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PARITY BARGAINING IN THE PUBLIC SECTOR — A MANDATORY, PERMISSIVE, OR ILLEGAL SUBJECT?

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I. INTRODUCTION

Collective bargaining has evolved as an effective process for facilitating discussion and resolution of employer/employee differences regarding conditions of employment. Congress recognized that because of the potentially infinite number of conditions of employment, it was necessary to pass legislation that would limit the scope of collective bargaining. Section 8(d) of the National Labor Relations Act (NLRA)[1] limits the scope of private sector collective bargaining. The scope of public sector bargaining is limited by state and federal statutes, which usually are modeled after section 8(d).[2] Courts interpreting public sector statutes generally follow a tripartite scheme developed by courts interpreting the NLRA. Under the tripartite scheme, all differences between employer and employee are categorized as either mandatory, permissive, or prohibited subjects of bargaining.[3]

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1. 29 U.S.C. § 158(d) (1912) requires that the employer and the employees "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."
2. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1684 n.8 (1984). "Yet unlike the NLRA, some public sector bargaining laws contain 'a management rights clause' that explicitly limits the scope of bargaining, typically by excluding decisions on personnel management, agency efficiency, and the 'mission' of the agency." *Id.* at 1684 and n.9.
3. *Id.* at 1684 n.13. The distinction between mandatory, permissive, and prohibited bargaining subjects under the NLRA first was explained in NLRA v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-50 (1958) and refined in other decisions. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 678-79 (1981); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965).

   For public sector interpretations of this tripartite framework of bargaining subjects, see National Union of Police Officers Local 502-M v. Board of Comm'rs, 93 Mich. App. 76, 87-90, 286 N.W.2d 242, 247-48 (1979); City of Beloit v. Wisconsin Employment Relations Comm'n, 73 Wis. 2d 43, 50-53, 242 N.W.2d 231, 234-36 (1976); *see also* Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ.

Mandatory subjects are those subjects over which the parties have a duty to bargain. During the bargaining phase for mandatory subjects the parties are entitled to bargain to impasse.[4] The refusal to bargain by either party constitutes an unfair labor practice.[5] Both employer and employees are required to bargain in good faith on mandatory subjects; however, they are not required to reach agreement.[6] Under section 8(d) of the NLRA, wages, hours, and other terms and conditions of employment are mandatory subjects of bargaining.[7] By definition, any matter that vitally affects wages, hours, or any other aspect of the relationship between employer and employee is a mandatory bargaining subject.[8] Under this definition, a wide variety of subjects, including pay and grievance procedures, are deemed mandatory.[9]

Permissive subjects, on the other hand, provide the employer and the employees with the choice of whether to bargain.[10] Where a permissive subject is the focus of bargaining, neither the employer nor the employees may utilize impasse resolution procedures — such as a strike by the employees — to settle a dispute.[11] During the term of a collective bargaining agreement, an employer unilaterally may initiate policies involving permissive subjects.[12]

Courts have developed a theory, called the management rights doctrine, used to exclude certain subjects from mandatory bargaining.[13] The management rights doctrine holds that public employers, like their pri-

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Ass'n, 572 P.2d 416 (Alaska 1977) (distinguishing bargainable and nonbargainable subjects).

4. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1685 (1984).
5. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).
6. National Union of Police Officers Local 502-M v. Board of Comm'rs, 93 Mich. App. 76, 87, 286 N.W.2d 242, 247 (1979). If, however, the failure to reach an agreement on mandatory subjects is because one party insists upon including a proposal that is not a mandatory subject of bargaining, the party insisting upon the proposal effectively has refused to bargain on the mandatory subjects and is guilty of an unfair labor practice. *Borg-Warner Corp.*, 356 U.S. at 349.
7. 29 U.S.C. § 158(d) (1912); *Local 502-M*, 93 Mich. App. at 87, 286 N.W.2d at 247.
8. *Local 502-M*, 93 Mich. App. at 87, 286 N.W.2d at 247.
9. *See* Detroit Police Officer's Ass'n v. City of Detroit, 61 Mich. App. 487, 492, 233 N.W.2d 49, 52 (1975). The *City of Detroit* court recited a list of mandatory bargaining subjects which includes the following subjects: hourly rates of pay, overtime pay, shift differentials, holiday pay, pensions, no-strike clauses, profit sharing plans, rental of company houses, grievance procedures, sick leave, work rules, compulsory retirement age, and management rights clauses. *Id.*
10. *Local 502-M*, 93 Mich. App. at 87, 286 N.W.2d at 247.
11. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1685 (1984); *see* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).
12. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1685 (1984); *see* Allied Chem. & Alkali Workers Local No. I v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187-89 (1971). By contrast, an employer's mid-term modification of mandatory subjects constitutes an unfair labor practice. *Allied Chemical*, 404 U.S. at 159.
13. *See Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1687-91 (1984).

vate sector counterparts, possess certain "management rights" that may not be the subject of bargaining unless the employers decide to bargain over them.[14] Management rights, as a general matter, encompass management decisions that are fundamental to the basic direction of a corporate enterprise or that impinge only indirectly upon the employment security of union members.[15] Under the management rights doctrine the following subjects are excluded from mandatory bargaining and thus are deemed permissive subjects of bargaining: insurance benefits for retired employees,[16] discontinuance of free investment services for bank employees,[17] employer contributions to an industry promotional fund,[18] price increases in a company cafeteria,[19] and price increases in vending machine items.[20]

Employers and employees are forbidden to contract over prohibited subjects.[21] Although the parties are not prevented from discussing prohibited subjects, contract provisions encompassing prohibited subjects are unenforceable.[22] By definition, a subject is deemed prohibited if enforcement of a contract encompassing the subject would violate a collective bargaining statute or other applicable law.[23] Usually, where enforcement of a contract provision that deals with an employment subject would violate rights of other employers or employees provided by the NLRA, courts will hold the subject is prohibited. For example, an agreement between union and management setting uniform labor standards throughout a particular industry violates the requirement of independent bargaining units.[24] In a second case that exemplifies this trend, an arbitration agreement providing that the wages of union members in one state are governed by terms contained in an agreement between a union in a second state and a division of a company in the second state was found to violate section 9 of the NLRA,[25] which requires bargaining representatives to be selected by a majority of employees in the bargaining unit.

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14. *Id.*
15. *Local 502-M*, 93 Mich. App. at 87, 286 N.W.2d at 247.
16. Board of Educ. of Union Free School Dist. No. 3 v. Associated Teachers of Huntington, 30 N.Y.2d 122, 129-30, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23 (1972).
17. Seattle First Nat'l Bank v. NLRB, 444 F.2d 30 (9th Cir. 1971).
18. NLRB v. Detroit Resilient Floor Decorators Local No. 2265, 317 F.2d 269 (6th Cir. 1963).
19. Westinghouse Electric Corp. v. NLRB, 387 F.2d 542 (4th Cir. 1967).
20. McCall Corp. v. NLRB, 432 F.2d 187 (4th Cir. 1970).
21. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1685 (1984).
22. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 909 (1973), *cited in* Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 54-55 n.6, 214 N.W.2d 803, 808 n.6 (1974).
23. Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 54-55 n.6, 214 N.W.2d 803, 808 n.6 (1974).
24. United Mine Workers v. Pennington, 381 U.S. 657 (1965).
25. Sperry Rand v. NLRB, 492 F.2d 63 (2d Cir.), *cert. denied*, 419 U.S. 831 (1974); 29 U.S.C. § 159 (1982).

In the public sector, a "public policy exception" further limits the scope of bargaining. Under the public policy exception, a subject may be prohibited even though it relates directly to wages, hours, or the conditions of employment if the subject is deemed to be a matter of public policy.[26] The public policy exception is premised on the rationale that public employers, unlike their private counterparts, are motivated by concerns that transcend mere profit-taking: The primary concern of public employers is the provision of adequate service to the general public.[27]

The public policy exception is similar in theory to the management rights doctrine in that certain aspects of the employment relationship are so important to the employer's goals that they outweigh the potential detrimental effects to the employees. The public policy exception goes further than the management rights doctrine, however, by declaring certain matters prohibited subjects of bargaining; public policy determinations may not be removed from the political process and placed on the bargaining agenda.[28] The rationale behind this exception is that public policy matters should be determined by the representatives of the voting public.[29]

The rationale behind the public policy exception, the inherent difference in the considerations of public employers versus private employees, is the reason why the NLRA excludes the public sector from its scope. Hence, decisions interpreting the NLRA are not dispositive of public employment issues. There are, however, certain subjects of public sector bargaining that do not involve public policy considerations. For these subjects the reasons for distinguishing public from private sector do not apply and private sector decisions are persuasive authority. The issue of parity bargaining agreements in public employment contracts is one of the class of subjects to which the public policy exception does not apply.

Parity bargaining agreements are utilized to create parity in the labor market by tying the wages of one bargaining unit with the wages of one or more other bargaining units contracting with the same employer. The unit negotiating the clause is labeled the contracting unit; the unit to which the clause is tied is the reference unit.

Structurally, a parity clause can be either vertical or horizontal. A vertical parity clause ties the wages of one group of workers with another

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26. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1691-96 (1984).

27. Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416, 419 (Alaska 1977).

28. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1691 (1984).

29. *Id.* at 1692. Under the public policy exception, the following subjects, all of which appeared in teachers' contracts, were held to be prohibited bargaining subjects: relief from nonprofessional duties, class size, teacher load, evaluations of administrators, number of teacher aides and specialists, and the school calendar. *Kenai Peninsula*, 1572 P.2d at 424 (appendix containing a complete list of subjects deemed prohibited, as well as negotiable).

group of command-superior workers in the same field. For example, a vertical parity clause might tie the wages of a group of police officers to a group of police lieutenants. A horizontal parity clause ties the wages of one group of workers to another similarly situated group in another field. A horizontal parity clause might be used to tie the wages of a group of fireman to a group of policemen.

Substantively, a parity clause may be either active or passive. An active parity clause imposes the terms negotiated by the contracting unit upon a reference unit. For example, a union and a company in New York negotiate a contract and the union demands that the contract terms be applied to the employer's California employees as well.[30] Active parity has been held a prohibited subject of bargaining.[31] In contrast, a passive parity clause maintains parity by tying the wages of the contracting unit to a reference unit. If the reference unit negotiates a wage increase, that increase also is given to the contracting unit. In different jurisdictions, passive parity has been declared mandatory, permissive, or prohibited.

This article analyzes the differing treatment of passive parity clauses in the public sector by various labor boards and courts. Private sector treatment of passive parity in cases arising under the NLRA also is examined. Because passive parity directly involves wages and neither violates the bargaining rights of the reference unit nor interferes with any public policy decisions, passive parity should be a mandatory subject of bargaining.

II. HISTORY OF PARITY BARGAINING

Courts traditionally have examined the scope of public sector collective bargaining with an expansive view. Citing unequivocal public policy as support for its decision, the New York Court of Appeals declared in *Board of Education of Huntington v. Associated Teachers*[32] that

> the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment.[33]

This ultra expansive view that collective bargaining covers all subjects not prohibited by statute has been limited in subsequent decisions.

30. *See* Sperry Rand v. NLRB, 492 F.2d 63 (2d Cir.), *cert. denied*, 419 U.S. 831 (1974).
31. *Id.*
32. 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972) (interpreting the Taylor Law, which requires the public employer to negotiate collectively with recognized employee organizations as to the terms and conditions of employment).
33. *Id.* at 129-30, 282 N.E.2d at 113, 331 N.Y.S.2d at 23.

In *Syracuse Teachers Association, Inc. v. Board of Education*,[34] the New York Court of Appeals imposed on collective bargaining limitations flowing from "plain and clear, rather than express prohibitions in the statute or decisional law."[35] In two cases decided in 1975, the New York Court of Appeals provided a standard for determining the proper scope of collective bargaining. In *Union Free School District, Town of Cheektowoja v. Nyquist*,[36] the court stated that prohibitions on the scope of collective bargaining may derive from "objectively demonstrable public policy" as expressed in imperative provisions of other laws.[37] In *Susquehanna Valley School District v. Susquehanna Valley Teachers' Association*,[38] the same court held that prohibitions in collective bargaining include those subjects barred by public policy, whether explicit or implicit in statute, decisional law, or both.[39]

Although these decisions served as a retreat from the ultra expansionist decision of *Board of Education of Huntington v. Associated Teachers*,[40] the retreat was more procedural than substantive. These decisions merely acknowledged that clear prohibitions on the scope of collective bargaining could be inferred from other statutes and decisional law. Pervading all of these decisions, however, is the substantive expression that public policy mandates a broad scope of collective bargaining.

The courts of other states also have concluded that public policy requires a broad scope of collective bargaining. Courts in both Wisconsin[41] and California[42] have held that an expansive view of the scope of collective bargaining carries out the public policy of equipping the state employer with the resources to compete actively in the labor market. These courts further have suggested that, in order to compensate the public employees for their lack of a right to strike, the scope of collective bargaining subjects should be broader in public employment than in private employment.[43]

Parity clauses were first adopted under the expansive view of public

34. 35 N.Y.2d 743, 320 N.E.2d 646, 361 N.Y.S.2d 912 (1974).
35. *Id.* at 743, 320 N.E.2d at 646, 361 N.Y.S.2d at 912.
36. 38 N.Y.2d 137, 341 N.E.2d 532, 379 N.Y.S.2d 10 (1975).
37. *Id.* at 143, 341 N.E.2d at 535, 379 N.Y.S.2d at 15.
38. 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975).
39. *Id.* at 616-17, 339 N.E.2d at 133, 376 N.Y.S.2d at 429.
40. 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).
41. The Supreme Court of Wisconsin formed its view of the public policy requirements in the following manner:

> [T]here are three major interests involved in collective bargaining in state employment: that of the public; that of the state employee; and that of the state as employer. The legislature has further declared that orderly and constructive employment relations for state employees and the efficient administration of state government promote all of these interests.

Wisconsin Dep't of Admin. v. WERC, 90 Wis. 2d 426, 430, 280 N.W.2d 150, 153 (1979).
42. San Joaquin County Employees Ass'n v. County of San Joaquin, 39 Cal. App. 3d 83, 87-88, 113 Cal. Rptr. 912, 914 (1974).
43. San Juan Teachers Ass'n v. San Juan Unified School Dist., 44 Cal. App. 3d 232,

sector collective bargaining. In most jurisdictions, parity clauses have been a long favored element in collective bargaining agreements.[44] In New York, parity clauses tying the wages of firemen to those of policemen can be traced to the collective bargaining agreements of the early 1900's.[45]

Patrolmen's Benevolent Association v. City of New York illustrates both the use and adoption of parity clauses.[46] In *Patrolmen's Benevolent Association*, the City of New York had executed collective bargaining agreements with unions representing three distinct units: policemen, police sergeants, and fire lieutenants. One of the agreements contained a vertical parity clause tying the wages of policemen to police sergeants.[47] When the sergeants' wages were raised, the policemen sought a wage adjustment in accordance with the negotiated parity agreement. The City refused to grant the adjustment, and the Patrolmen's Benevolent Association filed suit.

At trial, the City did not assert that the parity agreement was illegal;[48] rather, it argued that the interlocking parity agreements rendered the contract impossible to perform.[49] The City argued that the interlocking nature of the agreements would cause an interminable spiral of wage increases, because granting an increase in wages to one unit necessarily would cause the other units' wages to be raised accordingly. The City contended that the spiralling effect would continue *ad infinitum*.[50]

In dismissing the City's defense, the trial court applied general contract law, not labor principles, to define the duties that arose under the collective bargaining agreement.[51] The court stated that the field of labor relations is one in which contracts are forged through the bargaining process and, therefore, such a contract must be respected, even if the con-

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249, 118 Cal. Rptr. 662, 670-71 (1974); International Bhd. of Teamsters, Local No. 320 v. City of Minneapolis, 302 Minn. 410, 415, 225 N.W.2d 254, 257 (1975).

44. *See* Lafranchise & Liebig, *Collective Bargaining for Parity in the Public Sector*, 32 LAB. L.J. 598, 599 (1981).

45. *In re* City of New York, 10 N.Y. Pub. Empl. Rel. Bd. ¶ 10-3003, 10-3011; 694 GOV'T EMPL. REL. REP. (BNA) 42, 45 (1977).

46. Patrolmen's Benevolent Ass'n v. City of New York, 75 L.R.R.M. (BNA) 2293 (N.Y. Sup. Ct.), *aff'd*, 75 L.R.R.M. (BNA) 2429 (N.Y. App. Div. 1970), *rev'd on other grounds*, 76 L.R.R.M. (BNA) 2634 (N.Y.), *on remand*, 76 L.R.R.M. (BNA) 3087 (N.Y. Sup. Ct.), *aff'd*, 78 L.R.R.M. (BNA) 2747 (N.Y. Sup. Ct. 1971).

47. *Id.* at 2294.

48. *Id.* at 2295.

49. *Id.* at 2296. The impossibility argument was raised in the City's counterclaim. The City raised two formal defenses: 1) no formal contract; and, 2) the participation of the patrolmen in a panel hearing was a condition precedent. The court dismissed these defenses summarily. *Id.* at 2294-95.

50. *Id.* at 2296. In response to this argument the Patrolmen's Benevolent Association (PBA) responded that an *ad infinitum* spiral could not occur because the term of the agreement expired in 1970, and the PBA offered to waive its right to more than one raise.

51. *Id.* at 2297; *see also* Note, *The Negotiability of Parity Agreements in Public Sector Collective Bargaining*, 11 FORDHAM URB. L.J. 139 (1982).

tract proves to be onerous, expensive, or the result of miscalculation.[52]

In *Patrolmen's Benevolent Association* the parity clauses contained in the collective bargaining agreements were enforced rigidly. The court refused to excuse the City from performance, no matter how burdensome that performance might be to the City. *Patrolmen's Benevolent Association* is exemplary of the early viewpoint that, when a City voluntarily negotiates a wage term, contract law requires the enforcement of that contract term.

III. PRIVATE SECTOR TREATMENT OF PARITY

Parity agreements also have been used extensively in the private sector. Although there are distinctions between private and public sector labor law,[53] decisions arising under the NLRA are instructive in the resolution of public sector labor issues provided that there is no conflict between the particular private and public policies to be achieved.[54] Decisions regarding parity provisions arising under the NLRA are applicable to public employment contracts because most state statutes have adopted the statutory provisions of the NLRA.[55]

The key factor in determining the legality of parity clauses under the

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52. The court stated:

> By its own voluntary act in equating the salaries of Sergeants and Fire Lieutenants, [the City] set in motion the conditions preceding the Patrolmen's increase. In an early English decision it was established that where the law creates a duty or imposes a charge and the party is disabled to perform it without his fault, the law will excuse him, but where he creates a duty by his own contract, he is bound to make good, notwithstanding any accident against it by his contract. This agreement was drawn by skilled draftsmen with long experience in their field and the burdens later discovered could well have been foreseen and provided against.

75 L.R.R.M. at 2297.

53. The differences between public sector and private sector labor law arise because the government is the public sector employer. Unlike private sector employers, the government in its role as employer must respond to pressure from economic market forces as well as the various factions involved in the political process. *See* Summers, *Public Sector Bargaining: Problems In Governmental Decisionmaking*, 44 U. CIN. L. REV. 669 (1975); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L. J. 1156, 1159, 1167-68 (May 1974); Wellington & Winter, *The Limits of Collective Bargaining In Public Employment*, 78 YALE L.J. 1107, 1119 (June 1969). To insure the orderly functioning of our democratic form of representative government and to preserve the ability of elected representatives to make budgetary allocations, free from the disruptive activites of public employees, the concerted activities of public employees must be regulated. In the private sector, however, there is no compelling countervailing reason for enacting similar regulation. *See* City of New York v. DeLury, 23 N.Y.2d 175, 243 N.E.2d 128, 295 N.Y.S.2d 901 (1968).

54. *See* Lullo v. International Ass'n of Firefighters, Local 1066, 55 N.J. 409, 262 A.2d 681 (1970).

55. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1680 (1984); *see, e.g.*, Local 1522, Int'l Ass'n of Firefighters v. Board of Labor Relations, 31 Conn. Supp. 15, 19, 310 A.2d 511, 514 (1973); Firefighters Ass'n, Local 785 v. City of Lewiston, 354 A.2d 154, 161 (Me. 1976); KAN. STAT. ANN. §§ 72-5423 (Supp. 1983) (teachers), 345.050 (I)(e) (Supp. 1983) (firefighters); MICH. COMP. LAWS ANN. § 423.215 (West 1978); *see also State Public Employee-Management*

NLRA is the effect of the clause upon future negotiations. A parity clause violates the NLRA only when it *imposes* wages and benefits by "straight-jacketing" the reference union in future negotiations, through an active parity clause. If the parties to future negotiations maintain the ability to negotiate, however burdened that ability might be, the parity clause should be not only a permissible but also a mandatory subject of bargaining.

In *General Teamster, Warehouse & Dairy Employees, Local Union 126*,[56] the National Labor Relations Board reviewed an unfair labor practice charge concerning parity. During contract negotiations, the union insisted upon a parity provision tying the wages of its members to the wages paid to similar craftsmen of a different employer in another city. *General Teamster* clearly is distinguishable from the public sector cases because the parity clause at issue did not burden negotiations between the referent craftsmen and their employer. In fact, the parity provision had no effect upon the reference unit. *General Teamster* is noteworthy, however, for its illustration of the beneficial aspects of parity and its analysis regarding the demarcation between prohibited and permissive parity clauses.

Reviewing the union's demands, the Board found that parity was a mandatory subject of bargaining because it affected wages.[57] Specifically, the Board held that it was not unusual for collective agreements to provide for a fluctuating wage structure that varied in accordance with external factors such as the government's cost of living indices.[58] The Board equated the reference in the craftsmen's contract to another union's wage package with the common practice of tying wage raises to a governmental index and ruled that a parity clause was consistent with the NLRA. The Board noted that parity agreements are condemned only when they interfere with future negotiations by "straight-jacketing" parties that are entering into negotiations.[59] Under the *General Teamster* court's analysis, parity agreements thus are subject to disapproval only when wages are *imposed* on other parties.[60]

The Board's focus in determining the legality of parity bargaining is upon the term "imposition." A parity agreement imposes a wage package when, by agreement with the contracting union, the employer contractually binds itself to enforce a predetermined wage package upon the reference union in future negotiations. By imposing wages upon future labor parties, those parties are "straight-jacketed" and cannot negotiate because no terms or conditions concerning wages remain to be bargained

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"Collective Negotiations" Act, 1 GOV'T EMPL. REL. REP. (BNA) 51:215 to :219 (1970) (presenting comprehensive model state public employment relations bill).

56. 176 N.L.R.B. 406 (1969).

57. *Id.* at 407.

58. *Id.* at 407-08.

59. *Id.* at 408.

60. *Id.*

between the parties. By operation of the parity clause, the terms of a future agreement between the employer and a separate bargaining unit have been predetermined. If, however, in the future the parties can negotiate terms and conditions that affect wages, the parity clause is lawful because the parties are not "straight-jacketed."

In *General Teamster*, for example, the parity clause merely required the employer to grant its union employees any superior benefit gained by other employees during subsequent negotiations. The clause did not impose its wage package upon the reference unit, nor did the clause impose all of the terms of the latter agreement upon the first. Instead of an automatic mechanism, the parity clause acted as a contingency. If the reference union received a better package, then the benefits would apply to the first union. If, however, the reference unit did not receive a better package, the contingency mechanism would not operate, and the original agreement would apply. Because the parity clause operated only as a contingency to pass on better benefits, the clause did not "straight-jacket" future negotiations between the reference union and the employer. Thus, the Board ruled that the parity clause was consistent with the NLRA.[61]

A reversed parity scheme was before the NLRB in *Dolly Madison Industries, Inc.*[62] The employer insisted upon a clause that would grant him the option of adopting the provisions of any future agreement that contained more favorable wage and benefit terms negotiated between the union and other employers.[63] The union filed an unfair labor practice charge with the NLRB in order to test the legality of the clause and management's right to insist to point of impasse on inclusion of the clause.[64] In rejecting the union's charge of an unfair labor practice, the Board held that the clause was a mandatory subject of bargaining.[65] The Board reasoned that the clause did not breach the NLRA, because the clause did not impose any wage or benefits upon other parties or strip those parties of their full negotiating rights.[66] Specifically, the Board held that the clause was merely an effort by the employer to provide for a contractual contingency that would relieve him of the disadvantages that might result in the event that the union negotiated more favorable wage and benefit levels with future employers.[67] The Board further held that the clause did not "straight-jacket" the union in its future negotiations

61. *Id.* at 409.
62. 182 N.L.R.B. 1037 (1970).
63. The contract provision, generally referred to as a Most Favored Nations Clause, provided that if the union did make such an agreement with a competing employer, the employer's collective bargaining agreement automatically would be amended to give the employer the full benefit of the terms of the new agreement. *Id.*
64. *Id.*
65. *Id.* at 1038. The importance in the distinction between permissive and mandatory subjects of bargaining is that mandatory subjects may be bargained to the point of impasse. *See supra* notes 4-20 and accompanying text.
66. 182 N.L.R.B. at 1042.
67. *Id.* at 1038.

with other employers.[68]

In contrast to the courts' acceptance of passive parity in the private sector, the courts expressly and impliedly have declared that active parity clauses are prohibited. The Second Circuit highlighted the distinction between passive parity and active parity in *Sperry Rand v. NLRB*.[69] The employer executed a collective bargaining agreement with the union covering all technical employees in the New York area and subsequently opened a small office in California staffed by draftsmen recruited solely from the California area.[70] The union discovered that the draftsmen performed work similar to that performed by union draftsmen in New York and insisted that its New York contract covered all employees, including those in California.[71] Although the union previously had lost a representation election regarding the California employees, the union insisted that its New York contract established a minimum wage and benefits scale for those California employees.[72]

In holding that the union had committed an unfair labor practice under the NLRA, the court adopted a unit exclusiveness analysis.[73] The court held that a union commits an unfair labor practice when it attempts covertly to gain recognition as the bargaining agent of another unit, recognition that the union might not, and in this case did not, gain in a representation election.[74] The court analogized the situation *sub judice* to one where an employer attempts to impose on the employees of one unit the contract and bargaining agent of another unit.[75] The court concluded that, because the employer could not have complied with the

68. *Id.*

69. 492 F.2d 63 (2d Cir.), *cert. denied*, 419 U.S. 831 (1974).

70. The company did transfer several members of the Engineers Union, which had a contract similar to the draftsmen's contract, from New York to California. As a result, the company recognized the Engineers Union as the representative of both the assigned and newly hired engineers. *Id.* at 65 n.1.

71. *Id.* at 65.

72. *Id.* at 66-67.

73. The court initially determined that the California employees constituted a bargaining unit separate from the New York unit. Next, the court concluded that there was not enough evidence to support the New York unit's claim that its efforts were motivated by a desire to protect the job security of the New York employees, not by a desire to represent the California employees. Because there were two exclusive bargaining units, and the apparent motive of the New York unit was to represent the members of a separate unit, the court found that the general rule that separate units have the exclusive right to bargain for members of their unit was violated. *Id.* at 68.

74. *Id.* at 68-69.

75. The court stated:

> We also hold that, regardless of the Union's motive in seeking enforcement of the arbitration award, it committed an unfair labor practice because the subject of the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York City unit. Section 7 of the Act guarantees employees the right to organize and bargain collectively and the right to refrain from such activities. Generally, an employer commits the unfair labor practices of interfering with employees' § 7 rights and supporting a union in violation of § 8(a)(1) and

arbitrator's award without infringing upon the rights of the California employees in violation of sections 8(a)(1) and (a)(2)[76] of the NLRA, the union's attempt to make it do so constituted "a failure to bargain collectively in violation of section 8(b)(3)[77] of the [NLRA]."[78]

The concept of "refusal to bargain" is a useful ground for distinguishing passive parity cases, such as *Dolly Madison Industries, Inc.*, from active parity cases like *Sperry Rand*. Under a passive parity clause the employer merely agrees to provide the contracting unit with superior benefits that in the future might be procured by the reference unit; however, under an active parity clause the employer agrees with the contracting unit to refuse to bargain with the reference unit. Such an agreement violates the requirement, stated in section 8(b)(3) of the NLRA, that the employer bargain collectively with each unit.

In its decision, the *Sperry Rand* court cited *United Mine Workers v. Pennington*[79] for the proposition that an employer cannot bargain with a union over the wages that the union subsequently will negotiate with other employers.[80] The *United Mine Workers* decision, although it did not contain the term "active parity", discussed a nationwide conspiracy between a union and several large coal operators to impose agreed-upon wage scales upon smaller, nonunion operators, a scheme that allegedly violated antitrust laws. The defendant operators in *United Mine Workers* argued that the wage agreement was protected from antitrust scruntiny by the NLRA's policy of promoting "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."[81] The Court, however, held that the agreement was not protected by federal labor laws.[82]

In reaching its conclusion, the *United Mine Workers* Court reasoned that, although obtaining uniform labor standards was a legitimate aim of

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(a)(2) when it imposes on employees of one unit the contract and bargaining agent of another unit.

Id. at 69 (omitting cited cases).

76. Sections 8(a)(1) and (2) of the NLRA provide the following:

> (a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

77. Section 8(b)(3) of the NLRA provides that "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees. . . ."

78. 492 F.2d at 70.

79. 381 U.S. 657 (1965).

80. *Sperry Rand*, 492 F.2d at 70.

81. *United Mine Workers*, 391 U.S. at 664.

82. *Id.* at 666-68.

any labor organization, nothing in the labor policy indicated that the union and employers in one bargaining unit were free to bargain about the wages, hours, and working conditions of others units.[83] The Court held that a union forfeits its exemption from the antitrust laws when it agrees with one set of employers to impose a certain wage scale on other bargaining units; to hold otherwise would violate the duty to bargain unit by unit, by not allowing the other units to bargain independently over wages. In the words of the Court, such an agreement "straight-jackets" the other units in future negotiations.[84]

A comparison of *Dolly Madison Industries, Inc.* with *Sperry Rand* and *United Mine Workers* illustrates that for a parity clause to be prohibited under the NLRA, enforcement of the parity clause must require that the employer breach its duty to bargain collectively with each separate bargaining unit. In *Sperry Rand* and *United Mine Workers*, enforcement of the parity clauses would have required the employer to enforce the agreed-upon terms of a contract negotiated with one contracting unit on another unit. To enforce a wage or benefit provision on any unit without collectively bargaining over that provision constitutes a refusal to bargain in violation of section 8(b)(3) of the NLRA.

In contrast, the parity clause at issue in *Dolly Madison* merely required that if the union made an agreement with a competing employer containing terms more favorable to the employer, the original agreement would be amended to include those terms. This is analogous to a passive parity clause. Enforcement of such an agreement does not require a refusal to bargain by any unit, and therefore is not only a permissive subject of bargaining, but a mandatory subject of bargaining as well in the private sector.

IV. PARITY AGREEMENTS IN THE PUBLIC SECTOR

Notwithstanding the validity of passive parity clauses in the private sector, there has been a succession of successful attacks upon the use of both active and passive parity clauses in the public sector. The first case to question the validity of parity clauses in the public sector was *In re Uniformed Fire Officers Association*,[85] decided by the New York City Board of Collective Bargaining. There, interlocking collective bargaining agreements between policemen, firemen, and supervisors contained both vertical and horizontal parity clauses. The City alleged that both types of parity clauses were prohibited or were, at best, merely permissive subjects of bargaining.[86] In reviewing the City's charge, the Board observed that traditionally the City and its employees had engaged in the practice

83. *Id.* at 666.
84. *Id.* at 665-66.
85. Nos. BCB-116-72, BCB 118-72, Dec. No. B-14-72 (N.Y. City Bd. of Collective Bargaining Aug. 2, 1972).
86. *Id.* at 1.

of comparability bargaining.[87] The Board noted that the practice had endured for nearly eighty years.[88] Nevertheless, the Board recognized that the City's allegations posed serious and complex legal questions.[89] These issues were so complex and novel that the Board deferred its decision.[90] This case is noteworthy as the first case to suggest that parity agreements were vulnerable to attack.

The Connecticut State Board of Labor Relations was next to address the validity of parity agreements in *In re City of New London*.[91] The City had negotiated a collective bargaining agreement with its firemen, which included a passive parity clause providing for parity with a police unit.[92] The reference police union filed an unfair labor practice charge against the City, arguing that the parity clause "by its very presence and necessary operation puts undue pressure on the City to refuse police demands that exceed the benefits in the Firefighters' contract and also makes the Police Union, without its consent, a bargaining agent for the Firefighters as well as the policemen."[93]

In holding that the parity clause unlawfully interfered with the negotiating rights of the reference unit, the Board found that the presence of the parity clause in the firemen's contract caused police negotiators to carry a "double load — in effect . . . negotiating for the firemen as well as for their own members."[94] The Board recognized that parity is a fact of life for municipalities because the City always examines the future impact of its agreements on other labor sources. The Board, however, found the parity clause distinguishable because it forced the City to act in a prescribed manner, rather than be free to negotiate the issues later. The Board reasoned that, because of the automatic consequences of the parity clause, the City would be less likely to view the reference unit's proposals on their own merits than if only a moral obligation applied.[95]

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87. *Id.* at 5.
88. *Id.*
89. *Id.* at 6.
90. *Id.*
91. *In re* City of New London, Case Nos. MPP2268, MUPP 2343, Dec. No. 1128 (Conn. St. Bd. of Labor Rel. Apr. 10, 1973, 505 GOV'T EMPL. REL. REP. (BNA) F-1 (1973).
92. The parity clause provided:

> Any increase in wages which is granted to any employee of the Police Department, which is greater than that received by any employee of this Bargaining Unit who has the same relative length of service in a comparable rank to that held by such Police Department employee, shall be simultaneously granted and effective for such Bargaining Unit employee, and shall be in addition to the provisions of this agreement. . . . [T]he term "increase in wages" shall mean and include any increase in salary and any additional payment for services currently being performed, and any provision for and/or any increase in night shift premium.

Id.
93. *Id.*, slip op. at 3, 505 GOV'T EMPL. REL. REP. (BNA) at F-3.
94. *Id.*
95. *Id.* at F-4.

The Board therefore held that the parity clause interfered with the police reference unit's exercise of untrammeled bargaining rights.[96]

In analyzing this decision, it is important to note that the "double loading" concept, which focuses on the burden placed on the reference union's negotiating posture through the use of a passive parity clause, is distinguishable from the concept of "straight-jacketing" the reference union through the use of an active parity clause of the type found objectionable in the private sector cases. The "double loading" concept posits that the bargaining rights of the reference union named in a passive parity clause are burdened in two respects. First, the passive parity clause, which mandates parity between the contracting union and the reference union, undermines the reference union's bargaining position in subsequent negotiations. As a practical matter, during subsequent negotiations with the reference union, the employer must consider the economic effect of providing the requested benefits to the contracting union as well. This practicality makes it more difficult for the reference union subsequently to negotiate an increase in benefits. Second, the reference union essentially functions as bargaining agent for the contracting union, because any increase in benefits secured by the reference union will pass to the contracting union.

A passive parity clause forces the employer to consider and evaluate the economic package in terms of both the reference union and the contracting union. The employer remains under a duty to bargain with the reference unit. By contrast, an active parity clause forces the employer to *agree* to a predetermined economic package and to refuse to bargain with the reference unit.

In *City of New London*, the Board did not discuss the distinction between the "double loading" and "straight-jacketing" concepts. The Board, however, did address what it termed the "facts of life" of collective bargaining: the employer weighs the effects of granting concessions to one union upon future negotiations with other unions.[97] The Board did not find parity per se objectionable. Rather, the Board found the passive parity clause in the firemen's contract objectionable because it would interfere with the policemen's right to untrammeled bargaining.[98] The Board's holding implies that an employer can disregard the "fact of life" considerations and view the reference unit's proposals as if in a vacuum. Such a suggestion is inconsistent with the actual conduct of labor negotiations. Prudent employers make such evaluations regardless of the presence of a parity clause.[99] A parity clause merely expresses in contract terms the "fact of life" that employers evaluate the cost of solitary labor agreements in light of their effect upon overall labor costs. Thus, the Board erred by equating the "fact of life" evaluative considerations

96. *Id.*
97. *Id.*
98. *Id.*
99. *See* G. NIERENBERG, THE ART OF NEGOTIATING 79-108 (1968).

exercised by an employer with the "straight-jacketing" that occurs when the employer is forced to impose a predetermined economic package upon the reference union.

A reference union named in a passive parity clause, such as the policemen's union in *City of New London*, is burdened in its negotiating posture with the employer. This burden, however, is present in any bargaining relationship. The burden flows not from the presence of the parity clause, but from the "facts of life" inherent in negotiating labor agreements. Although the burden may be somewhat heavier as a result of the parity clause, the increase does not "straight-jacket" the parties. Enforcement of the clause does not require the City to refuse to bargain with the reference union.

The Board stated that another distinction between a parity clause and fact of life pressures is that a parity clause requires concessions be made to the contracting unit as soon as they are negotiated with the reference unit, even though the contracting unit's contract may have a year or more to run.[100] This statement implies that "fact of life" pressures are existent only during the period of negotiations for the contracting unit's contract.

This statement also ignores the actual conduct of labor relations. Even if the contracting unit's contract still has a year or more to run, the City knows that if it gives the reference unit a raise it will be pressured to give the contracting unit the same raise eventually. The pressure comes at the time of the bargaining of the reference unit's contract, whether there is an actual *legal* obligation created by a parity clause or merely a *moral* obligation created by the "fact of life" pressures.

In summary, the Board held that parity clauses interfere with the untrammeled bargaining rights of the reference union by unduly burdening the reference union with the interests of the contracting union.[101] The Board limited this holding, however, by declaring that parity agreements are not void per se, but are valid only where the reference union consents.[102]

The Board's decision in *City of New London* was appealed to the

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100. *In re* City of New London, Case Nos. MPP-2268, MUPP-2343, Dec. No. 1128 (Conn. St. Bd. of Labor Rel. Apr. 10, 1973) (slip op. 4), 505 GOV'T EMPL. REL. REP. (BNA) F-3.

101. *Id.*

102. *Id.* The court noted:

> To emphasize the narrow scope of our ruling, let us point out clearly certain things:
>
> —We are not deciding that parity between policemen and firemen is forbidden by the Act, or that it is wrong or undesirable.
>
> —We are not deciding that the existence of a parity clause in and of itself constitutes a violation of the Act under all circumstances.
>
> —We are not holding that the Act forbids the police and fire units to agree upon parity, or to bargain jointly for benefits with an understanding that they are to be equal.

Id.

Connecticut Court of Common Pleas.[103] Upholding the Board, the court viewed the parity clause as a far more insidious matter. Although the Board had held that the effect of the parity clause was to place an unlawful burden upon the negotiating rights of the reference union, the court held that the clause stripped the union of *all* negotiating rights.[104] Thus, the court repeated the Board's error by treating the employer's "fact of life" evaluative considerations as a "straight-jacketing" of the parties. The emphatic language used by the court further illustrates the court's failure to distinguish active from passive parity.[105] Stating that the reference union had been stripped of all negotiating rights, the court treated this passive parity agreement as imposing a wage package upon the reference union. This was not the case; the clause merely provided the first unit with benefits achieved by the second unit during its negotiations with the City.

Other decisional tribunals have relied upon the *City of New London* cases when addressing the legality of parity clauses in the public sector. For example, the Massachusetts Labor Relations Commission held parity clauses illegal in *Town of Methuen, Police & International Brotherhood of Police Officers*.[106] The town had maintained parity between the police department and other town departments. When the reference unit, the police union, filed an unfair labor practice charge, the Commission held that the parity clause forced the reference union to act as the representative for both unions and the parity clause thereby unlawfully interfered with the bargaining rights of the reference union.[107] In essence, the Commission adopted the "double loading" language and analysis of *City of New London*.

During the period when public employment relations agencies in Massachusetts[108] and Connecticut[109] had begun the assault on parity bargaining, New York courts remained steadfast in their approval of parity clauses.[110] In *In re City of Albany*,[111] however, the New York Public Employment Relations Board joined the retreat from parity clause ac-

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103. Local Union No. 1522, Int'l Ass'n of Firefighters v. Connecticut State Bd., 31 Conn. Supp. 15, 319 A.2d 511 (1973).
104. *Id.* at 18, 319 A.2d at 513. It is in this aspect of the case that the Board leveled its most telling and damaging charge against the parity clause. The Board reasoned that prior to opening negotiations with the city, the police union's bargaining power was restricted severely in that the union already was bound by the Firemen's contract. On this issue, the police union's right to bargain had been taken from it. *Id.*
105. *Id.* The court stated that the parity agreement would "impose equality for the future upon another group . . . which has had no part in making the agreement." *Id.*
106. MLRC No. MUP-507 (Mass. Labor Rel. Comm'n Jan. 24, 1974), 545 GOV'T EMPL. REL. REP. (BNA) B-15 (1974).
107. *Id.*
108. *See id.*
109. *See In re* City of New London, Case Nos. MPP-2268, MUPP-2343, Dec. No. 1128 (Conn. State Bd. of Labor Rel. Apr. 10, 1973), 505 GOV'T EMPL. REL. REP. (BNA) F-1 (1973).
110. Patrolmen's Benevolent Ass'n v. City of New York, 75 L.R.R.M. (BNA) 2293 (N.Y. Sup. Ct.), *aff'd*, 75 L.R.R.M. (BNA) 2429 (N.Y. App. Div. 1970), *rev'd*, 76

ceptance. In that case, firefighters sought parity with a police unit. Although parity bargaining previously had been held to be a *mandatory* subject of negotiations, the Board declared that the subject was *permissive* only.[112] The Board cited two controlling factors for its decision: (a) those seeking parity wished to be silent partners in the city's negotiations with the reference unit; and (b) parity clauses could improperly inhibit negotiations between the city and the reference unit itself.[113] Although it did not refer to the *City of New London*, the Board adopted that case's "double loading" rationale. The Board, however, did not adopt the remedy granted in *City of New London*. Instead of prohibiting parity clauses, the Board merely declared them to be permissive subjects of bargaining.

In *Local 1219 v. Connecticut Labor Relations Board*,[114] the Supreme Court of Connecticut adopted both the rationale and the remedy of *City of New London*. In *Local 1219*, firefighters sought enforcement of an arbitrator's award requiring parity between fire and police units.[115] The city argued that the passive parity clause was void.[116] The Supreme Court of Connecticut, deferring to the Board's experience, technical competence, and specialized knowledge, held that the Board's conclusion that the parity clause unlawfully interfered with the reference unit "was not based on caprice or whim and could have been reasonably drawn from the evidence."[117] The court based its decision on two grounds: first, the parity clause interfered with, restrained, and coerced the right of the reference unit to untrammeled bargaining;[118] second, the parity clause interfered with the exclusivity of the bargaining units.[119] The court also adopted the holding of the *City of Albany*, that parity clauses are permitted only when the reference unit has given its consent.[120]

Taking a different approach to the invalidation of parity clauses, the New York Supreme Court, Appellate Division, invalidated a passive par-

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L.R.R.M. (BNA) 3087 (N.Y.), *on remand*, 76 L.R.R.M. (BNA) 3087 (N.Y. Sup. Ct.), 78 L.R.R.M. (BNA) 2747 (N.Y. Sup. Ct. 1971).

111. 7 N.Y. Pub. Empl. Rel. Bd. ¶ 7-3079, 587 GOV'T EMPL. REL. REP. (BNA) B-12 (1976).

112. For a discussion of the distinction between permissive and mandatory subjects of bargaining, see *supra* text accompanying notes 4-20.

113. *Id.*

114. 171 Conn. 342, 370 A.2d 952 (1976).

115. *Id.* at 347, 370 A.2d at 955.

116. *Id.*

117. *Id.* at 348, 370 A.2d at 957.

118. *Id.*

119. *Id.* The court reasoned:

> On this issue, the police union's right to bargain has been completely taken from it. By voiding parity clauses in circumstances similar to those found in the present case, the defendant Board preserves the wall of separation mandated by the statute. The defendant's action will also ensure that the units will be allowed to tie themselves to a rule of equality only if each unit agrees with the other that its interests are the same.

Id.

120. *Id.*

ity clause because of its interference with the city's bargaining rights in *Doyle v. City of Troy*.[121] In *Doyle*, a firefighter's union sought compliance with a city charter provision mandating that the minimum salaries of firemen be equal to those of policemen at comparable grades.[122]

The court invalidated the parity provision of the city charter because of its conflict with state civil service law, which required full negotiations between the city and the bargaining unit regarding wages and other terms and conditions of employment.[123] The court reasoned that, because the ordinance infringed upon the city's full bargaining right by setting a minimum salary for firemen, the effect was to prohibit negotiations on the subject of wages. This rendered the ordinance invalid under the civil service law.[124]

The nature of the party whose rights were impaired distinguishes *Doyle* from the earlier cases. Unlike the earlier cases, the court did not examine the effect of the parity clause upon any reference union. The decision, however, supports the earlier view that parity clauses impose conditions upon other parties in contravention of the public policy of facilitating untrammeled negotiations between a municipality and a union.

In *Voight v. Bowen*,[125] the Supreme Court of New York, Appellate Division, amplified the need to mesh provisions of a collective bargaining agreement with the letter of the civil service statute. In *Voight*, the City of Long Beach had executed a passive parity agreement with its police force tying the wage scale of the police to that in effect between Nassau County and its police force.[126] The court invalidated the parity agreement. Viewing the parity provision as a means to resolve a wage dispute between Long Beach and its police unit, the court reasoned that the parity provision was the equivalent of the impasse arbitration scheme established by state statute.[127] The provision was invalidated because it did not contain mandatory subjects for consideration by the arbitrator as required by the state statute that set out the impasse arbitration scheme, such as the ability of Long Beach to pay and the general wage structure of the community.[128] The court held that the parity provision was unlawful because it provided for resolution of pay disputes through reference to wages paid by Nassau County, a resolution not authorized by the statute.[129]

Voight is noteworthy in several respects. First, it is distinguishable

121. 51 A.D.2d 845, 380 N.Y.S.2d 789 (1976).
122. *Id.* at 846, 380 N.Y.S.2d at 790.
123. *Id.* (referring to Public Employees' Fair Employment Act (Taylor Law), N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973)).
124. 51 A.D.2d at 847, 380 N.Y.S.2d at 791.
125. 53 A.D.2d 277, 385 N.Y.S.2d 600 (1976).
126. *Id.* at 278, 385 N.Y.S.2d at 601.
127. *Id.* at 279, 385 N.Y.S.2d at 602.
128. *Id.* at 280, 385 N.Y.S.2d at 603.
129. *Id.*

from the preceding cases because the parity provision in *Voight* was tied to a reference unit employed by a separate governmental employer. Because no employer was common to both the contracting and reference units, there was no meaningful opportunity for the court to address the degree of interference that the parity provision would exert on the reference union's negotiating rights.

Second, *Voight* is the only reported case to treat a parity bargaining clause as a substitute for impasse resolution. The *Voight* court, equating a negotiated agreement calling for parity with an impasse that leads to arbitration, overlooked the distinction between agreement and impasse. The parties had agreed to provide for an external mechanism to adjust future wage rates during the life of the agreement; therefore, the parity provision was not a substitute for impasse resolution, but an agreement to adjust future wages. An impasse regarding an "interests dispute" arises only when the parties cannot agree to the content of a proposed agreement.[130] In this case, however, the parties mutually agreed to the procedure to adjust wages; because there was no disagreement, there could not have been an impasse.

Finally, the decision is noteworthy as a departure from the contract law principles followed in *Patrolmen's Benevolent Association v. City of New York*.[131] By voluntarily executing the agreement, Long Beach had consented to the parity procedure. Through an erroneous definition of impasse, the court permitted Long Beach to repudiate its contractual duty to maintain parity.

In *Lewiston Firefighters Association, Local 785 v. City of Lewiston*,[132] the Supreme Court of Maine invalidated the use of parity clauses in public employment contracts by adopting the rationales of *Doyle v. City of Troy*[133] and *Local 1219 v. Connecticut Labor Relations Board*.[134] In *Lewiston Firefighters Association*, a city charter granted collective bargaining rights to firemen and provided for parity between police and firemen.[135] Based upon that charter, the firemen's collective bargaining agreement with Lewiston contained a passive parity clause.[136] A state

130. C. SMITH, J. MERRIFIELD, & D. ROTHSCHILD, COLLECTIVE BARGAINING AND LABOR ARBITRATION, 103, 103-04 (1970). Most statutes provide for the resolution of interests dispute impasses through binding arbitration. In lieu of a strike or other economic action, the parties submit their impasse to a neutral third party who then resolves the impasse. *See* Amalgamated Transit Union Div. 540 v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978).

131. *See* 75 L.R.R.M. (BNA) 2293 (N.Y. Sup. Ct.), *aff'd*, 75 L.R.R.M. (BNA) 2429 (N.Y. App. Div. 1970), *rev'd*, 76 L.R.R.M. (BNA) 2634 (N.Y.), *on remand*, 76 L.R.R.M. (BNA) 3087 (N.Y. Sup. Ct.), 78 L.R.R.M. (BNA) 2747 (N.Y. Sup. Ct. 1971); *supra* text accompanying notes 46-52.

132. 354 A.2d 154 (Me. 1976).

133. 51 A.D.2d 845, 380 N.Y.S.2d 789 (1976); *see supra* notes 121-24 and accompanying text.

134. 171 Conn. 342, 370 A.2d 952 (1976); *see supra* notes 114-20 and accompanying text.

135. 354 A.2d at 157.

136. *Id.*

statute passed subsequent to execution of the agreement provided for collective bargaining for all state employees.[137] Citing this state statute, the contract reference unit, the police, sought judicial invalidation of both the ordinance and the parity clause of the collective bargaining agreement.[138]

The court held, as had *Doyle*, that the ordinance was invalid because it clearly was inconsistent with the state statute.[139] In determining that the two laws were inconsistent, the court examined the collective bargaining scheme envisioned by the state legislature.[140] Adopting the same rationale as that utilized in *Local 1219 v. Connecticut Labor Relations Board*, the court found that the focal point of the state legislation was the exclusivity of each bargaining unit;[141] each unit represented an identifiable community of interests and only exclusive representatives could bargain for those interests.[142]

Citing the need for distinct units of bargaining, the court invalidated the parity pay provisions of both the ordinance and the collective bargaining agreement. The court held that by imposing the interests of the Lewiston Firefighters upon the Lewiston Police the parity pay provisions evaded the collective bargaining procedures mandated by state statute.[143]

The court's rationale is noteworthy because it provides a different view of the traditional invalidation argument. The majority of cases invalidating parity provisions reason that a parity clause interferes with the untrammeled bargaining rights of the reference unit.[144] The *Doyle* court, however, cited the interference of the parity provision with the community of interest of clearly defined units. Although both rationales focus upon the role of units in the collective bargaining process, the rationales are distinguishable. The first rationale authorizes a parity clause if the reference unit consents. The second rationale holds that any parity provision is invalid per se as contrary to the statutory scheme, regardless of consent by the reference unit.

In 1977, the New York State Public Employment Relations Board went beyond the holding of *In re City of Albany*,[145] which had held passive parity provisions permissive but not mandatory subjects of bargaining, and held in *In re City of New York*[146] that passive parity provisions

137. *Id.*
138. *Id.* at 158.
139. *Id.* at 159; *Doyle*, 51 A.D. at 849, 380 N.Y.S.2d at 791.
140. *Lewiston Firefighters Ass'n*, 354 A.2d at 160-61.
141. *Id.* at 161.
142. *Id.*
143. *Id.*
144. *See supra* notes 85-120 and accompanying text.
145. 7 N.Y. Pub. Empl. Rel. Bd. ¶ 7-3079, 587 GOV'T EMPL. REL. REP. (BNA) B-12 (1976); *see supra* notes 111-13 and accompanying text.
146. 10 N.Y. Pub. Empl. Rel. Bd. ¶ 10-3003, 694 GOV'T EMPL. REL. REP. (BNA) 42 (1977).

are prohibited subjects of bargaining.[147] In *In re City of New York*, the police union filed an unfair labor practice charge against the city, challenging a parity pay provision in the city's collective bargaining agreements with firefighters and sanitation workers. The provision cited the police unit as the reference unit. Holding this parity provision to be prohibited, the Board relied upon *Local 1219 v. Labor Board*[148] and *Doyle v. City of Troy*.[149] Utilizing the rationale of *Local 1219 v. Labor Board*, the Board found that the parity provision interfered with the untrammeled bargaining rights of the reference union, because the reference union was compelled by the provision to negotiate for both unions.[150] In concert with *Doyle v. City of Troy*, the Board found that the parity provision circumvented the state statutory collective bargaining scheme by limiting the negotiating duties of the city.[151] Although the objection based on the interference argument could be remedied by the consent of the reference unit, the Board's objection based on the conclusion that parity clauses contravene the city's statutory duty to negotiate could not be remedied by the consent of the reference union.[152]

In its summary, the Board stated that its conclusion was consistent with *Board of Education of Huntington v. Associated Teachers*,[153] which mandated a broad scope of collective bargaining, including all possible wage terms.[154] The Board stated that notwithstanding the broad scope of collective bargaining "the scope of negotiations is limited by plain and clear prohibitions in statutory or decisional law and by public policy 'whether derived from and whether implicit in statute or decisional law, or both.' "[155]

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147. *Id.* at ¶ 10-3009, 694 GOV'T EMPL. REL. REP. (BNA) at 43 (citing Local 1219 v. Labor Board, 171 Conn. 342, 370 A.2d 952 (1976)).
148. 171 Conn. 342, 370 A.2d 952 (1976).
149. 51 A.D.2d 845, 380 N.Y.S.2d 789 (1976).
150. 10 N.Y. Pub. Empl. Rel. Bd. at ¶ 10-3009, 694 GOV'T EMPL. REL. REP. (BNA) at 43.
151. *Id.* at ¶ 10-3009, 694 GOV'T EMPL. REL. REP. (BNA) at 44. The Board explained the limiting effect of the parity provision in the following manner:
> The city, by entering into "parity" agreements, has diminished its financial ability to grant benefits to employees represented by PBA beyond the formulas contained in the agreements negotiated with the intervenors [(firemen and sanitation workers)]. In brief, the "parity" agreement inhibits the public employer from evaluating or negotiating over PBA demands on their merits, but requires it to view PBA demands in light of the "parity" agreement. Inevitably, this interferes with the negotiation rights of PBA.

Id. at ¶ 10-3009, 694 GOV'T EMPL. REL. REP. at 43.
152. *Id.* at ¶ 10-3011, 694 GOV'T EMPL. REL. REP. (BNA) at 45.
153. 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).
154. *Id.* at 122, 282 N.E.2d at 109, 331 N.Y.S.2d at 17.
155. 10 N.Y. Pub. Empl. Rel. Bd. at ¶ 10-3011, 694 GOV'T EMPL. REL. REP. (BNA) at 45 (quoting Susquehanna Valley School Dist. v. Susquehanna Valley Teachers Ass'n., 37 N.Y.2d at 616-17, 339 N.E.2d at 133, 376 N.Y.S.2d at 429); *see supra* notes 34-35, 38-39 and accompanying text for discussion of cases that limit the scope of collective bargaining provided for under *Board of Educ. of Huntington*, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).

What the Board ignored, however, is that, although the prohibition need not be explicit and definitive it must be "plain and clear."[156] This is what board member Ida Klaus stated in an emphatic dissent.[157] Klaus noted that the parity provision was not prohibited by any plain and clear provisions of the state statute or decisional law.[158] Moreover, according to Klaus, parity clauses promote several important public interests including wage stability, union security, and early resolution of disputes.[159] Klaus concluded that the long history of parity acceptance,[160] other jurisdictions' acceptance of parity in private and public sector cases,[161] and the nonimposition of wage terms upon reference unions by a passive parity clause[162] combine to tip the scales in favor of acceptance of parity under the broad scope of collective bargaining espoused in *Huntington*.

The Board failed to address Klaus's reference to the NLRB case, *Dolly Madison Industries, Inc.*[163] The reasoning of *Dolly Madison* directly contradicts the Board's conclusion that the parity scheme precludes meaningful implementation of negotiating rights and, thus, contravenes the federal statutory scheme for collective bargaining.[164] In *Dolly Madison* the NLRB concluded that, because the parity scheme did not *impose* any contract terms on a reference unit, the parties were free to negotiate all terms; therefore, the employer's duty to negotiate under the NLRA was not breached.[165] The NLRA section at issue in *Dolly Madison* was very similar to the state statute at issue in *In re City of New*

156. 37 N.Y.2d at 616-17, 339 N.E.2d at 133, 376 N.Y.S.2d at 429 (quoting Syracuse Teachers Ass'n v. Board of Educ., 35 N.Y.2d 743, 744, 320 N.E.2d 646, 646, 361 N.Y.S.2d 912, 912 (1974)).

157. 10 N.Y. Pub. Empl. Rel. Bd. at ¶ 10-3012, 694 GOV'T EMPL. REL. REP. (BNA) at 45-46.

158. *Id.*

159. *Id.* Klaus stated that:

> Recourse to such clauses may reasonably serve to promote the early resolution of bargaining disputes and the timely conclusion of an agreement by affording the necessary assurance to the contracting union that it will not risk less favorable treatment by an early settlement as against those in other units who may play for the competitive advantage of a long wait-and-see policy. Thus, the strains and uncertainties of a protracted hiatus between contracts, and their inevitable threat to labor peace and the conduct of the governmental function, may well be avoided by the mechanism of the parity clause.

Id.

160. *Id.*

161. *See* Dolly Madison Indus., 182 N.L.R.B. 1037 (1970); West Allis Professional Policemen's Ass'n v. City of West Allis, No. XX, 17300, MP-294, Dec. No. 12706 (Wis. Empl. Rel. Comm'n May 17, 1974), *discussed at* 563 GOV'T EMPL. REL. REP. (BNA) B-7 (1974).

162. 10 N.Y. Pub. Empl. Rel. Bd. at ¶ 10-3011, 694 GOV'T EMPL. REL. REP. (BNA) at 46.

163. 182 N.L.R.B. 1037 (1970); *see supra* notes 62-68 and accompanying text.

164. 10 N.Y. Pub. Empl. Rel. Bd. at ¶ 10-3011, 694 GOV'T EMPL. REL. REP. (BNA) at 45.

165. 182 N.L.R.B. at 1038.

York.[166] Although decisions involving the NLRA are not binding on public sector bargaining decisions,[167] *Dolly Madison* is persuasive authority.[168] By failing to address the reasoning of *Dolly Madison*, especially after it was raised in the dissenting opinion of board member Klaus, the Board left its conclusions open to question. Because the Board neglected to address *Dolly Madison*, commentators and other labor boards are unable to discern whether the Board distinguished its decision from *Dolly Madison* on either factual or legal grounds. Hence, when labor boards attempt to resolve issues of parity bargaining, *In Re City of New York* should be recognized as being of dubious precedential value.

The Pennsylvania Labor Relations Board also has declared parity clauses prohibited subjects of bargaining.[169] Pennsylvania had restructured its existing wage agreement with one union to correspond to the terms of an earlier agreement negotiated with another union. The Board relied upon *Local 1219 v. Labor Board*,[170] *In re City of New York*,[171] and *In re Town of Methuen*,[172] and held that the restructuring was equivalent to a parity agreement and therefore was illegal.[173] The Board found that the parity provision imposed equality for the future upon another group that had no part in making the agreement. It found that the inevitable tendency of such agreements was to interfere with the rights of the reference union to enjoy untrammeled bargaining.[174] The Board concluded

166. 29 U.S.C. § 158(a)(5) (1982) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 159(a) (1982) provides the requirements for choosing bargaining representatives. N.Y. CIV. SERV. LAW § 209-a(1)(d) (McKinney 1983) provides: "It shall be an improper practice for a public employer or its agents deliberately . . . to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."

167. N.Y. CIV. SERV. LAW § 209-a(3) (McKinney 1983) provides that "[i]n applying this section, 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." *Id.*

168. The fundamental differences cited in N.Y. CIV. SERV. LAW § 209-a(3) (Consol. 1973) do not apply to the refusal to bargain issue. In N.Y. CIV. SERV. LAW § 209-a(1)(d) (Consol. 1973) refusal to bargain cases, the sole issue is whether there is a refusal to negotiate in good faith. *See, e.g.*, Board of Coop. Educ. Serv. v. New York Publ. Empl. Rel. Bd., 82 A.D.2d 691, 444 N.Y.S.2d 226 (1981); International Ass'n of Firefighters, Local 589 v. Helsby, 59 A.D.2d 342, 399 N.Y.S.2d 334 (1977). Refusal to negotiate in good faith is also the issue addressed in cases decided under § 8(a)(5) of the NLRA. *See Dolly Madison Indus.*, 182 N.L.R.B. 1037 (1970).

169. P.L.R.B. v. Commonwealth, PERA-C-7323-C, slip op. at 1 (Penn. Lab. Rel. Bd. Mar. 22, 1978), *discussed at* 760 GOV'T EMPL. REL. REP. (BNA) 20 (1978).

170. 171 Conn. 342, 370 A.2d 952 (1976); *see supra* text accompanying notes 114-20.

171. 10 N.Y. Pub. Empl. Rel. Bd. ¶ 10-3003, 694 GOV'T EMPL. REL. REP. (BNA) 42 (1977); *see supra* notes 146-58 and accompanying text.

172. Mass. Lab. Rel. Comm'n No. MUP507, slip op. at 1, *discussed at* GOV'T EMPL. REL. REP. (BNA) B-15 (1974).

173. P.L.R.B. v. Commonwealth, No. PERA-C-7323-C, slip op. at 8 (Penn. Lab. Rel. Bd. Mar. 22, 1978), *discussed at* 760 GOV'T EMPL. REL. REP. (BNA) 20-21 (1978).

174. *Id.*

that parity arrangements adversely affect the reference union by depriving the union of its full right to good faith bargaining in violation of the state statute.[175] The Board decided the "double-loading"[176] of the reference union was an undue burden, even though the parity clause did not impose any terms upon the reference union.[177] The decision thus repeated the mistakes of its predecessors by equating passive parity with active parity.[178]

V. PUBLIC SECTOR DECISIONS VALIDATING PARITY AGREEMENTS

The same year that the New York City Board of Collective Bargaining was reviewing the parity agreement in *In re Uniformed Fire Officers Association*,[179] the United States District Court for the District of Louisiana upheld the enforcement of parity agreements in *Cooperative Street Railway Shop Employees Association v. New Orleans Public Service Commission*.[180] There, the defendant public utility had executed agreements with six bargaining units. The agreements provided for parity among the units.[181] When subsequent negotiations produced higher wages for one of the reference units, the contracting units sought higher wages through enforcement of the parity clause. In enforcing the oral representations regarding parity, the court considered the substantial labor policy promoting parity. The court held that "the evidence is persuasive that such oral agreements are also intended to induce the several unions to sign written contracts and to give them and their members a sense of security that, if others do better later, those who reach accord earlier will not suffer."[182] This sense of security is one of the beneficial factors of passive

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175. *Id.*

176. For a discussion of the "double-loading" concept, see *supra* text accompanying notes 91-97.

177. P.L.R.B. v. Commonwealth, No. PERA-C-7323-C, slip. op. at 8 (Penn. Lab. Rel. Bd. Mar. 22, 1978), *discussed at* 760 GOV'T EMPL. REL. REP. (BNA) 20-21 (1978).

178. For a discussion of active versus passive parity, see *supra* notes 30-31, 70-81 and accompanying text.

179. Nos. BCB-116-72, BCB-118-72, Dec. No. B-14-72 (N.Y. City Bd. of Collective Bargaining, Aug. 2, 1972).

180. 352 F. Supp. 1100 (E.D. La. 1972).

181. *Id.* at 1101.

> [I]f any of the other five labor organizations representing [New Orleans Public Service, Inc.]'s employees obtained a general wage increase in excess of the one negotiated by Shop Employees, the employees represented by Shop Employees would be entitled to an additional increase to equalize their general wage adjustment with the increase paid to the other labor organization, unless the increase resulted from arbitration. A similar agreement had usually been made in the past with each union. These compacts, taken together, equalized all general wage increases whether a particular union was the first or last to reach an agreement with [New Orleans Public Service, Inc.]. . . .

Id.

182. *Id.* at 1102.

parity noted in the dissent of Ida Klaus in *In re City of New York*.[183]

In *West Allis Professional Policemen's Association v. City of West Allis*,[184] the Wisconsin Employment Relations Commission (WERC) upheld a parity pay provision between the city and firefighters. That provision tied the firemen's wages to the policemen's wages.[185] In its unfair labor practice charge, the police union asserted that the parity provision unlawfully interfered with and restrained its statutory right to free and untrammeled bargaining.[186]

The WERC cited several reasons for upholding the parity provision: (1) the historical acceptance and usage of parity agreements;[187] and (2) the parity provision did not interfere with the rights of the reference union because the provision *imposed* no wage settlement on the reference union.[188] The Commission thus implicitly distinguished active parity from passive parity.

The most compelling reason that WERC offered was the "fact of life" argument.[189] The Commission noted that absent a formal parity clause, management weighs the economic cost of its bargaining decision. A grant to one unit necessarily involves consideration of granting of an equivalent benefit to a comparable unit.[190] In reviewing this managerial decision-making process, the Commission noted that "the normal, unformalized considerations of employers, on the other hand, are very compelling, not only because of cost considerations, but because of very significant tactical considerations that an employer dealing with a number of unions must make respecting the relative positions of such unions."[191] The WERC concluded that this de facto parity process, the weighing of consequences absent a formal parity clause, is such a "fact of life" in collective bargaining that to distinguish the de facto from the de jure parity process, the weighing of consequences occasioned by the presence of a parity clause, is artificial and unnecessarily legalistic.[192]

A comparison of the *West Allis* decision with that of the Connecti-

183. 10 N.Y. Pub. Empl. Rel. Bd. ¶¶ 10-3003, 10-3011, 694 GOV'T EMPL. REL. REP. (BNA) 42, 45 (1977) (Klaus, dissenting); *see supra* notes 156-68 and accompanying text.

184. No. XX, 17300, MP-294, Dec. No. 12706, slip op. at 1 (Wis. Empl. Rel. Comm'n May 17, 1974), *discussed at* 563 GOV'T EMPL. REL. REP. (BNA) B-7 (1974).

185. *Id.*, slip op. at 2-3, *discussed at* 563 GOV'T EMPL. REL. REP. (BNA) at B-7.

186. *Id.*, slip op. at 4, *discussed at* 563 GOV'T EMPL. REL. REP. (BNA) at B-7. The police union's argument that the parity provision interfered with its statutory bargaining rights was asserted successfully in cases that declared parity clauses prohibited subjects of bargaining. *See supra* notes 85-178 and accompanying text.

187. No. XX, 17300, MP-294, Dec. No. 12206, slip op. at 5 (Wis. Empl. Rel. Comm'n May 17, 1974), *discussed at* 563 GOV'T EMPL. REL. REP. (BNA) at B-7.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

cut Labor Relations Board in *In re City of New London*[193] shows that an understanding of the "fact of life" theory is essential to a proper analysis of passive parity. Unlike WERC in *West Allis*, the Connecticut Board found that, despite the existence of morally-obligated or de facto parity, legally obligated or de jure parity interfered with the bargaining rights of the reference union.[194]

The Connecticut Board dismissed the "fact of life" argument by distinguishing de facto parity from de jure parity.[195] The Board reasoned that, because the parity clause legally bound the city to give the contracting union whatever is later given to the reference union and required that such concessions be made at the time of the making of the reference union's contract, the presence of the parity clause deterred the city from granting the reference unit more than that which the contracting unit already had.[196] The corollary of this reasoning is, absent the parity agreement, the natural political pressures will not deter the city from granting one bargaining unit more than another. This implies that the wages of one unit always are considered in a vacuum. The weakness of this argument is that no prudent employer will refuse to consider the expansive consequences of his negotiations.[197]

The WERC decision in *West Allis* more reasonably reflects the true dynamics at work in the negotiating process. Employers will evaluate any wage concession in light of its aggregate effect on competing unions. This is particularly true in the public sector, where the government is answerable not only to economic market forces, but also to the political structure of the democratic process.[198] If the elected officials of a city appear to be favoring one unit over another, the officials have to face not only the members of the other unit, but the conscience of the voters. In fact, in response to such pressures, some municipal employers have "voluntarily reopened contracts in order to restore parity during the life of the contract."[199]

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193. Case Nos. MPP-2268 & MUPP-2343, Dec. No. 1128 (Conn. St. Bd. of Lab. Rel. Apr. 10, 1973), 505 GOV'T EMPL. REL. REP. (BNA) F-1 (1979).
194. *Id.*, slip op. at 4, 505 GOV'T EMPL. REL. REP. (BNA) at F-4.
195. *Id.*
196. *Id.*
197. For a discussion of management's thought processes in collective bargaining, including an evaluation of the Professional Air Traffic Controller's Organization (PATCO) strike, see X. FRASCOGNA & H. HETHERINGTON, NEGOTIATION STRATEGY FOR LAWYERS 14-16 (1984).
198. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 227-28 (1977); Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 670 (1975).
199. *In re* City of New London, Case Nos. MPP-2268 & MUPP-2343, Dec. No. 1128, slip op. at 4 (Conn. St. Bd. of Lab. Rel.), 505 GOV'T EMPL. REL. REP. (BNA) F-1, F-4 (1979). Despite the contracting union's introduction of evidence on this issue, the Connecticut Board refused to accept the argument, noting that the evidence did not show that the practice was uniform or general, and that "[t]he firefighters' stance in this very case strongly suggests that they are unwilling to rely on the inevitability which [sic] their argument presupposes." *Id.*

In *City of Detroit v. Killingsworth*,[200] a Michigan circuit court upheld an arbitrator's award of parity. The arbitrator's award granted firemen a fixed percentage raise or an amount equal to the wage benefits negotiated later between Detroit and the police, whichever package was greater.[201] The city appealed the arbitrator's decision and argued, *inter alia*, that the award was beyond the jurisdiction of the arbitrator because the award was not finite.[202] The police union intervened, claiming that the parity provision interfered in their negotiating rights.[203]

In dismissing Detroit's argument, the court held that the award was not indefinite. Rather, the court reasoned that an award prescribing a wage scale that fluctuates on some outside factor does not lack definiteness or finality if the factor is itself fixed or readily determinable.[204] In addressing the police union's claim, the court made two observations: that parity clauses have a long history of usage and adoption within both private and public employment;[205] and that although the parity provision would inhibit the police unit's negotiations, the rule of law that the courts favor settlement of disputes outweighed that effect.[206] The court reasoned that, because there is no difference between vertical and horizontal parity and the police union vigorously supported its right to vertical parity, the intervenor was estopped from complaining of any unlawful interference.[207] The court noted that the parity clause acted as a contingency clause, common to both private industry and public employment, to determine and fix wages among different employees performing similar types of employment.[208] Although the court did not use the language expressly, its rationale is essentially the same as that expressed in the "fact of life" language of *West Allis*.[209]

In *In re City of Detroit*,[210] the Michigan Employment Relations Commission expanded upon the "economic facts of life" argument in municipal bargaining. Following the upholding of the arbitrator's award in *City of Detroit v. Killingsworth*,[211] another arbitrator had mandated parity between firemen and policemen, as well as between supervisors

200. 80 L.R.R.M. (BNA) 2752 (Mich. Cir. Ct. 1972).
201. *Id.* at 2753.
202. *Id.* at 2756.
203. *Id.* at 2753.
204. *Id.* at 2756.
205. *Id.*
206. *Id.* at 2757.
207. *Id.*
208. *Id.* at 2756.
209. West Allis Professional Policemen's Ass'n v. City of West Allis, No. XX, 17300, MP-24, Dec. No. 12706, slip op. at 5 (Wis. Empl. Rel. Comm'n May 17, 1974), *discussed at* 563 GOV'T EMPL. REL. REP. (BNA) B-7 (1974).
210. No. C72 A-1, slip op. at 1053 (Mich. Empl. Rel. Comm'n July 24, 1972), *discussed at* 491 GOV'T EMPL. REL. REP. (BNA) B-9 (1972).
211. 80 L.R.R.M. (BNA) 2752 (Mich. Cir. Ct. 1972); *see supra* notes 189-209 and accompanying text.

and police.[212] During negotiations with the police union, the city had insisted upon an economic package consistent with parity among firemen.[213]

The police union filed an unfair labor practice, charging that the City of Detroit's insistence upon parity interfered with the union's free and untrammeled bargaining rights.[214] In denying the charge, the Commission held that an employer does not refuse to bargain if, during the collective bargaining, it "considers" the impact of wages, hours, and other terms and conditions of employment of one bargaining unit on any other bargaining unit.[215]

The Commission further recognized that a public employer must determine the effect of one bargaining unit's contract on any other unit because the city, like other large employers, recognizes relationships between salaries.[216] In fact, the Commission not only recognized that such considerations are economic "facts of life," but it acknowledged that to foreclose such considerations would impose an undue hardship upon the parties.[217]

The most recent decision to approve parity was issued by the Court of Appeals of New York in *Niagara Wheatfield Administrators v. Niagara Wheatfield*.[218] In that case, school administrators had executed a collective bargaining agreement that tied their salaries to those of teachers.[219] After expiration of the contract and during negotiations for a new agreement, the reference teacher unit received a salary increase.[220] Relying upon the tie-in provision of the expired contract, the administrators sought a salary increase in order to maintain the salary ratio specified in the expired contract.[221]

When the school board refused to adjust wages the administrators filed a grievance, which led to arbitration. When the arbitrator ordered compliance with the tie-in provision, the school board filed suit alleging, *inter alia*, that the tie-in provision was against public policy and therefore

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212. No. C72 A-1, slip op. at 1056, *discussed at* 491 GOV'T EMPL. REL. REP. (BNA) at B-10.
213. *Id.*, slip op. at 1055, *discussed at* 491 GOV'T EMPL. REL. REP. (BNA) at B-9.
214. *Id.*, slip op. at 1055-56, *discussed at* 491 GOV'T EMPL. REL. REP. (BNA) at B-9, B-10.
215. *Id.*, slip op. at 1056, *discussed at* 491 GOV'T EMPL. REL. REP. (BNA) at B-11.
216. *Id.*, slip op. at 1057, *discussed at* 491 GOV'T EMPL. REL. REP. (BNA) at B-11.
217. *Id.*, slip op. at 1057, *discussed at* 491 GOV'T EMPL. REL. REP. (BNA) at B-11. Taking a sample of the testimony adduced at the hearing, the commission noted:

> Mr. Freemont was asked on cross-examination by counsel for DPOA: "Now, would this be a fair statement: that the City of Detroit did not negotiate wages and other fringe benefits with the DPOA without *taking into consideration* the additional cost for wages to be paid the firefighters and the lieutenants and sergeants?" Mr. Freemont answered "Yes."

Id. (emphasis supplied by the commission).
218. 44 N.Y.2d 68, 375 N.E.2d 37, 404 N.Y.S.2d 82 (1978).
219. *Id.* at 71, 375 N.E.2d at 39, 404 N.Y.S.2d at 83.
220. *Id.*
221. *Id.*

was illegal.[222] The school board argued that the tie-in provision emasculated the board's ability to effectively negotiate a new contract.[223]

The court rejected the school board's argument and enforced the tie-in provision. In addressing general public policy, the court noted that "we must first observe that the tie-in provision is not offensive to public policy. . . . Neither can it be said at this time that continuation of the tie-in provision during the period of contract negotiations contravenes public policy."[224] The court next addressed the effect of the provision on the negotiating position of the school board. The court held that "although the bargaining position of the association is thereby bolstered, the school board's ability to negotiate effectively has not been so encumbered that it has, in essence, lost control over this important facet of its operation."[225]

The court, by express and implied reasoning, rejected the two principal arguments asserted against parity agreements. First, the court held that the parity provision did not circumvent the employer's duty to fully negotiate. The employer must negotiate on each provision proposed by the union. The agreement to adjust future wages by means of an external force, rather than through negotiations, did not act as an unlawful delegation of the negotiating authority.

The court also implied that the provision does not restrain or interfere with the untrammeled bargaining rights of the teachers' union by forcing them to negotiate for themselves and the administrators. The court noted that, although the agreement guaranteed salary increments to association members upon an increase in teachers' salaries, nothing in the agreement assured that teachers' salaries would be increased substantially or even at all.[226]

The court further observed that the school board's voluntary agreement to raise teachers' salaries during the period of negotiations with the association, thereby raising association members' salaries, hardly demonstrated that the school board had lost control over its negotiations with the association.[227] In essence, the court held that tie-in provisions are economic "facts of life" that enhance the bargaining position of the contracting union without emasculating the duties of the employer or interfering with the negotiating rights of the reference union.

In *City of Schenectady v. City Firefighters' Union*,[228] the Supreme Court of New York addressed the legality of parity pay clauses at the request of the firefighters' union which requested that the court enforce an arbitration award which required wage parity between firefighters and police. The supreme court followed the analysis provided by the Court

222. *Id.* at 72, 375 N.E.2d at 39, 404 N.Y.S.2d at 83.
223. *Id.* at 73, 375 N.E.2d at 40, 404 N.Y.S.2d at 84.
224. *Id.* at 73, 375 N.E.2d at 40, 404 N.Y.S.2d at 85.
225. *Id.* at 73-74, 375 N.E.2d at 40, 404 N.Y.S.2d at 85.
226. *Id.*
227. *Id.*
228. 85 A.D.2d 116, 448 N.Y.S.2d 806 (1982).

of Appeals of New York in *Niagara Wheatfield*[229] and rejected a rule that would permit per se invalidation of parity clauses. Instead, the court adopted a rule which allows for case-by-case examination of parity provisions in the context of the circumstances in each case.[230]

The court specifically rejected two public policy arguments which often are advanced by opponents of parity bargaining:

> (1) [A] provision requiring parity for all such groups inhibits a public employer from entering into later negotiations with one of the groups on the merits of [that group's] particular demand and thus limits "the full range of negotiations to which the City is entitled under [its statutory scheme]" and (2) once having negotiated additional benefits for one group, the employer is foreclosed from negotiating on the demands for equality of treatment by other groups entitled to parity under the agreement.[231]

In acting to enforce the terms of the arbitration award, the court noted that parity clauses serve a legitimate public policy and do not "straightjacket" the parties during subsequent negotiations.[232] This aspect of *City of Schenectady* illustrates the common sense approach found in public and private sector cases that have validated passive parity clauses.

City of Schenectady potentially is distinguishable from other passive parity cases on the basis of one critical aspect of its analysis. The court, by basing its holding in part on the joint negotiations conducted by the negotiating unit, the reference unit, and the employer,[233] interjects by implication a requirement that the reference unit consent to the parity agreement between the contracting unit and the employer. The court's holding effectively has compromised the heretofore untrammeled bargaining rights of the contracting unit. In effect, the rule enunciated in *City of Schenectady* provides the reference unit with free rein to interfere with and even coerce contracting units attempting to exercise their negotiating rights.

The requirement that the negotiating unit obtain consent from the reference unit also compromises unit exclusivity. Utilization of this re-

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229. *See supra* text accompanying notes 218-27.
230. 85 A.D.2d at 119, 448 N.Y.S.2d at 808.
231. *Id.* at 118, 448 N.Y.S.2d at 8089.
232. *Id.*
233. *Id.* at 117, 448 N.Y.S.2d at 807. The court specifically noted that the employer, the City of Schenectady, had agreed to accept the passive parity clause only after completing joint negotiations with the contracting and reference units. *Id.* Furthermore, the court based its validation of passive parity, in large part, upon Schenectady's eventual resolution of its contract dispute with the reference unit. *Id.* at 119, 448 N.Y.S.2d at 809. These facts have led one commentator to conclude that *City of Schenectady* stands for the proposition that parity bargaining is lawful only where the reference unit consents to the arrangement. *See* Note, *The Negotiability of Parity Agreements in Public Sector Collective Bargaining*, 11 FORDHAM URB. L. J. 139, 157 (1982).

quirement allows the reference unit to give what amounts to final approval to a parity provision secured by the negotiating unit.

Although *City of Schenectady* upholds the parity clause, the court's analysis is seriously flawed. Utilization of reference unit consent unduly restrains the employer and the negotiating unit in the conduct of their labor relations and distorts unit exclusivity. Hence, *City of Schenectady* should be accorded minimal persuasive merit in resolving parity bargaining issues.

VI. THE DISTINCTION IN VIEWS

The majority view is that parity agreements in the public sector are prohibited. Employment relations boards in Massachusetts,[234] Connecticut,[235] Pennsylvania,[236] and New York,[237] as well as courts in Connecticut,[238] New York,[239] and Maine[240] have invalidated those provisions with two common themes (1) because the reference unit necessarily must negotiate on behalf of the contracting unit, parity provisions inherently thrust such additional economic burdens upon the reference unit that the ability of the reference unit to negotiate freely their own demands has been restrained[241] and (2) the effect of any parity agreement is to equalize the benefits between the contracting and reference units, thus removing the reference unit's right to bargain with respect to the terms covered by the parity agreement.[242]

The minority view recognizes that, because all parties to the bargaining process bring various economic burdens to the bargaining table, an employer is compelled to examine its concessions to one party in light of its future effect on other parties.[243] Unions also realize this economic "fact of life" in selecting those provisions to be advanced at the bargaining table. In contrast to the unrealistic de jure versus de facto distinction espoused by the majority, the minority view captures the reality of the

234. *In re* Town of Methuen, No. MUP-507, slip op. at 1 (Mass. Lab. Rel. Comm'n Jan. 24, 1974), *discussed at* 545 GOV'T EMPL. REL. REP. (BNA) B-15 (1974).
235. *In re* City of New London, Case Nos. MPP-2268 and MUPP-2343, Dec. No. 1128 (Conn. St. Bd. of Lab. Rel. Apr. 10, 1973), 505 GOV'T EMPL. REL. REP. (BNA) F-1 (1973).
236. P.L.R.B. v. Commonwealth, No. PERA-C-7323, slip op. at 1 (Penn. Lab. Rel. Bd. Mar. 22, 1978), *discussed at* 760 GOV'T EMPL. REL. REP. (BNA) 20 (1978).
237. *In re* City of New York, 10 N.Y. Publ. Empl. Rel. Bd., ¶¶ 10-3003, 10-3011, 694 GOV'T EMPL. REL. REP. (BNA) 42, 45 (1977) (Klaus, dissenting).
238. Local 1219 v. Connecticut Labor Rel. Bd., 171 Conn. 342, 370 A.2d 952 (1976); Local 1522 v. Connecticut Labor Rel. Bd., 31 Conn. Supp. 15, 319 A.2d 511 (1973).
239. Doyle v. City of Troy, 51 A.D.2d 845, 380 N.Y.S.2d 789 (1976); Voight v. Bowen, 53 A.D.2d 277, 385 N.Y.S.2d 600 (1976).
240. Firefighters Ass'n Local 785 v. City of Lewiston, 354 A.2d 154 (Me. 1976).
241. G. NIERENBERG, THE ART OF NEGOTIATING 48, 54 (1968).
242. *See* X. FRANSCOGNA & H. HETHERINGTON, NEGOTIATION STRATEGY FOR LAWYERS 14, 16 (1984).
243. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1159, 1167-68 (1974); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1119 (1969).

collective bargaining process. Both the employer and union engage in economic "fact of life" considerations and deliberations. The minority position, however, is correct: The passive parity agreement does not create, economic "facts of life;" it merely crystallizes them in written form.

The majority view is founded upon an erroneous "but for" argument. The argument is premised on the view that but for the passive parity clause the municipal employer would examine only the merits of the reference unit's proposals. This is an unrealistic view. Every employer, or for that matter any negotiating principal, examines all the consequences of its bargaining decisions. These external consequences are not limited to competing unions; rather, they may extend to financiers, stockholders, and taxpayers. Thus, even absent a passive parity clause, an employer will not bargain over union proposals in a vacuum.

The majority view is also flawed fatally due to some shallow legal analysis. The majority view concludes that the effect of the parity clause is to equalize the benefits among the contracting and the reference union, which "straight-jackets" the reference union in its own bargaining. This conclusion is based only upon the *effects* of parity and does not consider the *means* undertaken to gain those effects. The majority view thus fails to distinguish among the various types of parity clauses.

The minority view classifies parity as either active or passive. Although the effect of equalization is common to both parities, the methods of equalization are different. An active parity clause requires the employer to impose the wage terms of the contracting unit upon the reference unit. The minority view, in agreement with the majority view, holds these clauses to be illegal because such a contractual imposition strips the reference unit of any meaningful bargaining opportunities. The evil is not the resulting equality of contracts, but the means taken to achieve the result: the use of an active parity clause.

In contrast to the majority, the minority's analysis has identified the passive parity clause. As with the active parity clause, the effect of a passive parity clause is equality of contracts between the contracting and reference unions. The passive parity clause, however, accomplishes equality by requiring that any superior benefits earned by the reference unit be applied to the contracting unit. The reference unit is free to negotiate as to all subjects. The only limitations are those imposed by the market.

In addition to the foregoing factual and legal arguments, strong public policy reasons support the validity of passive parity agreements. The basic policy of the national labor laws is to minimize the disruption to commerce caused by labor strife by promoting collective bargaining.[244]

244. "The theory of the Act [NLRA] is that free opportunity for negotiation with accredited representatives of the employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

To accomplish this goal, courts have recognized that the lawful scope of collective bargaining subjects is quite broad.[245] Thus, as demonstrated in the discussion of the private sector cases,[246] the scope of lawful collective bargaining subjects includes passive parity agreements.

In *United Mine Workers v. Pennington*,[247] the Supreme Court commented upon the lawfulness of parity agreements by holding that uniformity of labor standards is a legitimate aim of any national labor organization. In *General Teamsters, Warehouse & Dairy Employees, Local Union 126*,[248] the NLRB declared that a passive parity clause was a lawful subject of mandatory bargaining because the clause affected wages as a fluctuating structure similar to a cost of living index. In *Dolly Madison Industries*,[249] the NLRB validated a passive parity clause because the moving party intended only to assure that its agreed-upon wage structure was not disadvantaged by any subsequent wage package won by a competitor. In short, because of the mutual assurances involved, the use of passive parity clauses has promoted earlier contract agreements and has led to labor stability in the private sector.

As in the private sector, the validity of a passive parity provision found in a collective agreement negotiated by a public employer turns upon whether the provision constitutes a term or condition of employment.[250] In the event the parity provision constitutes a term or condition of employment, the public employer must negotiate the inclusion of such term or condition and, upon reaching an understanding, must incorporate the parity provision into the collective agreement absent some statutory provision to the contrary.[251]

These statutory prohibitions arise not from the uniqueness of public employees or from the work they perform, but from the unique nature of the government in the role of employer.[252] Unlike the private sector employer, the government, as a decision-making body, must comply with a multitude of constitutions, statutes, and ordinances and must answer ultimately to various participants in the democratic process.[253]

Perhaps the primary countervailing reason for enacting such prohibitions in the private sector is to protect an employer's ability to remain competitive in the marketplace; however, the need for orderly functioning of a democratic form of representative government and the

245. *See* Board of Educ. of Huntington v. Associated Teachers, 30 N.Y.2d 122, 130, 282 N.E.2d 169, 173, 331 N.Y.S.2d 17, 23 (1972).
246. *See supra* notes 54-84 and accompanying text.
247. 381 U.S. 657 (1965); *see supra* notes 78-84 and accompanying text.
248. 176 N.L.R.B. 406 (1969); *see supra* notes 56-61 and accompanying text.
249. 182 N.L.R.B. 1037 (1970); *see supra* notes 62-67 and accompanying text.
250. Board of Educ. v. Associated Teachers, 30 N.Y.2d at 128, 282 N.E.2d at 112, 331 N.Y.S.2d at 21.
251. *Id.*
252. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 670 (1975).
253. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 227-28 (1977); Summers, *supra* note 252, at 669-73.

preservation of the right of elected representatives to make budgetary allocations free from the disruptive activities of its public employees require statutory prohibitions in the public sector.[254] Thus, for example, to insure the uninterrupted functioning of government, public employees have been restricted in the exercise of the most basic concerted activity — the right to strike.[255]

There is no feature unique to government that justifies prohibiting the use of parity clauses. Rather, there are important benefits to the government employer/employee relationship derived from the use of parity clauses. Passive parity clauses produce stable labor relations by encouraging public employees to settle early.[256] Such contractual provisions provide the contracting union with the security that it will not be disadvantaged by signing early. This security is the key to productive labor relations.[257] Further, parity agreements provide the governmental employer with the wage flexibility to recruit and retain the most competent employees in a highly competitive market.[258] Finally, parity provides for the uniform treatment of similarly situated employees.[259]

VII. CONCLUSION

The inclusion of an active parity clause in a contract between a labor unit and an employer requires the employer to impose previously negotiated wage, benefit, and conditions of employment terms on the reference labor unit during subsequent negotiations. Because an active parity clause compromises the reference unit's right to engage in open, comprehensive bargaining with an employer, the clause clearly is an illegal subject of bargaining under the NLRA and state statutes patterned after the NLRA.

The inclusion of a passive parity clause in a contract between a labor unit and an employer does not impose terms on a subsequently negotiating reference unit. A passive parity clause merely maintains parity between a negotiating labor unit and the reference unit by passing on to the negotiating unit enhanced benefits that are provided to the reference unit by the employer during subsequent negotiations. A passive parity clause does not impose previously negotiated terms on unwilling parties; accordingly, inclusion of a passive parity clause in a labor contract does not compromise the untrammeled bargaining rights of the reference unit or the employer.

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254. City of New York v. DeLury, 23 N.Y.2d 175, 186, 243 N.E.2d 128, 134, 295 N.Y.S.2d 901, 909 (1968).
255. Anderson Fed'n of Teachers v. School City of Anderson, 252 Ind. 558, 563, 251 N.E.2d 15, 18 (1969).
256. Cooperative St. Ry. v. New Orleans Pub. Serv., Inc., 352 F. Supp. 1100, 1102 (E.D. La. 1972).
257. M. FORKOSCH, A TREATISE ON LABOR LAW 1, 2 (1965).
258. San Joaquin County Employees Ass'n v. County of San Joaquin, 39 Cal. App.3d 83, 88, 113 Cal. Rptr. 912, 914, 86 L.R.R.M. (BNA) 2942, 2944 (1974).
259. United Mine Workers v. Pennington, 381 U.S. 657, 666 (1965).

The use of passive parity clauses in public sector bargaining should be encouraged, because passive parity clauses promote wage stability, provide for increased union security, and permit governmental employers to enjoy greater flexibility in dealing with their employees. Because they promote such beneficial public interests, passive parity should be categorized as a mandatory subject of bargaining. Passive parity clauses merely crystallize the "economic facts of life" of the collective bargaining process into contract form: All negotiating parties consider the comprehensive economic consequences of each bargaining proposal.