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County Sanitation District No.2 v. Los Angeles County Employees Association, Local 660: A Study in Judicial Legislation

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I. INTRODUCTION

Strikes by both public and private employees were illegal at common law.[1] In 1935, Congress granted private employees the right to strike but withheld the same right from state and federal employees.[2] Recently, some states have enacted specific legislation granting certain state and municipal employees the right to strike in limited circumstances.[3]

Despite statutory liberalization of the traditional no-strike rule, until recently no court had presumed to change the common law prohibition against public employee strikes absent express or implied statutory authorization. In May 1985, however, the California Supreme Court in *County Sanitation District No. 2 v. Los Angeles County Employees Association, Local 660*[4] decriminalized public employee strikes without finding any statutory authority to do so. Prior to *Sanitation District,* California courts declared public employee strikes illegal unless legislatively authorized.[5]

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1. *See* United Fed'n of Postal Workers v. Blount, 325 F. Supp. 879, 882 (D.D.C.), *aff'd,* 404 U.S. 802 (1971); Commonwealth v. Pullis (Mayor's Ct. Phil. (1806)), *reprinted in* 3 J. COMMONS & E. GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1958).

2. National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935).

3. *See* ALASKA STAT. §§ 23.40.200(a)-.200(d) (1985); HAWAII REV. STAT. § 89-12 (1976 & Supp. 1984); ILL. ANN. STAT. ch. 48, § 1617 (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 179A.18 (West Supp. 1984); OR. REV. STAT. § 243.736 (1985); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1985); VT. STAT. ANN. tit. 21, § 1730 (1978); WIS. STAT. ANN. § 111.70(4)(cm)(6)(c) (West Supp. 1985).

Two state courts have interpreted existing statutes to permit public employees a limited right to strike. The Idaho Supreme Court ruled that a statute prohibiting strikes by public employees under contract implicitly permitted strikes after the employment contract had expired. Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978). The Montana Supreme Court found that legislation permitting public employees to "engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection" authorized public employee strikes. State *ex rel.* Dep't of Highways v. Public Employees Craft Council, 165 Mont. 349, 352, 529 P.2d 785, 786, 788 (1974) (emphasis in original) (citation omitted).

4. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985).

5. The California Supreme Court adopted the common law prohibition against pub-

This note explains and analyzes the court's reasoning in *Sanitation District*. It demonstrates that the court's decision is analytically unsound and concludes that this analytical weakness justifies limiting *Sanitation District*'s precedential value.

II. THE *Sanitation District* CASE

In 1976, employees of the Los Angeles County Sanitation District, a public entity providing sanitation services for approximately four million residents, went on strike. Although management immediately obtained a restraining order, employees struck for eleven days,[6] during which time sanitation facilities were repeatedly vandalized.[7] After the strike the sanitation district brought a compensatory tort action against the employee union to recover overtime and security expenses incurred during the walkout.[8]

The trial court, relying on prior California cases holding public employee strikes illegal, awarded the sanitation district expenses plus costs and prejudgment interest.[9] A California court of appeal affirmed the union's liability but reduced the damages award because of an improper calculation.[10] The California Supreme Court reversed, ruling that unless "it is clearly

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lic employee strikes in Los Angeles Metropolitan Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960). *See also* Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666, 668 (1979); Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 105-07, 140 Cal. Rptr. 41, 44-45 (1977); Los Angeles Unified School Dist. v. United Teachers-Los Angeles, 24 Cal. App. 3d 142, 145-46, 100 Cal. Rptr. 806, 808 (1972); Trustees of Cal. State Colleges v. Local 1352, San Francisco State College Fed'n of Teachers, 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134, 136 (1970); City of San Diego v. American Fed'n of State, County and Mun. Employees, Local 127, 8 Cal. App. 3d 308, 310, 87 Cal. Rptr. 258, 260 (1970); Almond v. County of Sacramento, 276 Cal. App. 2d 32, 35-36, 80 Cal. Rptr. 518, 520-21 (1969); Pranger v. Break, 186 Cal. App. 2d 551, 556, 9 Cal. Rptr. 293, 297 (1960).

6. *Sanitation District*, 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

7. For example, a concealed plywood disk was discovered in a sludge line at the district's largest sewage facility, the entrance to the main plant was blocked by a locked plant vehicle, the main plant gate was damaged, and entrances to various plants were routinely covered with broken glass and roofing tacks. Moreover, abnormal debris discovered in the sewage treatment facility damaged plant machinery. County Sanitation Dist. No. 2 v. Los Angeles County Employee Ass'n, Local 660, 195 Cal. Rptr. 567, 571-72 n.4 (Cal. App. 1983), *vacated*, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985).

8. 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

9. *Id.*

10. County Sanitation Dist. No. 2 v. Los Angeles County Employee Ass'n, Local 660, 195 Cal. Rptr. 567 (Cal. App. 1983), *vacated*, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985).

demonstrated that . . . [a public employee] strike creates a substantial and imminent threat to the health or safety of the public," the strike is neither a tort nor a crime.[11] Because the court found that the sanitation workers' strike did not threaten public health or safety, the union was held not liable for any of the sanitation district's strike-related expenses.[12]

The court's decision was based on its analysis of the following factors: legislation relating to public employee strikes; policy justifications supporting the common law rule; the pros and cons of a new standard allowing some public employees to strike; and the constitutional implications of a complete ban on public employee strikes.

A. The Legislative Ban

Sanitation district management contended that the legislature had barred public employee strikes and that the lower court decision therefore should not be reversed even if the supreme court were disposed to change the common law rule outlawing such strikes. Management relied on section 3509 of the Meyers-Milias-Brown Act (MMBA), the statute governing the employment relations of California's municipal and county employees.[13] Section 3509 states that no portion of the MMBA should "be construed as making the provisions of Section 923 of the Labor Code applicable to public employees."[14] Prior case law establishes that section 923 of the California Labor Code protects the right of California's private workers to strike.[15] Management contended that section 3509's explicit refusal to extend section

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11. 38 Cal. 3d at 586-87, 699 P.2d at 850, 214 Cal. Rptr. at 439.

12. *Id.* at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443.

13. CAL. GOV'T CODE §§ 3500-3511 (West 1980 & Supp. 1985).

14. Section 923 of the California Labor Code states in part:

> [I]t is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection.

CAL. LAB. CODE § 923 (West 1971) (emphasis added).

15. *See* Petri Cleaners, Inc. v. Automotive Employees, Local No. 88, 53 Cal. 2d 455, 349 P.2d 76, 2 Cal. Rptr. 470 (1960) (holding the right of employees to strike to gain collective bargaining and union shop agreements protected by § 923, although employers were not obliged to comply). *Sanitation District* cited *Petri* with approval. 38 Cal. 3d at 573, 699 P.2d at 840, 214 Cal. Rptr. at 429.

923 protection to public employees constituted a legislative denial of the sanitation workers' right to strike.

The court rejected this argument. It first noted that a firefighters' statute containing language identical to section 3509 also contained a provision explicitly forbidding firefighter strikes.[16] Therefore, the court reasoned, if the legislature had desired to forbid all public employee strikes, it would have included an express no-strike provision in the MMBA.[17]

Second, the court relied on its decision in *San Diego Teachers Association v. Superior Court*,[18] which suggested that a provision identical to section 3509 regulating state educational employees[19] did not prohibit strikes by public school teachers. The court argued that, in light of *San Diego Teachers*, the legislature could not have intended to bar public employee strikes by including section 3509 in the MMBA.[20] Concluding that the legislature had not addressed the legality of public employee strikes, the court reasoned that it could change the common law if "reason and equity" so require: "If the courts have created a bad rule or an outmoded one, the courts can change it."[21]

B. Common Law Concerns

After finding no legislative barrier to deciding that public employee strikes were legal, the California Supreme Court examined the common law justifications for criminalizing public employee strikes. The policies behind the common law no-strike rule include concerns that public employee strikes (1) represent an attack on state sovereignty,[22] (2) serve no purpose because public employers lack authority to change legislatively determined employment conditions,[23] (3) give public employees inordinate bargaining power because of the inelastic demand for

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16. CAL. LAB. CODE §§ 1960-1964 (West 1971 & Supp. 1985). The section similar to § 3509 is § 1963; the explicit strike prohibition is found in § 1962.

17. 38 Cal. 3d at 573, 699 P.2d at 840-41, 214 Cal. Rptr. at 429-30.

18. 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

19. CAL. GOV'T CODE § 3549 (West 1980).

20. 38 Cal. 3d at 573, 699 P.2d at 841, 214 Cal. Rptr. at 430.

21. *Id.* at 584, 699 P.2d at 848, 214 Cal. Rptr. at 437.

22. *See* Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 273, 83 A.2d 482, 485 (1951) (denying Connecticut teachers' right to strike as offensive to state sovereignty).

23. *See* City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 44, 210 P.2d 305, 310-11 (1949) (upholding preliminary injunction restraining contractors from striking to coerce city official), *aff'd*, 109 Cal. App. 2d 81, 240 P.2d 16 (1952).

many public services,[24] and (4) threaten public, health, safety, and welfare through cessation of essential governmental services.[25] The court concluded that the proffered justifications are invalid in a modern legal context.[26]

As to the first of these justifications, the court noted that it had earlier rejected the doctrine of sovereign tort immunity, which gave rise to "incongruous results."[27] Reasoning by analogy from this rejection, the court concluded that state sovereignty was too archaic a concept to justify prohibiting strikes by public employees.[28]

The court also rejected the common law notion that public employee strikes should be outlawed because the legislature, not government employers, determines terms of employment for state employees. Legislation such as the MMBA grants considerable bargaining rights to public employees. As a result, most public employment contracts are the product of collective bargaining between employees and supervisors. The court concluded that because the legislature had authorized such procedures, this common law notion was of no concern.[29]

The court next considered the argument that public demand for services gives striking public employees inordinate bargaining power. The court rejected this argument after considering several market constraints on the effectiveness of such strikes. First, few government services are truly essential. Since the public can do without many public services, little risk exists that government officials will be forced to misallocate public resources in order to settle a strike. Second, the government can operate for substantial time periods despite the inconvenience

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24. *See* City of New York v. De Lury, 23 N.Y.2d 175, 181-83, 295 N.Y.S.2d 901, 905-07, 243 N.E.2d 128, 131-33 (1968) (affirming criminal contempt sanction imposed on striking New York sanitation workers).

Elasticity is a "concept devised to indicate the degree of responsiveness of [quantity] demanded to changes in market [price]." P. SAMUELSON, ECONOMICS 380 (9th ed. 1973). Generally, the quantity demanded of a good or service depends on its price. When prices rise, demand for some goods or services drops only slightly, while demand for other goods or services drops sharply. This change in demand is measured by elasticity. The more the demand fluctuates with price, the more elastic the good or service; the less the demand changes in relation to price, the more inelastic the good or service. *Id.*

25. City of New York v. De Lury, 23 N.Y.2d 175, 181-83, 295 N.Y.S.2d 901, 905-07, 243 N.E.2d 128, 131-33 (1968).

26. 38 Cal. 3d at 581, 699 P.2d at 846, 214 Cal. Rptr. at 435.

27. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (rejecting governmental immunity doctrine in California).

28. 38 Cal. 3d at 576, 699 P.2d at 842, 214 Cal. Rptr. at 431.

29. *Id.* at 576-77, 699 P.2d at 843, 214 Cal. Rptr. at 432.

caused by public employee strikes, as shown by the federal government's successful handling of the recent air-traffic controllers' strike. Third, the government maintains the ability to reject unacceptable demands made by striking public employee unions. Fourth, lost wages will deter a prolonged strike. Fifth, public concern over rising tax rates and service fees will prevent political, rather than economic, concerns from dominating the settlement process. Indeed, if the public were aware that public employees have the right to strike, it would be more supportive of government's resistance to unreasonable union demands. Finally, if public strike demands become unreasonable, the government has the option of subcontracting to private parties.[30]

The court also rejected the common law argument that public employee strikes should not be permitted because public services are essential. While recognizing that some governmental services are essential and their cessation might threaten public health or safety, the court concluded: "[T]o the extent that the 'excessive bargaining power' and 'interruption of essential services' arguments still have merit, specific health and safety limitations on the right to strike should suffice to answer the concerns underlying those arguments."[31]

C. Policy Justifications for the Court's New Rule

Sanitation District held that unless it is "clearly demonstrated that . . . a strike creates a substantial and imminent threat to the health or safety of the public,"[32] public employees may strike without criminal or tort liability. The court conceded that labor relations issues are best left to the legislature. Nevertheless, the court suggested that its decision allowing public employee strikes will improve labor relations. The court pointed to three factors as support for its conclusion: first, ten states have statutorily provided the right to strike to nearly all public employees; second, experienced labor mediators believe the right to strike improves public employee-employer relations; and third, the right to strike has improved employment relations in the private sector.[33] The court also argued that "the right to strike,

30. *Id.* at 577-79, 699 P.2d at 843-45, 214 Cal. Rptr. at 433-34.

31. *Id.* at 581, 699 P.2d at 846, 214 Cal. Rptr. at 435; *cf.* United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) (noting that an enterprise does not become essential merely because it is appropriated by the government).

32. 38 Cal. 3d at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439.

33. *Id.* at 581, 699 P.2d at 846-47, 214 Cal. Rptr. at 435-36.

in the public sector as well as in the private sector, represents a basic civil liberty."[34]

D. Constitutional Implications

Without deciding the issue, the court briefly addressed the union's contention that the right to strike is constitutionally protected. The court noted that the right to strike is increasingly viewed as a necessary "derivative of the fundamental right of freedom of association" and thus may merit some, but not absolute, constitutional protection.[35]

The court correctly noted that if the right to strike were given heightened constitutional protection, a ban on public employee strikes could be upheld only if narrowly drawn to serve a compelling state interest.[36] Without actually applying heightened scrutiny, the court stated that the traditional policy justifications for banning public employee strikes would not survive any degree of judicial scrutiny: "[T]he simplistic public/private dichotomy does not constitute a 'compelling' justification for a per se prohibition of public employee strikes." Thus, public employee strikes can be prohibited only "when they threaten the public health or safety."[37]

Sanitation District did not elevate the right to strike to constitutional status, despite the court's broad dicta. However, the court did say that the growing perception that such strikes merit constitutional protection "adds further weight to our rejection of the traditional common law rationales underlying the per se prohibition."[38]

III. ANALYSIS

Close examination of *Sanitation District* reveals that the California court's liberalization of the common law no-strike rule should be cautiously scrutinized in subsequent litigation. The court misconstrued legislative intent and summarily dismissed some legitimate concerns underlying the common law prohibition. Moreover, the court's new standard may not allow comprehensible strike regulation. Even assuming its viability, the stan-

34. *Id.* at 583, 699 P.2d at 848, 214 Cal. Rptr. at 437.
35. *Id.* at 590, 699 P.2d at 852-53, 214 Cal. Rptr. at 442.
36. *Id.* at 590-91, 699 P.2d at 853, 214 Cal. Rptr. at 442.
37. *Id.* at 591, 699 P.2d at 853, 214 Cal. Rptr. at 442.
38. *Id.* at 591, 699 P.2d at 854, 214 Cal. Rptr. at 443.

dard was misapplied in this case. Finally, the court's needless invocation of constitutional doctrine may discourage a legislative solution to California's labor-management problems.

A. Misconstruction of the MMBA

An integral premise of the court's decision is its finding that the legislature did not intend to ban public employee strikes by including section 3509 in the MMBA. However, California statutes and case law demonstrate that the legislature did intend to preclude public employee strikes.[39]

The court initially noted that while the firefighters' statute contains a provision identical to section 3509, the statute also contains another section expressly outlawing strikes. The court concluded that had the legislature intended to outlaw public employee strikes, it would have included an additional section in the MMBA explicitly doing so.[40]

Four California statutes regulating public employees contain provisions similar to section 3509 of the MMBA.[41] The oldest of these, the 1959 firefighters' statute, also expressly prohibits strikes. Nevertheless, this dual prohibition does not conclusively indicate that the legislature did not intend for section 3509 to bar strikes. The California Supreme Court did not interpret section 923 of the California Labor Code to protect the rights of private employees to strike until 1960.[42] After this interpretation, the legislature could rationally conclude that including both a denial of section 923 rights and an express strike prohibition in statutes regulating public employees was unneces-

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39. Justice Grodin, who joined the majority in *Sanitation District*, previously recognized that California courts had banned public employee strikes not authorized by the legislature. Such authorization, Grodin admits, is hard to find in the MMBA, especially in light of § 3509 of the atatute. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719, 758-59 (1972).

40. 38 Cal. 3d at 572-73, 699 P.2d at 840-41, 214 Cal. Rptr. at 429-30.

41. CAL. GOV'T CODE § 3509 (West 1980) (local employees); *id.* § 3536 (state employees); *id.* § 3549 (public educational employees); CAL. LAB. CODE § 1963 (West 1971) (firefighters).

42. In Petri Cleaners, Inc. v. Automotive Employees, Local No. 88, 53 Cal. 2d 455, 349 P.2d 76, 2 Cal. Rptr. 470 (1960), the California Supreme Court recognized that § 923 protects the unlimited right of employees to strike for collective bargaining privileges. That same year, in Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960), the court interpreted a legislative authorization to participate in "other concerted activities" as specifically authorizing and protecting strikes. Section 923 authorizes participation in "other concerted activities." *See generally supra* note 14.

sary. The firefighters' statute's withholding of section 923 rights and its explicit prohibition of strikes are significant only if one ignores subsequent judicial interpretation of section 923.

The court then erroneously relied on *San Diego Teachers Association v. Superior Court*.[43] In that case, the teachers' union argued that a provision of the Educational Employment Relations Act (EERA) making section 923 inapplicable to schoolteachers did not prohibit teacher strikes. The union reasoned that section 923's authorization of "other concerted activities" does not include a right to strike. Thus, the EERA's refusal to extend section 923 rights to schoolteachers was not intended to prevent teachers' strikes; it was intended only to prevent "the wholesale introduction of rules protecting collective bargaining . . . into the public sector [which] might conflict with tenure and other aspects of public employment."[44]

San Diego Teachers stated, in passing, its agreement with the union's argument regarding the scope of section 923.[45] However, the court's statement is unpersuasive for at least three reasons. First, the court's *statement* is inconsistent with its earlier *holding* in *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen*.[46] *Metropolitan Transit* squarely held that when the legislature granted employees the right to participate in "other concerted activities" it specifically authorized strikes.[47] Second, the issue before the court in *San Diego Teachers* involved the required procedures of the EERA, not the legality of the teachers' strike. The school district sought and obtained a restraining order preventing a threatened strike by the teachers' union. When the order was violated, the superior court entered contempt orders against the union. The union sought to annul the contempt order on a writ of review claiming that the EERA called for the Public Employee Relations Board to determine that the union acted in bad faith before the strike could be enjoined. The court explicitly stated that it was "unnecessary . . . to resolve the question of the legality of public

43. 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

44. *Id.* at 6, 593 P.2d at 841, 154 Cal. Rptr. at 896.

45. *Id.* at 13, 593 P.2d at 846, 154 Cal. Rptr. at 901 ("[S]ection 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of *concerted activities*." (emphasis added)).

46. 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960).

47. *San Diego Teachers*, 24 Cal. 3d at 19, 593 P.2d at 850, 154 Cal. Rptr. at 905 (Richardson, J., dissenting).

employee strikes if the injunctive remedies were improper."[48] Since the court ruled that the injunction was improper under the EERA, any assertion in the opinion that the EERA did not prohibit the teachers' strike was dictum. Third, the California Supreme Court had previously unanimously denied a hearing to an appellate court decision holding that the EERA provision in question constitutes "a legislative affirmance of an intent 'to withhold the right to strike from public educational employees.' "[49]

The legislature necessarily had a purpose in expressly denying public employees the protections afforded private employees under section 923 of the California Labor Code. Because section 923 is interpreted to guarantee private employees the right to strike, the plain meaning of section 3509 is to withhold that right.

In reaching the opposite conclusion in *Sanitation District,* the court not only intruded upon determinations best left to the legislature, but also unnecessarily reconsidered a decision the legislature had already made. In doing so, the court misconstrued statutory provisions and its own cases.

B. The Court's Unconvincing Refutation of Common Law Policy Justifications for Banning Strikes

The court's refutation of the four traditional common law justifications for banning public employee strikes was oversimplistic. The court failed to recognize that the common law justifications are interdependent considerations reflecting government's basic obligation to efficiently provide certain services to the public. Its failure to consider the legitimacy of this obligation and its less-than-probing analysis suggest that the court's disregard of the common law's no-strike rule was meritless.

1. The sovereignty argument

The court's rejection of state sovereignty as a justification for banning public employee strikes was based on its earlier re-

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48. *Id.* at 7, 593 P.2d at 842, 154 Cal. Rptr. at 897 (citations omitted).

49. *Id.* at 19, 593 P.2d at 850, 154 Cal. Rptr. at 905 (Richardson, J., dissenting) (quoting Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 106, 140 Cal. Rptr. 41, 45 (1977)). The supreme court unanimously denied a hearing in *Pasadena. Id.* at 18, 593 P.2d 849, 154 Cal. Rptr. 904. *See also* Almond v. County of Sacramento, 276 Cal. App. 2d 32, 37-38, 80 Cal. Rptr. 518, 522-23 (1969).

jection of sovereign tort immunity and the inconsistent results produced by that doctrine. Suggesting that all sovereignty-based doctrines are archaic, the court determined that sovereignty provides no justification for banning public employee strikes.[50] However, real differences exist between sovereign tort immunity and sovereignty as a justification for criminalizing strikes. Sovereign immunity in tort is based on the age-old maxim, "the king could do no wrong."[51] In contrast, sovereignty recognizes "[t]he necessary existence of the state and . . . [the] right and the power which necessarily follow."[52]

Abrogating sovereign tort immunity does not threaten state sovereignty. Government tort insurance has made it practical to abolish sovereign tort immunity without exposing the state to unmanageable judgments. Many states carefully limit the circumstances and procedures for obtaining judgments against public entities and their employees.[53] In addition, plaintiffs with tort claims against the state will likely have to bring their claims in the state's own court system.[54] Such tort actions do not individually or collectively threaten the state's existence.

On the other hand, a strike by public employees against a sovereign state "manifests nothing less than an intent on their part to prevent the operations of Government until their demands are satisfied."[55] This procedure differs from using the state's own instrumentalities to satisfy a claim against the state. Sovereignty and sovereign tort immunity are distinct legal concepts; that one has been correctly rejected does not mean the other retains no validity.

2. *The government-by-law argument*

The government-by-law justification is that public employee strikes serve no purpose because the state legislature, not gov-

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50. 38 Cal. 3d at 575-76, 699 P.2d at 842, 214 Cal. Rptr. at 431.

51. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214 n.1, 359 P.2d 457, 458 n.1, 11 Cal. Rptr. 89, 90 n.1 (1961).

52. BLACK'S LAW DICTIONARY 1252 (5th ed. 1979).

53. California has passed numerous statutes regulating tort recovery against public entities or employees. *See, e.g.*, CAL. GOV'T CODE §§ 810-996.6 (West 1980 & Supp. 1985).

54. Subject to certain exceptions, suits in federal court against states are barred by the eleventh amendment. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

55. 38 Cal. 3d at 575 n.20, 699 P.2d at 842 n.20, 214 Cal. Rptr. at 431 n.20 (quoting a letter from President Roosevelt to the president of the National Federation of Federal Employees).

ernment employers, sets the terms of employment. The court rejected this justification by arguing that when the legislature enacted the MMBA, it authorized public employee bargaining procedures, thus undercutting concern that employers could not respond to strike pressure.[56]

However, the court's answer only creates new problems. The authority of supervisors of striking public employees to respond to strikers' demands may indeed prevent an impasse from occurring, but the cost of achieving such a strike settlement may be a misallocation of public resources. Because of the limits on their authority and knowledge, public employee supervisors will not be able to work out a solution to the strike that takes into account all relevant public concerns. Even when the legislature has authorized collective bargaining, the governmental representative may not be sufficiently familiar with the budget to be an effective negotiator. Furthermore, local supervisors are under no constraint to ensure that resources are evenly distributed, as they do not bear the adverse consequences of their own misallocations.

The MMBA does not solve this problem because the statute does not provide either procedures for settling employment disputes or adequate governmental representation in labor disputes.[57] Consequently, the court's conclusion that the government-by-law objection is meaningless in light of the MMBA's passage is not accurate.

3. *The inelastic public service argument*

The court rejected the argument that public employees should not be permitted to strike because of their excessive bargaining power by identifying several market system constraints on a striking union's bargaining power.[58] For example, the court noted that not all governmental services are essential; thus public employees do not always have inordinate bargaining power.[59] The court's point may be conceded; however, numerous public services remain essential. If essential employees strike, the fact that nonessential employees might not be able to similarly pres-

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56. *Id.* at 576-77, 699 P.2d at 842-43, 214 Cal. Rptr. at 431-32.

57. CAL GOV'T CODE §§ 3500-3511 (West 1980 & Supp. 1985); *see* 38 Cal. 3d at 572 n.14, 699 P.2d at 840 n.14, 214 Cal. Rptr. at 429 n.14. *See generally* Grodin, *supra* note 39.

58. 38 Cal. 3d at 577, 699 P.2d at 843, 214 Cal. Rptr. at 432.

59. *Id.* at 577, 699 P.2d at 844, 214 Cal. Rptr. at 433.

sure the government will not prevent misallocation of government resources.

Next, the court stated that government has a present ability to hold firm against strikers for a considerable period, as evidenced by the recent air-traffic controllers' strike.[60] Even if the court's assumption is correct, the air-traffic controllers' strike is a poor illustration of the principle. The federal government did not deal with the strikers at all; rather, it fired the striking controllers and hired new ones. It is unlikely that the California Supreme Court meant to endorse this approach to settling strikes. Furthermore, without ability to fire controllers for their illegal strike, the government would have been hard-pressed to find a sufficient number of suitable controllers willing to leave permanent employment to fill temporary vacancies. An absence of temporary controllers would have disrupted air travel and increased pressure on the government to settle the strike, thereby raising the potential for misallocating public resources.

The court's next free market argument was that government employers always retain the option to reject unreasonable demands.[61] This truism is of limited comfort to public officials faced with mounting public pressure to settle strikes when essential services are involved. In addition, the court maintained that the self-imposed pay loss to striking employees will deter long strikes.[62] While this is true to some extent, *Sanitation District* indicates that striking public employees do not bear the same strike-related costs as their private sector counterparts. If a private employee joins his labor union in a strike, the employer must bear the cost of his employee's strike. Thus, the employee not only loses his wage for the strike period but also bears the risk that strike costs will cause his employer to cut back on production or service, resulting in a reduced work force.[63] If the cost of the strike is high enough, the employer may be forced out of business.

In contrast, when public employees strike, the government employer can generally absorb the cost. Furthermore, because

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60. *Id.* at 578, 699 P.2d at 844, 214 Cal. Rptr. at 433.

61. *Id.*

62. *Id.*

63. A business sets production at the point where price equals marginal cost. Strikes result in increased marginal cost, thereby inducing a reduction in output to the point at which price again equals marginal cost. *See generally* P. SAMUELSON, *supra* note 24, at 449-62.

government services frequently are monopolies, the taxpayer is obliged to continue purchasing the service even though the strike will increase its cost. Accordingly, the public employee's job is not threatened, while a private employee in a similar situation runs the risk of losing his job. As a result, even though loss of wages is a disincentive to public employee strikes, the disincentive is not as great as it is for striking private employees.

Next, the court maintained that public concern over increased taxes and utility fees would put pressure on striking public unions to settle strikes.[64] This argument is correct only to the extent it recognizes the truism that public employee strikes concern the public. The court's position that employee unions—over which the public has no control—will be as susceptible to public pressure as the government—over which the public has some control—is speculative at best. The common motivation of all strikes is to disable an employer in order to gain a superior bargaining position. Therefore, a striking public employees union will not acquiesce to public pressure as quickly as politically accountable public officials.

Finally, the court asserted that local municipalities may subcontract performance of necessary functions when faced with intransigent strikers.[65] Again, this assertion is partially true. Unfortunately, it is unworkable in areas of substantial and immediate public need. For example, subcontracting police protection, public education, or air-traffic control for any length of time would be difficult because of the shortage of qualified individuals in the private sector.

4. The essential function argument

The court also rejected the argument that government employees should not be allowed to strike due to the essential nature of governmental services. The court relied on the commonsense ground that not all governmental functions are essential.[66]

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64. 38 Cal. 3d at 578, 699 P.2d at 844, 214 Cal. Rptr. at 433.

65. *Id.*

66. *Id.* at 579-81, 699 P.2d at 845-46, 214 Cal. Rptr. at 434-35. The court attempted to refute two related essentiality-based doctrines. The first doctrine, already examined *supra* notes 58-65 and accompanying text, is that public employees engaged in essential governmental services possess inordinate bargaining power because of the services they provide. Accordingly, public employees should not be allowed to strike. The second doctrine is the notion that public employees engaged in essential governmental services should not be allowed to strike because the strike would endanger public welfare.

Although this rationale is convincing on its face, it misses the point. Even if not all services are essential, it is not the court's job to decide which services are essential and which are not. Traditionally, courts have had great difficulty differentiating nonessential from essential governmental functions. This attempted distinction has already proven unworkable in the context of determining state immunities from federal taxation and regulation.[67] A rule permitting only nonessential public employees the right to strike will prove equally unworkable.

The problems inherent in distinguishing essential from nonessential government functions or services were explained by the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority:*

> There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.[68]

The *Garcia* Court also found "unsound in principle and unworkable in practice" an immunity "that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' "[69] The rule of *Sanitation District* is similarly unsound in principle and will prove unworkable in practice.

A court is not the governmental body that determines the functions in which government should engage. Therefore, courts should not determine which governmental functions are essential. While some governmental functions are clearly not essential, a bright line for drawing such distinctions does not exist.[70]

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67. *See* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985) (invalidating essential governmental function test for determining state immunity from federal regulation); New York v. United States, 326 U.S. 572, 579-81 (1946) (holding state railroad subject to federal taxation).

68. 105 S. Ct. at 1015 (quoting Helvering v. Gerhardt, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

69. *Id.* at 1016.

70. *See, e.g.*, United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 886 (D.D.C.) (Wright, J., concurring) ("No douht, the line between 'essential' and 'non-essential' functions is very, very difficult to draw. For that reason, it may well be best to accept the demarcations resulting from the development of our political economy."), *aff'd*, 404 U.S.

States have the right to determine whether certain public employees may strike or whether because of the importance of their function they may not.[71] However, such determinations should be made by the legislature, which is better equipped to draw such important distinctions.

C. *The Court's Unworkable New Standard*

Sanitation District declares that "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public."[72] This standard cannot be applied easily for two reasons. First, whether a strike endangers public welfare is a function of the changing nature and length of the strike and does not lend itself to a static determination. Second, because many courts will be called upon to determine the legality of strikes in various circumstances, the standard will not foster clearly defined public employee rights nor specific public protections. Finally, even assuming the viability of the standard, it was incorrectly applied to the facts in this case.

Although strikes may not threaten public welfare initially, a threat may develop in time.[73] If a threatening situation develops, the court will probably enjoin the strike as illegal even though it had previously been legal. An injunction issued against strikers who have been legally striking for a considerable period of time will probably be ignored, given the passions that strikes can ignite.[74] In addition, an injunction issued after the strike begins to threaten public safety terminates the strike at the point it best serves the strikers' purpose of exerting pressure on the govern-

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802 (1971).

71. Numerous statutory schemes have classified employees according to the necessity of their functions and have allowed most classes of employees a conditional right to strike. However, absolutely essential employees, such as police or firefighters, are often obliged to submit to binding arbitration. *See, e.g.*, ALASKA STAT. §§ 23.40.200(b)-.200(d) (1985); ILL. ANN. STAT. ch. 48, § 1617 (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 179A.18 (West Supp. 1984).

72. 38 Cal. 3d at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439.

73. *Id.* at 587, 699 P.2d at 850, 214 Cal. Rptr. at 439.

74. Unable to consider matters not properly brought before it, a court may never have occasion to determine whether a harmful strike is legal. Under the new standard, even if a strike is harmful to public welfare, the strike will not be illegal unless an appropriate party challenges it.

ment. This increases the likelihood that strikers will disregard the injunction.

The standard also provides neither uniformity in the law governing employee relations nor specific safety limitations to protect the public. Lack of uniformity will naturally result from the number of lower California courts that will administer the standard in a variety of fact situations. A clear standard is unlikely to emerge from such a system. Consequently, conflicting signals will be sent to public employee unions contemplating strikes. If a union can make a colorable argument that a strike does not create "a substantial and imminent threat to the health or safety of the public,"[75] the union will probably strike and let the courts settle the question.

Even if the standard is uniformly interpreted, it does not provide specific health and safety limitations necessary to ensure public welfare. The standard itself is not specific, and specific limitations are unlikely to develop because California courts will be forced to adopt limitations on a case-by-case basis.

Finally, the court misapplied its own standard. The striking sanitation workers provided solid waste disposal and sewage services for approximately four million residents.[76] During the strike the sanitation facilities were sabotaged, which might have caused the sewage facility to flood.[77] An earlier sanitation workers' strike in San Francisco caused the discharge of millions of gallons of untreated sewage into the Pacific Ocean.[78] Since the *Sanitation District* strike lasted for eleven days, a lower court applying the new standard would have been justified in finding an imminent threat to public health and enjoining the strike.

However, the California Supreme Court found that the strike did not endanger public health; thus, the strike was not a crime and the employee union was not liable for damages to the sanitation district.[79] This sweeping result is arguably incorrect under the standard articulated by the court. A court could reasonably find that the possibility of discharging millions of gallons of untreated sewage into the Pacific Ocean as a result of

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75. 38 Cal. 3d at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439.

76. 195 Cal. Rptr. 567, 571 (1983).

77. *Id.* at 570.

78. State v. City of San Francisco, 94 Cal. App. 3d 522, 525, 156 Cal. Rptr. 542, 543 (1979).

79. 38 Cal. 3d at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443.

facility sabotage constitutes an imminent threat to public health and safety.[80]

D. The Court's Needless Consideration of Constitutional Implications

The final subject the court addressed was the constitutional implications of denying public employees the right to strike. The majority noted that the right to strike may be a necessary extension of the workers' right to associate guaranteed by the first amendment. Thus the court determined that the constitutionality of the right to strike "may merit consideration at some future date."[81] However, because the court did not extend constitutional protection to the right to strike in this case, the court's opinion was advisory.

The court's consideration of the constitutional implications was also unwise. First, the theory of a right to strike as a corollary to first amendment freedom of association has been litigated in several state and federal cases and has been uniformly rejected.[82]

Second, a state constitutional right to strike[83] would probably protect few, if any, employees. Congress granted the statutory right to strike to private employees partially so that the right could be regulated; thus, any state constitutional right to

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80. Since the court's reasoning parallels that in Note, *Collective Bargaining Under the Meyers-Milias-Brown Act—Should Local Public Employees Have the Right to Strike?*, 35 HASTINGS L.J. 523 (1984), the court should have considered the note's conclusion that the sanitation workers' strike actually threatened public health, safety, and welfare. *Id.* at 546-48.

81. 38 Cal. 3d at 590, 699 P.2d at 852-53, 214 Cal. Rptr. at 42. In her concurring opinion, Chief Justice Bird asserted that the right of public employees to strike is in fact one of constitutional dimension. *Id.* at 598, 699 P.2d at 855, 214 Cal. Rptr. at 444 (Bird, J., concurring).

82. *See, e.g.*, United Fed'n of Postal Workers v. Blount, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971); School Dist. v. Holland Educ. Ass'n, 380 Mich. 314, 157 N.W.2d 206 (1968); New York v. De Lury, 23 N.Y.2d 175, 295 N.Y.S.2d 901, 243 N.E.2d 128 (1968); Annot., 37 A.L.R.3D 1147, § 4 (1971) (citing cases).

83. 38 Cal. 3d at 590, 699 P.2d at 852, 214 Cal. Rptr. at 441; *see also id.* at 605 n.9, 699 P.2d at 863 n.9, 214 Cal. Rptr. at 452 n.9 (Bird, J., concurring). Although Chief Justice Bird is careful to cite coordinate provisions of the California Constitution, both her argument and the majority opinion are based on federal adjudications of amendments to the United States Constitution. Because the United States Supreme Court in United Fed'n of Postal Workers v. Blount, 325 F. Supp. 879, 884 (D.D.C.), *aff'd*, 404 U.S. 802 (1971), determined that public employees have no constitutional right to strike, the California court may not yet have identified the "adequate and independent state grounds" necessary to uphold such a novel state constitutional right. *See* Michigan v. Long, 463 U.S. 1032 (1983).

strike for private employees arguably has been preempted by Congress.[84] Moreover, a state constitutional right to strike would not extend to federal employees because existing federal law makes it illegal for federal employees to strike.[85] Therefore, such a right would only apply to California's state and municipal employees. And, even if the right were granted to state and municipal employees, Congress would remain free to restrict or proscribe that right. Traditionally, Congress has regulated rights of private employees under the commerce clause, leaving the states to regulate public employees.[86] However, after *Garcia*, which severely restricts state immunity from federal regulation under the commerce clause, Congress presumably could preempt any state constitutional right to strike.[87]

Third, the majority fails to acknowledge that extending constitutional protection to the right to strike deprives the state of some options for dealing with strikers. Since an employee cannot be dismissed for exercising his first amendment rights,[88] employees who strike could not be fired or suspended. Therefore, striking employees would face no threat that the government would subcontract their services because subcontracting would be equated with unconstitutional termination.

Finally, the court's needless discussion of constitutional issues may limit the legislative response. The court admits that the question whether to allow public employee strikes is "essentially a political argument"[89] that the legislature, and not the court, is well suited to address. "While the Legislature may enact . . . specific restrictions [to protect public health and safety]

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84. Although the preemptive effect of the National Labor Relations Act is of uncertain scope, *see generally* A. Cox & D. Bok, Cases and Materials on Labor Law 1169-1218 (7th ed. 1969), the United States Supreme Court in the context of invalidating a state regulation of strikes has held:

> In the National Labor Relations Act of 1935 . . . as amended by the Labor Management Relations Act . . . Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. . . . None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation.

Automobile Workers v. O'Brien, 339 U.S. 454, 456-57 (1950).

85. *See* 5 U.S.C. §§ 3333, 7311(3) (1982); 18 U.S.C. § 1918 (1982).

86. Anderson, *Strikes And Impasse Resolution In Public Employment*, 67 Mich. L. Rev. 943, 950-52 (1969).

87. Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

88. Perry v. Sindermann, 408 U.S. 593, 597 (1971).

89. 38 Cal. 3d at 581, 699 P.2d at 846, 214 Cal. Rptr. at 435.

the courts must proceed on a case-by-case basis."[90] These statements invite a legislative determination of which employees may be prohibited from striking because the services they perform are essential. However, the court goes on to warn the legislature that public employees' right to strike may be constitutionally protected and therefore subject to a standard of judicial review approaching "strict scrutiny."[91] Under this standard, the legislature's "purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[92]

In short, the court has invited the legislature to act, but has implicitly stated that the courts, in the context of first amendment and equal protection challenges, will ultimately decide which governmental functions are essential. Faced with this nonchoice, the legislature may relegate strike regulation to the judiciary. Ironically, the court may now be forced to regulate an area of government over which it did not wish to assume control and over which it has little competence.[93]

IV. Conclusion

In evaluating the precedential value of *Sanitation District*, courts should cautiously consider the California Supreme Court's premises, its conclusions, and the problems its new standard will likely create. Preventing all public employees from striking, regardless of their function, may be unfair. Courts certainly have the prerogative to change outdated common law rules. However, to prudently use such authority a court should not merely consider whether legitimate rights are unduly abridged but whether the court is capable of realistically fashioning remedies for their deprivation. When, as in this case, granting such rights will require constant judicial supervision over an area in which the judiciary has little expertise and in

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90. *Id.* at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438.

91. *Id.* at 590, 699 P.2d at 853, 214 Cal. Rptr. at 442. Despite its suggested invocation of strict scrutiny, the court claims that such a right would not be absolute. *Id.* at 590, 699 P.2d at 853, 214 Cal. Rptr. at 441. Just how such a qualified constitutional right would merit strict scrutiny is unclear and certainly does not clarify the court's opinion on the constitutional status of public employee strikes.

92. *Id.* at 590, 699 P.2d at 853, 214 Cal. Rptr. at 442 (quoting Vogel v. County of Los Angeles, 68 Cal. 2d 18, 22, 434 P.2d 961, 963, 64 Cal. Rptr. 409, 411 (1967)).

93. Justice Grodin had previously noted that "[j]udges seldom have the labor relations experience necessary to evaluate the many subtleties in unfair labor practice cases." *See* Grodin, *supra* note 39, at 729.

which the judiciary's role is not practically limited by legislation, the remedy may be worse than the injustice. Because the *Sanitation District* standard will be applied in the absence of any legislative guidelines and because the court's opinion acts to discourage any legislative action, *Sanitation District* was wrongly decided and may cause considerable confusion in California labor law for years to come.

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