134} and arguably under state law as well,\textsuperscript{135} \textit{Jackson}'s unequivocal incorporation of the duty of fair representation into the Taylor Law was never seriously questioned by the courts of New York thereafter.\textsuperscript{136}

Nevertheless, in the 1981 decision in \textit{Albino v. City of New York},\textsuperscript{137} it could still be said — as the Second Department did say in that case — that the application of the duty of fair representation to the fourteen year old Taylor Law had not yet been definitively decided by the Court of Appeals. Lower tribunals throughout the state could, therefore, only assume that it applied.\textsuperscript{138} Three years later, the decision of New York's highest court in \textit{Civil Service Bar Ass'n v. City of New York}\textsuperscript{139} seemed to settle the issue.

In \textit{Civil Service Bar Ass'n}, the union agreed to a negotiated settlement that was less favorable to some employees than the arbitration award the union had originally obtained in the grievance process. A

\textsuperscript{131} \textit{Id.} at 443.
\textsuperscript{132} \textit{Id.} (emphasis added).
\textsuperscript{133} \textit{Id.} at 442.
\textsuperscript{134} \textit{See Rawson}, 495 U.S. at 372-73; \textit{see supra} notes 94-98 and accompanying text.
\textsuperscript{135} \textit{See infra} notes 147-53 and accompanying text.
\textsuperscript{138} \textit{Id.} at 592.
\textsuperscript{139} 474 N.E.2d 587 (N.Y. 1984).
group of employees sought vacatur of the settlement on the ground that the union had not fairly represented their interests. The Court of Appeals, rejecting the claim of unfair representation, left little doubt that the duty of fair representation applied to the Taylor Law, and that the *Vaca* standards governed. The first sentence of the court's decision was direct: "[a] union does not violate its duty of fair representation when it settles an appeal from an order confirming an arbitration award ... in the absence of arbitrary, discriminatory or bad faith conduct by the union."140

Reviewing the development of the duty of fair representation in the United States Supreme Court, the New York Court of Appeals repeated the *Vaca* standard and noted that "the courts in New York have recognized a similar duty of fair representation on the part of public sector unions predicated on their role as exclusive bargaining representatives."141

Without adding that it was now recognizing that duty as well, the Court of Appeals nevertheless appeared clearly to be doing so. "The union did not violate its duty of fair representation in the circumstances of this case," the court concluded, not because there was no such duty under the Taylor Law, but because the union had acted honestly and in good faith in "balancing the divergent interests of its membership."142 Indeed, the Court of Appeals has since cited *Civil Service Bar Ass'n* for the proposition that the Taylor Law scheme of exclusive bargaining agents — like the corresponding scheme of the NLRA — necessarily implies a duty of fair representation.143 Moreover, since that decision, the existence of the duty of fair representation has been treated by the Court of Appeals as settled.144

In the eight years that separated *Jackson* and *Civil Service Bar Ass'n*, PERB had been applying the duty of fair representation as an essential component of the Taylor Law scheme.145 It was during that time, in *Brighton Transportation Ass'n* and *Nassau Educational Chapter*, that PERB had developed a standard which, though akin to that set forth in *Vaca*, was articulated in meaningfully different terms. Lit-

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140. Id. at 590 (emphasis added).
141. Id. at 591 (citations omitted).
142. Id. at 591-92 (emphasis added).
144. See, e.g., *Civil Service Employees Ass'n v. PERB* (Diaz), 533 N.E.2d 1051 (N.Y. 1988) [hereinafter Diaz]; *Smith v. Sipe*, 493 N.E.2d 237 (N.Y. 1986). In any event, any lingering doubts were eliminated with the enactment of the 1990 amendment to the Taylor Law. See supra notes 7, 110 and accompanying text.
145. See supra notes 121-28 and accompanying text.
tle definitive guidance, however, has yet to issue from the state's courts. The three-prong Vaca standard applied in Civil Service Bar Ass'n has been restated verbatim in many recent Appellate Division decisions, but there has been little elaboration of its meaning in those decisions, and none at all in the decisions of the Court of Appeals.

Two recent cases did present New York's highest court with an opportunity to elucidate the contours of the duty of fair representation under the Taylor Law. But in Smith v. Sipe, the court summarily adopted the dissenting opinion of the Appellate Division, and left unspecified what alternative line of reasoning in that opinion it agreed with. In Civil Service Employees Ass'n v. PERB (Diaz), the court avoided a pressing issue passed upon below by both PERB and the Appellate Division, by refusing to address the issue on a procedural technicality.

In Smith, an employee lost his position when he followed the erroneous advice of the union president. The significant issue implicated was whether mere negligence could constitute a violation of the duty of fair representation under the Taylor Law. But the divided Third Department panel decided the case without answering that question. In upholding the employee's complaint, the court construed the allegations as claiming more than mere negligence. The dissent did not answer the question either — at least not unequivocally. Instead, it concluded that the particular negligence involved in the case did not violate the duty of fair representation, even though "negligent conduct" of a "more significant" nature might.

The Court of Appeals reversed the Appellate Division's finding of a breach of the duty of fair representation by simply adopting the "reasons stated" in the dissent. But the "reasons stated" in the dissent were fairly subject to different interpretations about the penultimate issue of mere negligence. All that can be derived from the dissent and its adoption by the Court of Appeals is that, under the Taylor Law, negligent conduct does not necessarily constitute a duty of fair representation violation — but it might.

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149. Smith, 487 N.Y.S.2d at 155.
150. Id. at 156.
151. Smith, 493 N.E.2d at 238.
In its 1988 decision in *Diaz*, the Court of Appeals declined to address the issue of whether a union’s gross negligence can violate the duty of fair representation. According to the court, the precise issue resolved by PERB and the Appellate Division was not specifically raised by the employee before the hearing officer, and therefore, it was waived.152

The grievance filed by the employee in *Diaz* had been dismissed because of a series of mistakes and omissions by the union’s grievance representative. PERB found that the union was grossly negligent in training the representative and, thus, had breached its duty of fair representation. The Third Department annulled PERB’s determination. It rejected PERB’s rule that a breach of the duty of fair representation may be based on “irresponsible or grossly negligent” union conduct. “There must be a showing,” the Appellate Division held, that the union’s activity or omission “was deliberately invidious, arbitrary or founded in bad faith.”153 The Court of Appeals’ avoidance of that issue — addressed both by PERB and the Appellate Division — leaves unsettled the validity of PERB’s *Nassau Educational Chapter* standard, which held that grossly negligent union conduct is sufficient under the Taylor Law to support a charge of unfair representation.

C. Summary

Fifteen years ago, Benjamin Aaron labelled Supreme Court criteria for breach of the duty of fair representation “impenetrable ambiguity.”154 Today, there is little to penetrate. Recent Supreme Court decisions have not eliminated all confusion, but they appear to have eliminated most of the substance of the duty of fair representation. Only the most egregious union conduct — wholly irrational or invidiously discriminatory — is prohibited.

Previously deemed an essential guarantee to workers that they would be represented “fairly,” viz. “impartially,”155 in “complete good faith,”156 and not “in perfunctory fashion,”157 the duty of fair representation has been transformed into a mandate that courts be “highly deferential”158 to bargaining agents — the very ones whose conduct the duty was intended to regulate. While the Supreme Court

152. *Diaz*, 533 N.E.2d at 1052.
155. *Steele*, 323 U.S. at 204.
156. *Huffman*, 345 U.S. at 338.
158. *O'Neill*, 111 S. Ct. at 1135.
is ostensibly still applying the *Vaca* standard, it can hardly be disputed that the Court's recent interpretation and application of that standard has diluted employee protection from arbitrary treatment.

The status of the duty of fair representation under the Taylor Law is not much better. The Court of Appeals has said very little, except that the duty exists and that it is "similar" to what is spelled out in *Vaca*. Without meaningful guidance from above, New York's lower courts have, not surprisingly, been reduced to reflexive recitation of *Vaca*'s three prongs. Only PERB seems willing and able to take the duty of fair representation seriously. Only PERB, with its "improperly motivated" or "grossly negligent or irresponsible" standard, has given the duty of fair representation shape and force under the Taylor Law. And yet, as in *Diaz*, its efforts have been frustrated or, as in most judicial opinions on the subject, simply been ignored.

**IV. Conclusion: A Call For Independence**

This twenty-fifth anniversary of the Taylor Law seems a most appropriate time for an *independent* reconsideration of the duty of fair representation — independent of Supreme Court analysis and more attuned to the history, policies, and purposes of public sector labor relations in New York. Indeed, in *CSEA v. Helsby*, its first decision on the Taylor Law, the Court of Appeals stressed that the new statute could not be analogized too closely to federal law governing private sector labor. And the court has, even in recent decisions, continued to insist that the Taylor Law and the NLRA reflect some fundamentally different concerns which must be considered when construing the state's statute.

The Taylor Law itself explicitly provides that "the fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent." Moreover, the Taylor Law explicitly reflects New York State's policies "to promote harmonious and cooperative relationships between government and its employees and to protect the public by

159. *Civil Service Bar Ass'n*, 474 N.E.2d at 590-91.
160. See supra notes 121-28 and accompanying text.
162. Id. at 482-83.
assuring, at all times, the orderly and uninterrupted operations and functions of government."165

The Taylor Law likewise reflects New York’s history of public sector labor strife and the disruption of vital government services that compelled the statute’s adoption.166 Additionally, for twenty-five years now, a body of decisional and administrative law construing and applying the Taylor Law has developed. Surely, that body of law should be at least as influential in resolving issues under the Taylor Law as Supreme Court decisions interpreting entirely different statutes.

Finally, the duty of fair representation, only implied in the federal private sector labor statutes, is now explicit in the Taylor Law. The 1990 amendment to the state statute makes a breach of the duty of fair representation one of three "improper employee organization practices."167 The existence of the duty of fair representation under the Taylor Law no longer depends upon inference or theoretical construct. It is an express, integral part of the statutory scheme. This codification of the duty of fair representation would certainly suggest that it be given full — and not begrudging — effect.

These foregoing factors, among others, would seem to dictate independent interpretation and application of the Taylor Law. At the least, these factors would seem clearly to demonstrate that slavish adoption of Supreme Court standards is inappropriate. There is, of course, a ready analogue to this recommended independence. It is state constitutional law. New York, and specifically the Court of Appeals, has a long and proud tradition of protecting individual freedoms as a matter of state law, and thus, independent of Supreme Court interpretation of the federal constitution.168 Safeguarding rights and liberties under the state constitution insures that the state’s fundamental law reflects the state’s fundamental values and principles. New York’s courts and administrative agencies should rely on such factors as the text and intent of specific provisions of the New York Constitution, on state history and traditions, on the attitudes,
interests, concerns and character of the state's people, and on state statutory and decisional law as well as other evidence of strong state policy. The lowest national common denominator applied by the Supreme Court must not be the final authority.

Nor should the Supreme Court's drastically diluted duty of fair representation under the NLRA be deemed authoritative for New York's Taylor Law. Rather, standards developed to resolve public sector labor disputes in the state, such as those forged by PERB in a quarter-century of decision-making, are more appropriate. Surely, they are more reflective of New York's policies, principles and experience in public, as opposed to private, sector labor.

PERB's *Nassau Educational Chapter* test, which states that "improperly motivated" or "grossly negligent or irresponsible" conduct constitutes unfair representation,\(^{169}\) provides some genuine guarantee to employees of "good faith"\(^ {170}\) and "serious attention"\(^ {171}\) by their exclusive bargaining representatives. That test contrasts favorably with the mere shell of a duty of fair representation, the "wholly irrational" or "invidious" criteria, currently applied by the Supreme Court under federal law.\(^ {172}\) Moreover, PERB is the agency specifically charged with implementing and applying the Taylor Law in adjudicating public employee claims.\(^ {173}\) Consequently, PERB's test is born of experience and familiarity with, and wisdom and insight into, New York's law and New York's problems and particular circumstances.

PERB's test is also faithful to the Taylor Law's express command that federal private sector labor decisions and law shall not be regarded as binding,\(^ {174}\) and that the "fundamental distinctions between private and public employment" be recognized.\(^ {175}\) Most critical among these distinctions are the vulnerability of public employees to the political process in setting terms and conditions of employment, and the prohibition against public employee strikes.\(^ {176}\) These factors make good faith, responsible, and competent representation of public employees by their unions imperative under the Taylor Law. A meaningful guarantee of fair representation, conscientiously enforced

\(^{169}\) See *supra* notes 125-28 and accompanying text.  
\(^{170}\) See *supra* note 123 and accompanying text.  
\(^{171}\) See *supra* note 127 and accompanying text.  
\(^{172}\) See *supra* notes 102-06 and accompanying text.  
\(^{174}\) See *supra* notes 54-55, 164 and accompanying text.  
\(^{175}\) N.Y. Civ. Serv. Law § 209-a(4) (McKinney 1983 & Supp. 1993); see also *supra* notes 39-53 and accompanying text.  
\(^{176}\) See *supra* notes 45-47, 51 and accompanying text.
through the application of firm standards, is essential to ensure that
the interests of public employees "receive adequate consideration."\footnote{177}

Finally, unlike the rather meager standards set by the Supreme
Court, the duty of fair representation criteria developed by PERB are
responsive to the very concerns that led to the Taylor Law's adoption
in New York. As recently recalled by the Court of Appeals, wide-
spread strikes prior to the Taylor Law's enactment had been fueled by
"a feeling of futility on the part of public employees;"\footnote{178} a primary
purpose of New York's statute was, consequently, "to secure fair
treatment" for government workers.\footnote{179} PERB's \textit{Nassau Educational
Chapter} test insures a real measure of "fair treatment" by putting
some teeth into the duty of fair representation under the Taylor Law.
It also frees public sector labor relations in New York from the ebb
and flow of the federal standards, which have seemed more dependent
upon changing Supreme Court attitudes toward the duty of fair repre-
sentation than upon the fundamental protective purpose of the duty
of fair representation to be a "bulwark" for employees.\footnote{180}

Just as New York has been independent in safeguarding individual
rights and liberties as a matter of state constitutional dictate,\footnoteref{181}
so too should New York be independent in safeguarding the rights of its
public employees under the Taylor Law — including the right to fair
representation by exclusive bargaining agents.

\footnote{177. Summers, \textit{supra} note 44, at 1161.}
\textsc{Governor's Committee on Public Employee Relations, Final Report, at 42
(1966)).}
\footnote{179. \textit{Id}.}
\footnote{180. See \textit{supra} notes 83-84 and accompanying text.}
\footnote{181. See \textit{supra} note 168 and accompanying text.}