

## EMPLOYEE CHALLENGES TO COLLECTIVE BARGAINING CONTRACTS: THE SCOPE OF JUDICIAL REVIEW\*

COLLECTIVE bargaining contracts may confer seemingly greater benefits upon some employees than others in a bargaining unit. To the extent that employees have divergent interests or particular skills, contracts necessarily must affect them differently.<sup>1</sup> However, diversity of treatment may also result from a union's failure to represent fairly all employees in a unit.<sup>2</sup> Yet so long as a union retains support of a majority of workers in a unit, employees dissatisfied with the contract cannot bargain directly with the employer or through another agent; the National Labor Relations Act and the Railway Labor Act empower the majority representative to bargain exclusively for all workers in the unit.<sup>3</sup> The dissatisfied minority, if union members, may challenge the existing agreement through the union's grievance procedures<sup>4</sup> or campaign within the union for revision of the contract.<sup>5</sup> When such intra-union remedies fail or are unavailable, the minority's only recourse is to attack the contract before the administrative agencies or the courts.

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\* *Huffman v. Ford Motor Co.*, 195 F.2d 170 (6th Cir. 1952), *cert. granted*, 73 Sup. Ct. 35 (1952).

1. See COX, *CASES ON LABOR LAW* 891-2 (2d ed. 1951); CHAMBERLAIN, *COLLECTIVE BARGAINING* 140 (1951).

2. See, *e.g.*, *Graham v. Brotherhood*, 338 U.S. 232 (1949); *Tunstall v. Brotherhood*, 323 U.S. 210 (1944). For discussion of the union's duty to represent fairly minority groups in the bargaining unit, see Notes, 65 HARV. L. REV. 490 (1952) (comprehensive treatment); 52 COL. L. REV. 399 (1952); 37 CORNELL L.Q. 509 (1952). See also BAIKKE & KERR, *UNIONS, MANAGEMENT AND THE PUBLIC* 178-201 (1948).

3. 49 STAT. 453 (1935), 29 U.S.C. § 159(a), as amended, 61 STAT. 143-4 (1947), 29 U.S.C. § 159(a) (Supp. 1952) (NLRA); 48 STAT. 1187 (1928), as amended, 45 U.S.C. § 152 subd. fourth (1946) (RLA). See *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (NLRA construed); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944) (RLA construed).

4. The United Automobile Workers-CIO, for example, affords individual members a right of appeal up to the floor of the international convention. Communication to the YALE LAW JOURNAL from Kurt L. Hanslowe, Assistant General Counsel, UAW-CIO, dated November 6, 1952, in Yale Law Library. The disputed seniority clause in the principal case, *Huffman v. Ford Motor Co.*, 195 F.2d 170 (6th Cir. 1952), *cert. granted*, 73 Sup. Ct. 35 (1952), had been challenged unsuccessfully before the international convention. Communication from Kurt L. Hanslowe, *supra*. The Railway Brotherhoods permit appeals, with the international president as final arbiter. See *Division 525, Order of Ry. Conductors v. Gorman*, 133 F.2d 273, 278 (8th Cir. 1943).

5. The union member's participation in the bargaining process, by a right to vote on the proposed contract or to select the personnel to do the actual negotiating, may depend on whether bargaining is on a local or industry-wide basis. See de Vyver, *The Intra-Union Control of Collective Bargaining*, 5 LAW & CONTEMP. PROB. 288 (1938); CHAMBERLAIN, *COLLECTIVE BARGAINING PROCEDURES* 11-17, 40-8 (1944).

The National Labor Relations Board and the railway labor boards offer little protection against unfair union representation. Although the NLRA and the RLA do not grant specific power to ensure fair representation, the NLRB, unlike the railway labor boards, has occasionally attempted to judge the adequacy of representation.<sup>6</sup> Under Sections 8(a)(3)<sup>7</sup> and 8(b)(2)<sup>8</sup> of the NLRA, as amended by the Labor Management Relations Act of 1947, the NLRB can prevent employer and union tactics which, in order to influence union membership, discriminate among employees.<sup>9</sup> While the statute does not proscribe discrimination for other purposes,<sup>10</sup> the NLRB has claimed authority to deal with the problem. Under its power to certify bargaining agents,<sup>11</sup> the Board has threatened to deny<sup>12</sup> or rescind<sup>13</sup> certification of an agent which fails to represent all members of a unit fairly.<sup>14</sup> But these threats,

6. Because the railway labor agencies lack the NLRB's power to censure "unfair labor practices," these agencies cannot use such power to attack a union's discriminatory representation. Although the National Mediation Board, set up under the RLA, has authority to certify bargaining agents, the Board has never used this power to ensure fair representation. See Note, 56 *YALE L.J.* 731, 737 (1947); Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 *ILL. L. REV.* 425, 429-30 (1949). Moreover, the National Railroad Adjustment Board, authorized to hear disputes between employees and carriers, apparently has no power to hear disputes between employees and their bargaining representatives. *Ibid.* See also *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 205-7 (1944) (Adjustment Board provides no administrative remedy for Negro employees denied fair representation by statutory bargaining representative); *Tunstall v. Brotherhood*, 323 U.S. 210, 213-14 (1944) (same).

7. 61 *STAT.* 140 (1947), 29 U.S.C. § 158(a)(3) (Supp. 1952).

8. 61 *STAT.* 141 (1947), 29 U.S.C. § 158(b)(2) (Supp. 1952).

9. *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944) (unfair labor practice for employer to execute closed-shop agreement with knowledge that union intends to cause former members of rival union to be discharged by denying them union membership). See Note, 58 *HARV. L. REV.* 448, 451-5 (1945).

10. For an ingenious, although somewhat tortured construction of §§ 8(b)(3) and 9(a) of the NLRA that would permit the NLRB to deal with all discriminatory collective bargaining agreements, see Note, 65 *HARV. L. REV.* 490, 494 n.46 (1952).

11. 61 *STAT.* 143 (1947), 29 U.S.C. § 159 (Supp. 1952).

12. See *Larus & Bro. Co.*, 62 *N.L.R.B.* 1075, 1085 (1945).

13. See, e.g., *Veneer Products, Inc.*, 81 *N.L.R.B.* 492, 494 (1949); *Larus & Bro. Co.*, 62 *N.L.R.B.* 1075, 1085 (1945); *Carter Mfg. Co.*, 59 *N.L.R.B.* 804, 806 (1944).

14. Exclusion of Negroes from a union often accompanies unfair representation. See, e.g., *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). And see Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 *ILL. L. REV.* 425, 436 (1949). But the NLRB has ruled that such exclusion does not constitute a sufficient basis for denying certification. E.g., *Atlanta Oak Flooring Co.*, 62 *N.L.R.B.* 973 (1945). In *Larus & Bro. Co.*, 62 *N.L.R.B.* 1075 (1945), the Board found unfair representation, but the question of rescinding certification became moot by the expiration of the contract and the union's relinquishment of certification.

The Board's certification power, however, was never intended to be a method of policing the adequacy of representation. Cushman, *The Duration of Certification by the National Labor Relations Board and the Doctrine of Administrative Stability*, 45 *MICH. L. REV.* 1, 33-5 (1946).

never carried out,<sup>15</sup> have been made only in cases where the union allegedly discriminated against Negroes.<sup>16</sup> And even if certification were denied in these cases, the majority representative could continue to bargain for the unit with the employer.<sup>17</sup>

To challenge discriminatory contract clauses, therefore, employees must look to the courts. After exhausting any administrative<sup>18</sup> and intra-union remedies they might have,<sup>19</sup> employees may sue the employer and union to enjoin performance of the disputed contract<sup>20</sup> and to recover damages for past injuries.<sup>21</sup> Courts traditionally have denied relief on the theory that a union is a private association, immune from judicial interference.<sup>22</sup> Some courts recently have explained their reluctance to upset contracts by the desire to avoid impinging on the freedom of collective bargaining.<sup>23</sup> A few cases suggest that a union owes its members the duty to act in "good faith"<sup>24</sup> and

15. The Board came closest to exercising this power in *Larus & Bro. Co.*, 62 N.L.R.B. 1075 (1945). See note 14 *supra*.

16. See cases cited in note 13 *supra*.

17. "[I]t is well established that whenever a representative had been designated by a majority of the employees in an appropriate unit, the employer is under an immediate duty to bargain collectively and may not insist that the designated union procure a certification from the Board." COX, *CASES ON LABOR LAW* 492 (2d ed. 1951).

18. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944). In most cases it is doubtful if an administrative remedy exists. See preceding paragraph in text.

19. See *Haynes v. United Chemical Workers*, 190 Tenn. 165, 174, 228 S.W.2d 101, 105 (1950). See also Vorenberg, *Exhaustion of Intra-union Remedies*, 2 LAB. L.J. 487 (1951); Note, 44 YALE L.J. 1446 (1935).

20. See cases cited in note 31 *infra*.

21. See *Brotherhood v. Tunstall*, 163 F.2d 289, 293 (4th Cir. 1947) (operation of contract enjoined and damages recovered from union); *Rolax v. Atlantic C.L.R.R.* 186 F.2d 473, 480 (4th Cir. 1951) (damages recovered from both union and employer).

22. *E.g.*, *Teague v. Brotherhood*, 127 F.2d 53, 56 (6th Cir. 1942) (refusal to enjoin provisions of collective bargaining agreement discriminating on the basis of race); *Courant v. Int'l Photographers*, 176 F.2d 1000, 1003 (9th Cir. 1949) (refusal to interfere with union's admissions policy); *Shaup v. Grand Int'l Bro.*, 223 Ala. 202, 204-05, 135 So. 327, 328-9 (1931) (refusal to interfere with union's determination of employee's seniority status); *Long v. Baltimore & Ohio R.R.*, 155 Md. 265, 279-80, 141 Atl. 504, 509 (1928) (same); *Jennings v. Jennings*, 56 Ohio Law Abstract, 258, 260-1, 91 N.E.2d 899, 900-01 (Ct. App. Mahoning County 1949) (refusal to invalidate allegedly unfair distribution of back wage fund). *But cf.* *Local Union No. 57 v. Boyd*, 245 Ala. 227, 16 So.2d 705 (1944) (arbitrary expulsion from union resulting in loss of job prohibited because worker has "vested property right" in job); *Fleming v. Motion Picture Operators*, 124 N.J. Eq. 269, 1 A.2d 386 (1938) (same). See Note, 52 COL. L. REV. 399, 400-01 (1952). See also Hewitt, *The Right to Membership in a Labor Union*, 99 U. OF PA. L. REV. 919, 928-36 (1951).

23. *Jennings v. Jennings*, 56 Ohio Law Abstract 258, 263, 91 N.E.2d 899, 902 (Ct. App. Mahoning County 1949) (refusal to invalidate allegedly unfair distribution of back wage fund); *Hess v. Trailer Co. of America*, 31 Ohio Op. 566, 569-70 (C.P. 1944) (refusal to enjoin operation of disputed seniority provision).

24. *E.g.*, *Piercy v. Louisville & Nashville R.R.*, 198 Ky. 477, 248 S.W. 1042 (1923). See Comment, 47 YALE L.J. 73, 90 (1937); Christenson, *Seniority Rights under Labor Union Working Agreements*, 11 TEMP. L.Q. 355, 370-1 (1937).

"in accordance with its constitution."<sup>25</sup> But the latter requirement is hardly a bar to unfair representation of minority factions since the majority can enforce its will in accordance with procedural requirements of the constitution. And "good faith" seems to preclude a union only from interfering with a worker's rights under an existing contract.<sup>26</sup> In the landmark *Steele* case,<sup>27</sup> however, the Supreme Court imposed on bargaining agents under the RLA the duty to represent fairly all members of a craft.<sup>28</sup> The Court inferred this duty from provisions of the Act that make a union, supported by a majority of employees in a craft, the exclusive bargaining agent for the entire unit.<sup>29</sup> In the absence of such a duty, minority groups might be denied representation.<sup>30</sup> The Court found in *Steele* that the defendant union had violated this duty by making a contract which discriminated against Negro workers. Subsequent cases which invalidated contract clauses were confined to similar

25. *E.g.*, *Gleason v. Thomas*, 117 W. Va. 550, 186 S.E. 304 (1936).

26. In *Belanger v. Local Division*, 254 Wis. 344, 36 N.W.2d 414 (1949), employer and union altered the contract's seniority clause. The court viewed this as an amendment to a valid existing contract; the change was thus unlawful. When the contract expired, the parties incorporated the previously invalid provision in the new agreement. This was upheld. *Belanger v. Local Division*, 256 Wis. 479, 41 N.W.2d 607 (1950). See also *Day v. Louisville & Nashville R.R.*, 295 Ky. 679, 175 S.W.2d 347 (1943).

27. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

28. Chief Justice Stone, at one point in the opinion, discussed the duty to represent "non-union members of the craft." *Id.* at 201. Yet later, the opinion refers to the duty to represent *all* members of the craft. *Id.* at 202-3. Clearly, the latter phraseology would include minority factions within the union as well as employees in the bargaining unit who are not union members. The rationale of the opinion suggests that the Court did not intend to exclude minority factions within the union from the class to whom the union owed the duty. See *Huffman v. Ford Motor Co.*, 195 F.2d 170 (6th Cir. 1952), *cert. granted*, 73 Sup. Ct. 35 (1952) (statutory duty owed to minority faction within the union). *Contra*: *Williams v. Yellow Cab Co.*, 21 U.S.L. WEEK 2286 (3d Cir. Dec. 8, 1952) (no statutory duty owed to minority members of union). In a recent case, *Brotherhood v. Howard*, 343 U.S. 768 (1952), a divided Supreme Court held that a union under the RLA is under a duty to refrain from using its bargaining power to discriminate racially against members of a *different* bargaining unit. The Court considered the different classification of the units unimportant, perhaps because employees of both units were performing the same tasks.

29. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 199-200 (1944). A similar duty can be inferred from § 9(a) of the NLRA, 61 STAT. 143 (1947), 29 U.S.C. § 159(a) (Supp. 1952), which authorizes a union supported by a majority of the employees in a bargaining unit to bargain exclusively for all the employees. The NLRB, when threatening to rescind certification, has cited *Steele*. See cases cited in note 13 *supra*. See *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944).

30. "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 201 (1944).

facts.<sup>31</sup> In cases where challenged contract provisions did not involve racial discrimination, courts consistently have refused to upset the agreement.<sup>32</sup>

In *Huffman v. Ford Motor Company*,<sup>33</sup> the union's duty to represent fairly was invoked for the first time to invalidate a contract making no racial distinctions.<sup>34</sup> Under the Selective Service Act of 1940, veterans returning to their pre-war jobs received seniority credit for time spent in military service. But the Act made no provision for veterans who did not hold jobs before induction into the armed forces.<sup>35</sup> To treat all veterans alike, Ford and the United Automobile Workers negotiated a contract granting to newly hired veterans seniority credit for military service.<sup>36</sup> As a result, certain newly hired veterans acquired higher seniority than employees with earlier hiring dates. During subsequent employment slumps, some newly hired veterans

31. *Brotherhood v. Howard*, 343 U.S. 768 (1952); *Graham v. Brotherhood*, 338 U.S. 232 (1949); *Tunstall v. Brotherhood*, 323 U.S. 210 (1944); *Brotherhood v. Mitchell*, 190 F.2d 308 (5th Cir. 1951); *Rolax v. Atlantic C.L.R.R.*, 186 F.2d 473 (4th Cir. 1950).

32. *Britt v. Trailmobile Co.*, 179 F.2d 569 (6th Cir. 1950) (seniority provisions disputed following merger of formerly independent bargaining units); *Hess v. Trailer Co. of America*, 17 Ohio Supp. 39, 31 Ohio Op. 566 (C.P. 1944) (same); *Elder v. New York Cent. R.R.*, 152 F.2d 361 (6th Cir. 1945) (same); *Belanger v. Local Division*, 256 Wis. 479, 41 N.W.2d 607 (1950) (same); *Jennings v. Jennings*, 56 Ohio Law Abstract 258, 91 N.E.2d 899 (Ct. App. Mahoning County 1949) (contract's distribution of back wage fund not upset); *Lewellyn v. Fleming*, 154 F.2d 211 (10th Cir. 1946) (revision of old seniority districts); *Edelstein v. Duluth, M. & I.R.Ry.*, 225 Minn. 503, 31 N.W.2d 465 (1948) (same); *Hester v. Brotherhood*, 99 F. Supp. 968 (W.D. Mo. 1951) (reapportionment of jobs between two bargaining units).

33. 195 F.2d 170 (6th Cir. 1952), *cert. granted*, 73 Sup. Ct. 35 (1952).

34. *But cf. Crowell v. Palmer*, 134 Conn. 502, 509, 58 A.2d 729, 732 (1948) (*Steele* cited by court enjoining an unfair apportionment of overtime work which violates collective agreement).

35. 54 STAT. 890 (1940), as amended, 50 U.S.C. APP. § 308(b) (1946). Interpreting this statute, the Supreme Court said that a veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he held his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-5 (1946). The statute gives seniority credit for time spent in service only to a veteran who "has left or leaves a position" *to which he returns*.

36. In addition to reenacting the seniority provisions of the Selective Service Act, the contract read:

"Any veteran of World War II who was not employed by any person or company at the time of his entry into the service . . . and who is hired by the company after he is relieved from training and service . . . shall, upon having been employed for six (6) months . . . receive seniority credit for the period of such service subsequent to June 21, 1941, provided:

" . . . .  
"Such veteran shall not have previously exercised his right in any plant of this or any other company."

Brief for Appellees, p. 4, *Huffman v. Ford Motor Co.*, 195 F.2d 170 (6th Cir. 1952).

continued working while non-veterans and rehired veterans with earlier hiring dates were laid off. One such rehired veteran sought a declaratory judgment, against Ford and the union, invalidating the seniority clause in the contract.<sup>37</sup> Plaintiff claimed, among other things, that the contract discriminated against rehired veterans in favor of veterans not employed by Ford prior to military service.<sup>38</sup> The district court granted defendant's motion for summary judgment.<sup>39</sup> On appeal, the Sixth Circuit reversed, holding the clause unenforceable as to plaintiff and those veterans "similarly situated."<sup>40</sup> The Supreme Court granted certiorari<sup>41</sup> and already has heard the oral argument.<sup>42</sup> The Court's decision should be handed down shortly.

The Sixth Circuit's holding was grounded on *Steele*. There the Supreme Court had said: "Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft. . . ."<sup>43</sup> This language, seemingly incomprehensible, had never been explained by the Supreme Court or by any lower court. *Huffman*, however, relied on this portion of the opinion, interpreting it to mean that contract provisions are void which have "no relevance to terms and conditions of work or the normal and usual subjects of contracts between union and employer."<sup>44</sup> The court held that, since acts performed prior to employment were unrelated to "conditions of work," the disputed seniority clause was invalid.<sup>45</sup> But the *Huffman* standard is both unrealistic and short-sighted. Seniority standing has often been influenced by such things as the worker's sex, marital status, number of dependents,

37. Plaintiff brought the action individually and on behalf of approximately 275 other employees at Ford's "Louisville Works." *Huffman v. Ford Motor Co.*, 195 F.2d 170, 171-2 (6th Cir. 1952).

38. Plaintiff also contended that the contract denied him the seniority rights guaranteed by the Selective Service Act of 1940. Brief for Appellant, pp. 10-11, *Huffman v. Ford Motor Co.*, 195 F.2d 170 (6th Cir. 1952). See note 35 *supra*. Neither the District Court nor the Court of Appeals sustained this contention.

39. *Huffman v. Ford Motor Co.*, W.D. Ky., May 23, 1951.

40. *Huffman v. Ford Motor Co.*, 195 F.2d 170 (6th Cir. 1952).

41. *Ford Motor Co. v. Huffman*, 73 Sup. Ct. 35 (1952).

42. 21 U.S.L. WEEK 3174 (U.S. Dec. 23, 1952).

43. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944).

44. *Huffman v. Ford Motor Co.*, 195 F.2d 170, 175 (6th Cir. 1952).

45. The court said: "[W]e are cited to no case which approves the creation of seniority rights . . . upon the basis of acts done or services rendered prior to entering upon the employment in which the seniority is claimed." *Ibid.* But Ford (at p. 29 in its brief) had referred the court to *Haynes v. United Chemical Workers*, 190 Tenn. 165, 223 S.W.2d 101 (1950). There the Tennessee Supreme Court refused to upset a seniority clause giving credit to veterans for part of the time spent in the armed forces prior to their employment.

residence, citizenship, and physical handicaps.<sup>46</sup> Since these criteria are not relevant to "conditions of work," the *Huffman* test would invalidate seniority clauses based on them. Moreover, restriction of valid contract clauses to subjects within the "normal and usual" area of union-management negotiations could freeze the scope of collective bargaining. Had such a rule been in effect a decade ago, many of the provisions now common in collective agreements might have been held invalid.<sup>47</sup> In any event, the disputed seniority clause in *Huffman* was not unusual—more than 375 collective contracts had incorporated similar provisions.<sup>48</sup>

*Steele* suggests that the validity of collective contracts should be tested by the reasonableness requirement of the Fourteenth Amendment's Equal Protection Clause<sup>49</sup> rather than by the criteria applied in *Huffman*.<sup>50</sup> In *Steele* the Supreme Court analogized the union's duty to represent fairly all members of a craft with the duty of a legislature to grant equal protection to all citizens.<sup>51</sup> Legislatures are permitted to differentiate among classes of citizens so long as the classification is reasonable.<sup>52</sup> Similarly, a contract differentiating among employees should be upheld if it represents a reasonable solution to a labor problem.<sup>53</sup> There is little doubt that the *Huffman* seniority clause would survive such a test. The Sixth Circuit implied that the disputed clause would be held reasonable by admitting that a statute enacting a similar provision would be constitutional.<sup>54</sup> Aside from this admission, the seniority benefits

46. HARBISON, SENIORITY POLICIES AND PROCEDURES AS DEVELOPED THROUGH COLLECTIVE BARGAINING 38 (1941); P-H, UNION CONT. SERV. ¶ 53,521 (1948). *Hartley v. Brotherhood*, 283 Mich. 201, 277 N.W. 885 (1938) (married women denied seniority standing for furlough purposes by contract), 36 MICH. L. REV. 1395. Cf. *Aeronautical Lodge v. Campbell*, 337 U.S. 521 (1949) (superseniority for union officers).

47. For a comprehensive treatment of the expanding scope of collective bargaining, see Note, 58 YALE L.J. 803 (1949). See also CHAMBERLAIN, *THE UNION CHALLENGE TO MANAGEMENT CONTROL* (1948).

48. Communication to the YALE LAW JOURNAL from Kurt L. Hanslowe, Assistant General Counsel, UAW-CIO, dated November 6, 1952, in Yale Law Library. The UAW-CIO itself was a party to about 300 of these contracts.

49. U.S. CONST. AMEND. XIV, § 1.

50. For a discussion of this interpretation of *Steele*, see Note, 65 HARV. L. REV. 490 (1952).

51. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944).

52. "We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor." Justice Brandeis in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406 (1928) (dissenting opinion). See *Radice v. New York*, 264 U.S. 292, 296 (1923); *Arkansas Natural Gas Co. v. Railroad Comm'n*, 261 U.S. 379, 384 (1923). See also, Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 93 n.10 (1950).

53. See Note, 65 HARV. L. REV. 490, 495-7 (1952). Also see 66 HARV. L. REV. 365 (1952).

54. "The question presented is not whether a legislature could have imposed this change in seniority provisions through the medium of statute. Enactments granting preferences to veterans both in the securing of employment and in ratings for civil service

extended to newly hired veterans were a reasonable solution to problems fostered by the war. The union feared that newly hired veterans would be hostile toward organized labor if they could acquire only shaky job tenure while non-veterans retained wartime earned seniority credit.<sup>55</sup> Moreover, wartime manpower shortages, compelling many employers to hire women and elderly employees, led to a deterioration of the quality of the work force.<sup>56</sup> And to some extent, jobs were being held by workers less in need of remunerative employment than were ex-servicemen.<sup>57</sup> The *Huffman* seniority clause would obviously prevent bitterness among newly hired veterans and retain a younger and more able, though not always as experienced,<sup>58</sup> work force during industrial slowdowns.

But *Steele* lends itself to an even narrower interpretation than the reasonableness test: courts will invalidate only those contracts violative of a clearly expressed public policy. In *Steele* the union's deliberate and overt discrimination against Negro employees clashed with the spirit of the Constitution. Under the Fourteenth and other Amendments, the Supreme Court has assumed a positive role in combating racial discrimination—in voting rights, housing, education, and transportation.<sup>59</sup> *Steele* may represent only another instance of the Court's hostility toward racial discrimination by public or quasi-public institutions. The factual setting of cases following *Steele* buttresses this public policy interpretation. These cases, although never precisely articulating the criteria for testing the validity of collective contracts, have in-

examinations have been passed and are constitutional." *Huffman v. Ford Motor Co.*, 195 F.2d 170, 173-4 (6th Cir. 1952).

55. Many veterans who were unable to find jobs after World War I, while union members continued working, became hostile toward organized labor. Though considerably stronger after World War II, the unions allegedly faced a similar problem with newly hired veterans. Brief for Ford Motor Co., pp. 27-9, *Huffman v. Ford Motor Co.*, 195 F.2d 170 (6th Cir. 1952).

56. See HARBISON, SENIORITY PROBLEMS DURING DEMOBILIZATION AND RECONVERSION 13-14 (1944).

57. Communication to the YALE LAW JOURNAL from Kurt L. Hanslowe, Assistant General Counsel, UAW-CIO, dated April 18, 1952, in Yale Law Library. Brief for the Petitioner (UAW), p. 11, *UAW-CIO v. Huffman*, U.S. Sup. Ct., No. 194, Oct. 1952 Term.

58. The Sixth Circuit assumed that the seniority clause "prefers men without experience over men with experience." *Huffman v. Ford Motor Co.*, 195 F.2d 170, 175 (6th Cir. 1952). But the clause does not necessarily have this effect. For example, "A" (re-employed veteran) is hired on January 1, 1942, enters military service January 1, 1943, returns to work January 1, 1945. On January 1, 1946, "A" has two years' work experience but four years' seniority credit (under the Selective Service Act). "B" enters military service January 1, 1941, and is hired on January 1, 1943. On January 1, 1946, "B" has three years' work experience. "B" thus has more work experience than "A". Brief for the Petitioner (UAW), pp. 42-3, *UAW-CIO v. Huffman*, U.S. Sup. Ct., No. 194, Oct. 1952 Term.

59. See cases collected in *Briggs v. Elliot*, 93 F. Supp. 529, 538 (E.D.S.C. 1951) (dissenting opinion).

validated only those provisions which discriminated against Negroes.<sup>60</sup> Moreover, in *Haynes v. United Chemical Workers*,<sup>61</sup> the Supreme Court of Tennessee, citing *Steele*, upheld a contract expressly on the ground that it was in keeping with public policy. In fact, the disputed provision in *Haynes* was similar to the *Huffman* seniority clause.<sup>62</sup> And since the Department of Labor had recommended contractual seniority for newly hired veterans,<sup>63</sup> the *Huffman* clause advanced rather than contravened public policy toward veterans.

The "public policy" interpretation of *Steele* will minimize judicial interference with collective contracts. Dissatisfied minority factions would have little hope of upsetting a contract unless a clear violation of public policy, as expressed in constitution or statute, could be proved.<sup>64</sup> Only those contracts which discriminate on racial or similar grounds—such as political or religious beliefs—would arouse judicial antipathy.<sup>65</sup> On the other hand, a reasonableness test would invite courts into the collective bargaining process. The reasonableness criterion, in cases under the Equal Protection Clause, favors legislation: a statute is valid "if any state of facts reasonably may be conceived to justify it."<sup>66</sup> But courts may not feel constrained to extend this presumption of validity<sup>67</sup> to collective contracts. "Reasonableness" is so flexible a concept that no verbal departure need be made from the test cited in Equal Protection cases in order to strike down provisions which, to a court, seem unfair to minority factions. The commentators who urged a reasonableness test clearly intended a more affirmative role for the judiciary in the labor field than courts now assume in constitutional law cases.<sup>68</sup> Specifically, courts were asked to consider: the difficulty of resolving the problem; alternatives open to the union; industrial practices adopted in the past to deal with similar problems; and the result which will best promote sound industrial relations.<sup>69</sup> Yet such a scope for court review of collective contracts is out of harmony with the philosophy of our national labor legislation.

60. See cases cited in notes 31 and 32 *supra*. Also see *Betts & Easley*, 161 Kan. 459, 169 P.2d 831 (1946) (union, denying membership to Negroes in craft, enjoined from bargaining), 57 YALE L.J. 731 (1947).

61. 190 Tenn. 165, 228 S.W.2d 101 (1950).

62. See note 45 *supra*.

63. U.S. DEPT. OF LABOR, RETRAINING AND REEMPLOYMENT ADMINISTRATION, STATEMENT OF EMPLOYMENT PRINCIPLES (1946).

64. See *Haynes v. United Chemical Workers*, 190 Tenn. 165, 171, 228 S.W.2d. 101, 103-4 (1950).

65. See *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (dissenting opinion).

66. *Metropolitan Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935). See note 52 *supra*.

67. Cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

68. Note, 65 HARV. L. REV. 490 (1952). For another suggestion that courts take a more active part in combatting union discriminatory action, see Note, 52 COL. L. REV. 399 (1952) (no attempt to develop criteria for judicial intervention).

69. Note, 65 HARV. L. REV. 490, 496-7 (1952). Also see 66 HARV. L. REV. 365 (1952).

The NLRA and the RLA apparently assume that employer and union, without external interference, can best resolve their mutual problems.<sup>70</sup> The wisdom of this course is clear. Courts particularly are ill equipped to substitute their "reasonable" solutions to industrial problems for those of employer and union.<sup>71</sup> Judicial intervention could never occur with full knowledge of the give and take—the compromise of competing interests—that is the essence of any bargaining process.<sup>72</sup> Moreover, judicial intervention might disrupt industrial relations.<sup>73</sup> When a court enjoins enforcement of a contract, the parties must renegotiate, thus presenting the dangers of deadlock and strike. And the prospect of disruption in employer-union relations—as well as the inconvenience and expense to which unions could be subjected—might make court challenge of bargaining contracts particularly attractive to factions hostile to the bargaining representative.<sup>74</sup> In short, a "policy" test of collective contracts can prevent flagrant union discrimination without unduly encroaching on the parties' freedom in the bargaining process.

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70. See 49 STAT. 499 (1935), 29 U.S.C. § 151 (1946) (NLRA, Findings and Policies); 61 STAT. 152 (1947), 29 U.S.C. § 171 (Supp. 1952) (Title II, statement of policy); 44 STAT. 582 (1926), 45 U.S.C. § 157 subd. first (1946) (no obligation upon the carrier and the employee representative to arbitrate). An exception to the general policy exists in case of strikes imperiling national health or safety; such strikes can be enjoined for a period of 80 days. 61 STAT. 155 (1947), 29 U.S.C. §§ 176-80 (Supp. 1952). For criticism of even this exception, see Note, 48 COL. L. REV. 759, 770-2 (1948).

71. See Schwellenbach, *Compulsory Arbitration* in BAKKE & KERR, *UNIONS, MANAGEMENT AND THE PUBLIC* 493 (1948); COX, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 305 (1948); Van Arkel, *Administrative Law and the Taft-Hartley Act*, 27 ORE. L. REV. 171, 173-8 (1948) (suggests NLRB, rather than courts, should cope with problems of breach of collective contracts because of courts' lack of expertise). Even those clauses which may seem unreasonable may be justified. See, e.g., *Jennings v. Jennings*, 56 Ohio Law Abstract 258, 91 N.E.2d 899 (Ct. App. Mahoning County 1949) (court refuses to upset contract), criticized in Note, 65 HARV. L. REV. 490, 497-8 (1952). In *Jennings* all employees received equal shares of a fund, distributed to mitigate past wage inequities. A minority, pointing to their higher wage rate under new contract provisions, claimed a larger share of the back wage fund on the ground that they had been most underpaid in the past. But it is quite possible that the majority's interests had been sacrificed at the bargaining table to induce the employer to grant a higher wage rate to the minority and to provide a back wage fund. How well can a court, forced to judge a contract's reasonableness, evaluate such factors?

72. See CHAMBERLAIN, *COLLECTIVE BARGAINING* c.3 (1951); LIEDERMAN, *THE COLLECTIVE LABOR AGREEMENT* c.4 (1939).

73. See *Britt v. Trailmobile Co.*, 179 F.2d 569, 573 (6th Cir. 1950).

74. See *Jennings v. Jennings*, 56 Ohio Law Abstract 258, 263, 91 N.E.2d 899, 902 (Ct. App. Mahoning County 1949).