COMMENT

Union Waiver of Public Employees' Due Process Rights

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The Supreme Court has unequivocally extended due process protection to permanent public employees. This Comment addresses the disputed issue of whether a union may waive due process rights at the bargaining table. Are these rights insulated from the bargaining process? Or may a union relinquish due process protection, presumably in exchange for concessions from the state employer? The author concludes that due process rights may not be waived by bargaining representatives.

INTRODUCTION

The United States Supreme Court recently handed down its latest word on the due process rights of public employees in Cleveland Board of Education v. Loudermill.1 The Court affirmed that the due process clause protects the employment rights of permanent state workers. It found that a state must afford its tenured employees pretermination notice and an opportunity to respond, and post-termination administrative review.2 While these safeguards are arguably minimal, they at least provide public employees some assurance that the state will not summarily deprive them of their livelihood.

As will be discussed below, the decision synthesizes a progression of the Court's due process cases and puts to rest a dispute within the Court over the states' prerogative to limit their employees' due process protection. Under the fifth and fourteenth amendments,3 the deprivation of a liberty or property interest triggers the due process right. Therefore, if a public employee enjoys a property interest in her employment, her termi-

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The author wishes to thank the editors of the Industrial Relations Law Journal for their help with the preparation of this Comment.

2. Id. at 1495, 1496.
3. The fifth amendment of the United States Constitution states, in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The fourteenth amendment of the United States Constitution states, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."
nation gives rise to the due process right, since the government has thereby deprived her of that interest. Since this protection is grounded in the Constitution, once the government grants its workers such a property interest, it may not statutorily truncate their due process safeguards.

State courts have reached a similar conclusion. For example, in *Skelly v. State Personnel Board*, the California Supreme Court held that a state employer must afford its permanent employees preremoval due process protection, which "must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."  

A remaining issue is whether a public sector union may waive the due process rights of the employees it represents. The issue arises in several contexts. First, unions generally do waive employees' rights in the course of collective bargaining with employers. Workers enjoy a panoply of constitutional and statutory rights. If a union may waive such a right, it becomes a bargaining chip that the union may exchange for concessions from an employer. The waivability of some rights, such as the right to strike, is well-settled. However, whether a union may also bargain away due process rights is less certain.

Arguably, no self-respecting union would blatantly forfeit the bare bones protection afforded public employees in *Loudermill*. However, there are subtle ways whereby a union might relinquish public employees' due process rights at the bargaining table, perhaps without even realizing it. For example, the parties to a collective bargaining agreement might agree to an automatic resignation provision, whereby a public employee who is absent without leave for a given number of days is considered to have automatically resigned. Under these circumstances, an administrator has exclusive authority to terminate the delinquent worker's employment. He may thereby discharge the employee without affording her preremoval notice or an opportunity to explain her absence.

Also, the civil service legislation of some states allows the parties to a collective bargaining agreement to substitute grievance arbitration for administrative review of disciplinary actions. A public sector union would forfeit workers' due process rights if it agreed to replace adminis-

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5. Id. at 215, 539 P.2d at 788-89, 124 Cal. Rptr. at 28-29.
8. See, e.g., N.Y. CIV. SERV. LAW § 76(4) (McKinney 1983), which provides that the administrative procedures for review of employee discipline and dismissals "may be supplemented, modified, or replaced by agreements negotiated between the state and an employee organization. . . ."
trative review of employee discharges with an arbitration procedure that failed to comport with the constitutional minimum.9 Similarly, a union's agreement to submit termination disputes to a biased tribunal would compromise public employees' due process protection, since due process requires an impartial decisionmaker.10

The waiver issue also arises in the context of union control over grievance arbitration. If a public sector collective bargaining agreement provides for grievance arbitration of disciplinary matters, and a union fails to pursue a discharged employee's grievance to arbitration, it relinquishes that employee's due process protection. This aspect of the issue has been extensively treated elsewhere,11 and is beyond the scope of this Comment.

This Comment first reviews the basis of public employees' preremoval due process protection. It then examines several state court decisions that expressly deal with union waiver of due process rights. The next section analyzes Supreme Court cases that address the related issue of whether a state may abrogate public employees' due process protection as a condition of their employment. The section argues that the limitations imposed on states' interference with their workers' due process rights unequivocally preclude denial of those rights through collective bargaining. The final section concludes that unions may not waive public employees' due process rights at the collective bargaining table. It draws this conclusion from a comparison of the status afforded due process protection and the well-settled principles that govern union waiver of workers' statutory rights.

The Comment does not question the efficacy of the due process requirement itself, but rather assumes the correctness of the judicial doctrine that extends due process protection to public employees threatened with discharge. Nor does it question the parameters of that protection. Instead, it evaluates whether unions may waive that protection in the course of collective bargaining.

I

PUBLIC EMPLOYEES' DUE PROCESS RIGHTS

Under the United States Constitution, the state may not deprive a

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person of liberty or property without due process.\textsuperscript{12} Therefore, a discharged public employee is entitled to due process protection if she has a property interest in her employment or if the termination compromises her liberty.\textsuperscript{13} The Supreme Court employs a two-part test to determine a person's right to due process. It first considers whether she was deprived of a protected interest. If so, it asks what process is due.\textsuperscript{14}

In the seminal case of \textit{Board of Regents v. Roth},\textsuperscript{15} the Supreme Court found the existence of a property interest in employment where an employee has "a legitimate claim of entitlement" to her job.\textsuperscript{16} The Constitution provides procedural protection for this property interest, but is not the source of the interest. Instead, the property interest is created and defined "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."\textsuperscript{17}

Accordingly, a state law that precludes removal of public employees except "for cause" affords the employees an "independent entitlement" to their employment. They thereby have a property interest in their jobs.\textsuperscript{18} If either an express contract with a public employer or a mutual understanding between employer and employee gives rise to a similar entitlement to continued employment, it also creates a property interest in employment.\textsuperscript{19} Accordingly, the state may not deprive permanent, non-probationary public employees of their jobs without affording them due process.\textsuperscript{20}

The discharge of an employee may also implicate a liberty interest.\textsuperscript{21} The Supreme Court has cited at least two situations that may compromise a public employee's liberty and therefore give rise to the due process right. The liberty interest is implicated if a state employer makes charges against an employee "that might seriously damage his standing and as-

\textsuperscript{12} See supra note 3; Goss v. Lopez, 419 U.S. 565, 574 (1975).
\textsuperscript{14} Logan, 455 U.S. at 428. See also Goss, 419 U.S. at 577; Morrissey, 408 U.S. at 481.
\textsuperscript{15} 408 U.S. 564 (1972).
\textsuperscript{16} Id. at 577.
\textsuperscript{17} Id. See also Perry, 408 U.S. at 601.
\textsuperscript{18} See Logan, 455 U.S. at 430.
\textsuperscript{20} Loudermill, 105 S. Ct. at 1491.
\textsuperscript{21} Roth, 408 U.S. at 573.
societies in his community." Also, a state employer that fires an employee may deprive him of liberty if it imposes a stigma or other disability upon him that forecloses his freedom to take advantage of other employment. Under either of these circumstances, a public employee would be entitled to due process protection.

In *Loudermill*, the Supreme Court balanced the competing interests to determine what process is due once the due process clause is triggered. Those interests include the employee's interest in retaining his employment, the government's interest in expedited removal of unsatisfactory employees and avoiding administrative burdens, and the general risk of an erroneous termination. The Court found that an employee's substantial interest in remaining employed and the value of accurate decisionmaking outweigh the government's interest in immediate terminations. Accordingly, it held that a tenured public employee is entitled to preremoval process including "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." In addition, the state must afford the employee post-termination administrative review.

In *Loudermill*, there was no factual dispute about the circumstances under which the complaining employees had been discharged. The amount of process due when a factual dispute does exist remains an open question. In his concurrence, Justice Brennan advocated increased process when factual disputes are involved, including "a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker."

II

UNION WAIVER OF DUE PROCESS RIGHTS

A. Existing Court Precedent

Whether a union may waive public employees' due process rights at the collective bargaining table is apparently an open question in most jurisdictions. However, a few state courts have directly confronted the issue.

22. *Id.*
23. *Id.*
25. *Id.* at 1494.
26. *Id.* at 1494-95.
27. *Id.* at 1495.
28. *Id.* at 1496.
29. *Id.* at 1499 (Brennan, J., concurring).
30. As discussed below, the highest courts of New York and Kansas have ruled on this matter. *Infra* notes 31-45 and accompanying text.
In *Antinore v. State*, a New York appellate court upheld such a waiver, and the highest court affirmed its decision. The New York Civil Service Law provides public employees with procedures and remedies to challenge disciplinary actions. However, it also expressly allows the state and a union to negotiate agreements that supplement, modify or replace those provisions. In *Antinore*, the state and its employees' bargaining representative had "executed an agreement which provided binding arbitration as the method of disposing of challenges to disciplinary action." The arbitration arrangement replaced the statutory procedures and precluded administrative or judicial review. The plaintiff was a state worker who had received notice of discharge. He challenged the constitutional sufficiency of the arbitration procedure on due process grounds.

The lower court had granted judgment for the plaintiff. It found that the arbitration procedure deprived the plaintiff of due process, and that the plaintiff had not waived his constitutional rights. It further held that the state statute was unconstitutional, since it allowed its procedural safeguards against disciplinary action to be replaced by the constitutionally deficient contract provisions.

The appellate court reversed. It acknowledged the constitutional insufficiency of the arbitration procedure provided by the collective bargaining agreement. However, the court reasoned "that due process requirements . . . are not relevant when they have been waived by the party seeking to assert them, as by voluntarily entering into an agreement for the resolution of disputes in a manner which dispenses with one or more of the rights constitutionally guaranteed." The court held that the union could waive due process rights on behalf of the employees. It reasoned:

[The union,] as designated bargaining agent for a group of public employees in which plaintiff was included, was agent for plaintiff, such that its assent to the agreement was plaintiff's assent. . . . The fact that this plaintiff did not himself approve the agreement negotiated by his representative and now disclaims satisfaction with one aspect of the agreement makes it no less binding upon him. Labor relations involving any sizeable group cannot be expected to proceed only with the consent of each member of the group. Orderly process requires that agreements be made.

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32. Id. at 8, 371 N.Y.S.2d at 214.
33. Id. at 8, 371 N.Y.S.2d at 214-15.
34. Id. at 9, 371 N.Y.S.2d at 215.
35. Id.
36. Id. at 9, 371 N.Y.S.2d at 216. Arguably, the arbitration procedure did in fact satisfy due process requirements. See Finkin, supra note 11, at 255.
and complied with even in the face of minority dissent or disapproval. Plaintiff, as employee, has the benefits of the contract; he must accept also what he may regard as the disadvantages, for in the bargaining process it may well be that the latter were assumed in exchange for the conferment of the former.\(^{38}\)

In *Gorham v. City of Kansas City*,\(^{39}\) the Kansas Supreme Court agreed with the New York courts. *Gorham* involved two police officers who had been discharged and afforded a hearing before the Grievance Board pursuant to the governing collective bargaining agreement. The Board found that the discipline was appropriate, and the officers appealed the penalties to the state court on due process grounds.

The trial court ruled in favor of the officers. It found that the officers enjoyed a property interest in continued employment which could not be taken away without due process. It held that the postremoval hearing did not satisfy their due process rights and their collective bargaining agent could not waive those rights.\(^{40}\)

The Kansas Supreme Court reversed. It agreed that the officers had a property right in their employment,\(^{41}\) but held that a public sector union may contractually waive the due process rights of the represented employees.\(^{42}\) It quoted a passage from *Antinore* to support its decision.\(^{43}\) However, the court qualified its holding by stating that the negotiated agreement must provide "fair, reasonable and efficacious procedures by which employer-employee disputes may be resolved."\(^{44}\) The court found that the contested agreement provided adequate protection under this standard.\(^{45}\)

The courts’ reliance on a waiver theory is questionable at best. Admittedly, an individual may waive her constitutional right to due process protection.\(^{46}\) This rule applies to public employees.\(^{47}\) Nevertheless, courts entertain a strong presumption against waiver of due process rights.\(^{48}\) An individual’s waiver of such rights must be clear and une-

\(^{38}\) Id. at 10-11, 371 N.Y.S.2d at 217. But see International Ass’n of Fire Fighters, Local 55 v. City of San Leandro, 180 Cal. App. 3d 179, 226 Cal. Rptr. 238 (1986) (The court found that a union’s agreement to a residency requirement did not estop the covered public employees from raising a constitutional challenge to that requirement.).


\(^{40}\) Id. at 372, 590 P.2d at 1054-55.

\(^{41}\) Id. at 374, 590 P.2d at 1056.

\(^{42}\) Id. at 378, 590 P.2d at 1058.

\(^{43}\) Id. at 377, 590 P.2d at 1057-58 (quoting *Antinore*, 49 A.D.2d at 10-11, 371 N.Y.S.2d at 217; see supra note 38 and accompanying text).

\(^{44}\) Id. at 378, 590 P.2d at 1058.

\(^{45}\) Id.

\(^{46}\) See National Steel & Shipbuilding Co. v. Director, Office of Workers’ Compensation Programs, 616 F.2d 420 (9th Cir. 1980).

\(^{47}\) See Barnett v. Housing Auth., 707 F.2d 1571 (11th Cir. 1983).

\(^{48}\) See Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973). See also Nelson v. McCarthy, 63
quivocal,\textsuperscript{49} and is valid only if made voluntarily and knowingly.\textsuperscript{50}

The fact that a public employee may waive her due process rights does not lead to the conclusion that a union may waive those rights on her behalf. In fact, union waiver of due process rights is antithetical to constitutional precepts underlying the requirements of individualized waiver. In an extensive article on the subject, Professor Finkin noted:

[T]he transference of the power to waive due process from the individual to a collective cannot be reconciled with the Constitution. The fourteenth amendment . . . is a limit upon government. “A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be [sic].” It follows that one’s right to due process cannot be infringed simply because a majority of one’s fellow workers choose that it be.\textsuperscript{51}

Notably, soon after the Antinore court rendered its decision, Professors Koretz and Rabin of Syracuse University College of Law questioned the efficacy of the court’s reasoning. They stated:

We are somewhat uncomfortable with basing the result in Antinore on waiver, particularly where constitutional rights are involved. Waiver of constitutional rights should be looked upon askance, especially when individual rights are extinguished by group action.\textsuperscript{52}

Nevertheless, the New York state courts have consistently affirmed and entrenched the Antinore doctrine.\textsuperscript{53}

The federal courts have provided scant guidance on this issue. However, on several occasions the federal bench in New York has implicitly disagreed with the result reached by the state court in Antinore.

In Goetz v. Windsor Central School District,\textsuperscript{54} a school district suspended a janitor suspected of theft and requested a written explanation for his involvement in the matter. The janitor responded not with an
explanation, but with a request for a hearing. The school district ignored his request and terminated his employment. He filed an action in district court alleging deprivation of property and liberty interests without due process of law. The district court granted defendants' summary judgment motion and the janitor appealed.

The Second Circuit agreed that the janitor possessed no property interest in his employment and affirmed that part of the lower court's decision. However, the court found that the allegations of theft stigmatized the janitor. Therefore, if the school district publicly disseminated such information, it deprived the janitor of a liberty interest, and he was entitled to due process protection. The court remanded the suit to permit discovery on that issue. Finally, the court held that the janitor's failure to take advantage of the opportunity to explain his involvement in the theft was not fatal to his cause. The court stated:

If it is found that [the janitor] was deprived of a liberty interest, he may well be entitled to more due process than the procedure under the collective bargaining agreement afforded him.

In Marcello v. Long Island Railroad, a discharged employee brought an action under 42 U.S.C. § 1983. He alleged a deprivation of his constitutional rights, including his right to due process, in connection with his dismissal. The district court granted defendants' motion for summary judgment, but noted in dictum, "A collective bargaining agreement clearly cannot lawfully abrogate rights that the Constitution guarantees."

B. Recent Supreme Court Precedent Insulates the Due Process Rights of Public Employees

As discussed above, the Burger Court unequivocally recognized that permanent public employees have a property interest in their employment and enjoy concomitant due process protection. However, the justices disputed the related issue of whether a state may partially abrogate the due process rights of its employees when it gives them a property entitlement to employment. This issue and the majority's apparent resolution of it is examined below for two reasons. First, by concluding that a state may not limit its employees' due process protection once it grants them a property interest in their employment, the majority implicitly precludes union waiver of that protection. Secondly, the majority ele-

55. Id. at 609.
56. Id. at 610.
57. Id.
59. Id. at 59 n.6. See also Forts v. Ward, 471 F. Supp. 1095, 1098 n.8 (S.D.N.Y. 1978), vacated in part on other grounds, 621 F.2d 1210 (2d Cir. 1980) ("[T]o the extent a collective bargaining agreement is in conflict with a constitutional mandate, it is to that extent unenforceable.").
vates public employees' due process protection to a high status among rights enjoyed by these employees. The elevated status of due process rights, in conjunction with established principles governing union waiver of statutory rights, refutes the Antinore court's rationale and suggests that due process rights are immune from union waiver.

The dispute among the justices emerged in Arnett v. Kennedy. Justice Rehnquist wrote the opinion for the Court, with Chief Justice Burger and Justice Stewart joining his opinion. However, while his result commanded a majority, his reasoning did not. Justice Rehnquist argued that a statute which grants public employees a property entitlement to their employment may limit the process to which they are due. The six remaining justices disagreed. The dispute resurfaced in Vitek v. Jones and Logan v. Zimmerman Brush Co., and was put to rest in Loudermill when the majority held that the state may not circumscribe its employees' due process rights.

Arnett v. Kennedy involved a nonprobationary federal employee who had been dismissed from the Office of Economic Opportunity ("OEO"). The Lloyd-La Follette Act prohibited the OEO from firing its employees without cause. It also set forth minimum procedural protection for employees subject to discharge. The OEO followed those procedures, and denied the employee's request for a hearing. He claimed a property interest in his employment and contested his dismissal on constitutional grounds, alleging that the OEO had denied him due process protection. The district court held that the Act's removal procedures were unconstitutional. It granted summary judgment for the employee and ordered reinstatement and backpay.

The Supreme Court reversed. Although the Court did not dispute the employee's property interest in his employment, the plurality held that when Congress gives a federal employee a right in his employment, it may also define the procedures by which the right may be taken away. Justice Rehnquist wrote:

[Where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter

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61. 445 U.S. 480 (1980). Vitek involved the liberty interests of a state prisoner involuntarily transferred to a mental hospital.
64. 416 U.S. 134 (1974).
66. Arnett, 416 U.S. at 139.
with the sweet.\textsuperscript{68}

He concluded:

Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest.\textsuperscript{69}

Justice Rehnquist thereby held that the Act's procedures were immune from constitutional attack.\textsuperscript{70}

However, six justices refuted Justice Rehnquist's "bitter with the sweet" theory. Justice Powell found that once the legislature grants a public employee a property interest in his employment, it may not deprive the employee of his minimum constitutional due process protection. He stated:

[The plurality's] view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.\textsuperscript{71}

Nevertheless, Justice Powell balanced the interests of the government and the employee and found that the Lloyd-La Follette Act did afford the employee adequate due process protection. He therefore concurred with the plurality.\textsuperscript{72}

The remaining justices agreed that the Constitution alone defines the due process rights of public employees deprived of a property or liberty interest in their employment.\textsuperscript{73}

At its next opportunity, a majority of the justices unequivocally rejected Justice Rehnquist's "bitter with the sweet" rationale. In \textit{Vitek},\textsuperscript{74} \textit{Logan},\textsuperscript{75} and \textit{Loudermill},\textsuperscript{76} the Court quoted Justice Powell's concurrence in \textit{Arnett},\textsuperscript{77} and held that although state law and practice deter-

\textsuperscript{68} \textit{Arnett}, 416 U.S. at 153-54.
\textsuperscript{69} Id. at 155.
\textsuperscript{70} Justice Rehnquist also held that the Act's termination procedures adequately protected the employee's liberty interest. \textit{Id.} at 157-58.
\textsuperscript{71} Id. at 167 (Powell, J., concurring).
\textsuperscript{72} Id. at 167-71.
\textsuperscript{73} Justice White found that the Lloyd-La Follette Act satisfied minimum constitutional requirements. \textit{Id.} at 195-96. However, he determined that the particular bias of the hearing officer deprived the appellee of due process, and he therefore disagreed with the plurality's result. \textit{Id.} at 199, 202.

Justices Marshall, Douglas and Brennan found that the Lloyd-La Follette Act failed to satisfy the appellee's minimum due process rights. \textit{Id.} at 212-27.

\textsuperscript{74} \textit{Vitek}, 445 U.S. at 480.
\textsuperscript{75} \textit{Logan}, 455 U.S. at 432.
\textsuperscript{76} \textit{Loudermill}, 105 S. Ct. at 1487.
\textsuperscript{77} \textit{Vitek}, 445 U.S. at 490 n.6; \textit{Logan}, 455 U.S. at 432; \textit{Loudermill}, 105 S. Ct. at 1493.
mine the *existence* of a protected interest, the Constitution sets minimum procedural safeguards for such an interest that state action may not undermine.\textsuperscript{78}

*Logan* involved an employee in Illinois who was discharged because he had a short left leg. He alleged a violation of the state Fair Employment Practices Act ("FEPA") and filed a charge with the Illinois Fair Employment Practices Commission. However, the Commission failed to schedule a timely conference, and the Illinois Supreme Court ultimately held that the Commission lacked jurisdiction over the matter.

The United States Supreme Court reversed. It first noted that the FEPA gave the employee a constitutionally protected property interest,\textsuperscript{79} and then held that the state may not specify a process by which it deprives the employee of such an interest that falls short of minimum constitutional requirements. The Court stated:

\begin{quote}
[B]ecause "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the pre-conditions to adverse official action." Indeed, any other approach would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach.\textsuperscript{80}
\end{quote}

The Court concluded that the minimum procedure to which the claimant was constitutionally entitled was a hearing before the Commission.\textsuperscript{81}

In *Loudermill*,\textsuperscript{82} the Court drove the final nail in the coffin of Justice Rehnquist's reasoning. *Loudermill* involved several discharged state civil service employees who alleged that the termination procedures deprived them of due process. The Court stated, "[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today."\textsuperscript{83} The Court reaffirmed that the Constitution is the sole determinant of due process protection. Therefore, when a state grants an employee a substantive property right in her employment, it may not also authorize the deprivation of that interest without providing constitutionally sufficient procedural safeguards.\textsuperscript{84}

Under these decisions, when her due process rights are at stake, a public employee clearly need not take the bitter with the sweet. That is, the state may not condition her "legal entitlement" to employment upon a forfeiture of constitutional rights.

\begin{footnotes}
80. *Id.* at 432.
81. *Id.* at 434.
83. *Id.* at 1493.
84. *Id.*
\end{footnotes}
This line of cases further suggests that a public employer and a union may not bargain away her due process rights in the course of collective bargaining. Pursuant to *Vitek* and *Logan*, the American Bar Association Committee on Public Employee Relations noted:

The employer must, therefore, determine the minimum requirements of the Constitution. Those can be exceeded by statute, ordinance, or collective bargaining agreement, but cannot be reduced. . . .

The due process restraint on public sector collective bargaining is inescapable in light of the analogy between legislation and a state employer's labor contract. The agreement embodies rules that govern the workplace. Although they typically result from negotiations between management and a union, the rules are nevertheless implemented and enforced by management. In the case of public employment, management is the state.

Justice Powell recently emphasized this analogy in *Abood v. Detroit Board of Education*. The case involved a first amendment challenge to a public sector agency shop clause. In his concurrence, Justice Powell stated, "The collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals." He noted that when a union and a state agency agree to a contractual provision pursuant to collective bargaining, the agreement "has the same force as if the [agency] had adopted it by promulgating a regulation." He thereupon stated, "Accordingly, the . . . collective-bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation."

The Constitution, which restrains the state's capacity to circumscribe its workers' due process rights, thereby imposes due process limitations on a state employer's collective bargaining agreements. Accordingly, a state may not adopt a labor contract that subjects its employees to discharge procedures that fall short of the constitutional minimum. This restraint precludes union waiver of public employees' due process rights at the bargaining table. Otherwise, the state could accomplish by contract what the Supreme Court forbids it from accomplishing by statute.

85. *Baird*, supra note 78, at 792.
86. *See Finkin*, supra note 11, at 246-47.
88. *Id.* at 252-53 (Powell, J., concurring).
89. *Id.* at 253.
90. *Id.*
C. The Force of Due Process Rights in Light of Established Precepts Governing Waiver of Statutory Rights

As discussed above, union waiver of public employees' due process rights cannot be reconciled with the Supreme Court's proscription against state interference with such rights. This section examines the issue in a slightly different context, and concludes that established waiver principles, coupled with the status afforded due process protection, further insulate those rights from union waiver.

1. Union Waiver of Statutory Rights

The National Labor Relations Act ("NLRA") affords private sector workers a panoply of organizational and collective rights. Courts recognize that a union may forfeit some of these rights in the course of collective bargaining. For example, unions may waive employees' right to strike, their right to engage in sympathy strikes, and their Weingarten rights.

The courts' rationale for allowing such waiver is strikingly similar to Justice Rehnquist's "bitter with the sweet" reasoning. Essentially, the courts note that workers benefit from institutionalized collective bargaining and are bound by the union's decisions as quid pro quo for the benefit. In NLRB v. Allis-Chalmers Manufacturing Co., the Supreme Court stated:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree

94. Prudential Life Ins. v. NLRB, 661 F.2d 398 (5th Cir. 1981) (The so-called "Weingarten right" gives employees the right to have a union representative present at investigatory interviews conducted by an employer.).
95. 388 U.S. 175 (1967).
with many of the union decisions, but is bound by them. 96
The fact that employees reap specific benefits in exchange for the forfeiture of their statutory rights further legitimizes the waiver. 97

As discussed above, the Antinore court relied on a "bitter with the sweet" rationale to uphold union waiver of due process rights. 98 The court noted that public employees benefit from collective bargaining and must accept the concomitant disadvantages. By the court's reasoning, if a union decides to forfeit their due process rights, the workers are justifiably bound by the decision. The court made no attempt to distinguish among the different rights of workers.

However, the United States Supreme Court has made such a distinction, and has unequivocally insulated public employees' due process rights from the "bitter with the sweet" theory. 99 Similarly, certain statutory rights are also immune from the rationale that would otherwise allow a union to waive those rights. For example, a union may not waive employees' rights to distribute union literature or to solicit union support in nonworking areas on nonworking time. 100 Employees' rights against discrimination are not subject to waiver, 101 nor may a union bargain away the employees' right to strike against unfair labor practices. 102 The benefit of collective organization and the receipt of economic benefits may not be conditioned upon the forfeiture of these rights.

2. Non-Waivable Fundamental Rights

A fundamental rights distinction emerges from case precedent that precludes union waiver of public employees' due process rights. The distinction evolved in cases prohibiting union waiver of certain statutory rights and applies with at least equal force to constitutional due process rights.

Unions may not waive rights that are fundamental to the NLRA's statutory scheme. The NLRA is premised upon workers' rights to or-

96. Id. at 180.
99. Loudermill, 105 S. Ct. at 1487; Logan, 455 U.S. at 422; Vitek, 445 U.S. at 480; Arnett, 416 U.S. at 134.
organize, bargain collectively and select their bargaining representative. Accordingly, a union may not waive rights that protect workers engaging in those activities.

This principle underlies the Supreme Court's recent decision in Metropolitan Edison v. NLRB. There the Court articulated a rule to govern union waiver of employees' statutory rights. It held that "a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative." The Court cited NLRB v. Magnavox Co. to support its holding.

In Magnavox, the Court held that a union may not waive employees' rights to distribute union literature or to solicit union support at the workplace during nonworking hours. The Court noted that such a waiver would infringe upon the workers' right to choose a bargaining representative, because it would effectively preclude solicitation by a union's opposition. Since this right is at the heart of the policy embodied in the NLRA, the Court held that it is not subject to union waiver.

Guided by Metropolitan Edison, courts have also found that a union may not waive the NLRA's proscription against discrimination. In NLRB v. Niagara Machine & Tool Works, the Second Circuit determined that a superseniority clause favoring union officials violated section 8(a)(3) of the NLRA, which prohibits discrimination that encourages or discourages membership in a labor organization. The court held that such rights are not amenable to union waiver.

In addition, a union may not waive other fundamental statutory

103. According to § 1 of the NLRA, the Act's underlying policy is to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (1982).

105. Id. at 705-06. See also Prudential Life, 661 F.2d at 400.
107. Id. at 325-26.
108. See NLRB v. Local 1131, UAW, 777 F.2d 1131 (6th Cir. 1985); Local 1384, UAW v. NLRB, 756 F.2d 482 (7th Cir. 1985); NLRB v. Niagara Machine & Tool Works, 746 F.2d 143 (2d Cir. 1984); Local 900, Int'l Union of Electrical Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).
109. 746 F.2d 143 (2d Cir. 1984).
110. Id. at 149-50.
111. Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1982), states, in relevant part: "It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."
112. Niagara Machine, 746 F.2d at 151.
Rights of workers, such as the right to equal employment opportunity guaranteed by Title VII of the Civil Rights Act of 1964.113

Thus, the distinction that emerges from the cases is that certain rights afford such fundamental protection to employees that the grant of a benefit may not be conditioned upon their forfeiture. They are immune from the "bitter with the sweet" rationale that justifies the exchange of workers' rights for employment benefits, and may not be abridged either by legislative fiat or collective bargaining.

As discussed above, the Supreme Court has elevated public employees' due process protection to this status. Consequently, a union may not waive the due process rights of public employees at the bargaining table.

Conclusion

Although certain courts have legitimized union waiver of public employees' due process rights, the practice is unacceptable under established precepts of due process protection and waiver principles.

First, union waiver is the product of group action. That is, a union presumably acts for a majority of the workers it represents when it waives their rights. However, group waiver is antithetical to the precepts of constitutional protections. The Constitution insulates the inalienable rights of individuals from the tyranny of the majority. To allow the majority to forfeit an individual worker's constitutional right to due process would violate the very fabric of the Constitution.

Secondly, the Supreme Court has unequivocally determined that when a legislature grants government employees a substantive right in their employment, it may not authorize termination procedures that fall short of the minimum requirements of due process. Practically, a public sector collective bargaining agreement is indistinguishable from legislation. Both embody rules that the state implements and enforces. Hence, a state may not achieve by collective bargaining what the Constitution forbids it from accomplishing by statute. Therefore, public employees' due process rights may not be sacrificed at the bargaining table. This restraint precludes union waiver of those rights.

Finally, the rationale that allows a union to waive workers' rights is inapplicable to the constitutional due process protection of public sector employees. A union has authority to forfeit rights of employees because the workers benefit in return. They enjoy both the advantages of collective organization and the specific benefits that the union presumably obtains in exchange for their rights. Courts therefore hold that employees

are bound by the decisions made by a union on their behalf. The workers must pay the piper. They may not post facto complain about the cost.

However, the Supreme Court has found that some rights are insulated from this rationale. That is, a grant of benefits may not be conditioned upon the forfeiture of those rights. A union may not waive workers' rights that are central to their rights to organize and to choose a collective bargaining representative. Similarly, the state may not condition an entitlement to employment upon an employee's forfeiture of due process.

A "fundamental rights" distinction emerges from case precedent. The Court has singled out statutory and constitutional rights that are fundamental to employees' interests and insulated them from interference by the state and unions. It is no surprise that the statutory rights in this category, including rights of association, self-organization and freedom from discrimination, resemble constitutional rights. These rights are basic individual freedoms and therefore deserve special protection. Therefore, they are immune from state action and union waiver.

The Court has unequivocally ruled that the due process rights of public sector employees enjoy such status. Those rights are immune from a "bitter with the sweet" rationale which would otherwise allow them to be sacrificed in exchange for other benefits. A union, therefore, should not be able to forfeit public employees' due process rights at the bargaining table.