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Has County Sanitation District (No. 2) v. Los Angeles County Employees Association Trashed the Traditional Prohibitions Upon Public Sector Strikes?

Until recently, the majority of courts in this country regularly found public sector strikes contrary to the common law.¹ In 1985, the California Supreme Court concluded that the common law prohibitions against public sector strikes should no longer be recognized in that state. This decision, *County Sanitation District (No. 2) v. Los Angeles County Employees Association*,² also raised several constitutional considerations to justify public sector strikes. The question remains whether this decision rests on solid theoretical foundations.

Part I of this note examines the common law principles prohibiting public sector strikes. Part II discusses whether recent case law has eroded these traditional common law justifications. Part III surveys and evaluates several constitutional arguments initially proposed fifteen years ago by Judge Skelly Wright in a concurring opinion³ and more fully explicated by Chief Justice Bird⁴ in her concurring opinion in *County Sanitation*. Part IV concludes that neither the expansive growth of government into areas considered by some to be nontraditional nor our rapidly changing socio-economic situation has eroded the traditional common law prohibitions, and further suggests that the right to strike does not emanate from enumerated constitutional rights.

I. Common Law Principles Prohibiting Public Sector Strikes

The justifications advanced to support the common law bar to public sector strikes can be summarized by four arguments. The principal justification states that a strike by public employees constitutes a denial of governmental authority, referred to as the sovereignty argument. The Connecticut Supreme Court initially espoused the doctrine of government as sovereign in the context of labor relations in *Norwalk Teachers' Association v. Board of Education*.⁵ The Connecticut Supreme Court em-

1 See *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971). In *Blount* a public sector union sought declaratory and injunctive relief invalidating portions of statutes which prohibited strikes against the federal government or the District of Columbia. The *Blount* court concluded that no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers. The *Blount* court held that public employees possessed no stronger right to strike than private employees and, in the absence of a statute, do not possess this right. Judge Skelly Wright concurred in part with the majority's reasoning and in its result. However, Judge Wright asserted that the right to strike is related so intimately to the recognized fundamental right to organize that it merits some degree of constitutional protection.

2 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985).

3 See *Blount*, 325 F. Supp. at 883; *supra* note 1.

4 Chief Justice Bird is no longer Chief Justice of the California Supreme Court.

5 138 Conn. 269, 83 A.2d 482 (1951). The *Norwalk Teachers' Association* sued the Board of Education seeking a declaratory judgment involving several questions including determining the right of the plaintiff to organize itself as a labor union and whether the union could engage in strike activities. The *Norwalk* court determined:

phasized that sovereignty is embodied in the people and may only be delegated to a government which they establish and operate by law. To allow a public sector strike would deny governmental authority and would contravene the public good.⁶

In *Norwalk*, the Connecticut Supreme Court cited several statements made by Presidents who shared similar sentiments.⁷ The most famous statement was written by President Franklin D. Roosevelt in a letter to the president of the National Federation of Federal Employees. President Roosevelt, a chief executive purportedly quite amicable to the interests of the union movement in the private sector in this country, encapsulated the sovereignty argument when he concluded:

Militant tactics have no place in the functions of any organization of government employees [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.⁸

The sovereignty doctrine remains the strongest and most persuasive justification behind the common law prohibition of public sector strikes. Further, although the sovereignty principal can be distinguished readily from the others, threads of sovereignty are woven tightly through the other three antistrike arguments, knitting a strong case in support of prohibiting strikes by government employees.⁹

In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry out its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare.

Id. at 276, 83 A.2d at 485.

6 *Id.*

7 President Calvin Coolidge declared in response to the Boston police strike that "[t]here is no right to strike against public safety by anybody." *Id.* at 273, 83 A.2d at 484. President Woodrow Wilson, commenting on the same strike, stated that the public sector strike is "an intolerable crime against civilization." In an address to Congress, President Wilson also stated:

The right of individuals to strike is inviolate and ought not be interfered with by any process of government, but there is a predominant right and that is the right of the government to protect all of its people and to assert its power and majesty against the challenge of any class. The government, when it asserts that right, seeks not to antagonize a class but simply to defend the right of the whole people as against the irreparable harm and injury that might be done by the attempt by any class to usurp a power that only government itself has a right to exercise as a right to all.

Id. at 273-74, 83 A.2d at 484.

8 *Id.*

9 The sovereignty argument, however, has not gone without challenge. In *County Sanitation* Justice Broussard quoted Judge Harry T. Edwards who had earlier observed:

[T]he application of the strict sovereignty notion—that governmental power can never be opposed by employee organizations—is clearly a vestige from another era, an era of unexpanded government With the rapid growth of the government, both in sheer size as well as in terms of assuming sources not traditionally associated with the 'sovereign,' government employees understandably no longer feel constrained by a notion that The King can do no wrong.

The second traditional justification barring public sector strikes reasons that because the terms of public employment are established by the legislature through unilateral lawmaking, public employers, the executive branch, cannot respond to strike pressure.¹⁰ Due to this division of power, public sector strikes would result in government by contract and not government by law.¹¹

The third justification asserts that the legislature cannot grant public employees the right to strike because this conferral would afford the employees excessive bargaining power, distorting the political process.¹² Tangentially, some argue that such a legislative grant would be an improper delegation of legislative authority.¹³ The delegation which occurs is not a direct delegation to a particular political unit; the decision making process remains with the legislature. However, conferring a right to strike upon the public sector indirectly delegates undue influence to public sector employee unions, as well as a leverage device which would improperly enable government employees to sway legislative determination. Although distinguishable from the first two common law principals, this third justification is integrally related to the first two.

Lastly, the fourth common law justification holds that the public sector employee provides an essential service which would contravene the common good if interrupted.¹⁴ In an address to the Sixteenth International Convention of American Federation of State, County and Municipal Employees (AFSCME) in April 1966, former Secretary of Labor Wirtz asserted that "every governmental function is essential in the broadest term. If it weren't, the government shouldn't be doing it."¹⁵ Wirtz also stated:

[A]n attempt to distinguish between various kinds of government functions in terms of their essentiality seems to me fruitless and futile. Policeman and fireman are . . . no more essential than school teachers. The only difference is that the costs and losses from being without fire and police departments is more dramatic and more immediate, but . . . in terms of measure of the importance to the future . . . school children being without education, even for a week, is a matter of serious concern.¹⁶

38 Cal. 3d at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431; *infra* notes 26-48 and accompanying text. See also Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359-60 (1972).

10 38 Cal. 3d at 576, 699 P.2d at 843, 214 Cal. Rptr. at 432.

11 *Id.*

12 *Id.* at 577, 699 P.2d at 843, 214 Cal. Rptr. at 432-33.

13 *Id.* at 577-78, 699 P.2d at 844, 214 Cal. Rptr. at 432-33.

14 *Id.* at 579, 699 P.2d at 845-49, 214 Cal. Rptr. at 434.

15 Quoted in K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 111 (1967).

16 *Id.* at 113. Wirtz concluded:

I come to the conclusions that the sound doctrine of public employment relations is one that assures and guarantees a reasonable and a fair procedure—with independent third party determination if necessary—for settling new contract disputes, and which, therefore, does not include the strike [and] there ought to be full protection . . . by unions representing public employees in the handling of grievance issues, including, if necessary . . . , the submission of such issues to independent arbitration, regardless of whether what we are talking about is the application of an agreement or a statute.

Wirtz's observations appear consistent with the opinion of the United States Supreme Court in *United States v. United Mine Workers*.¹⁷ In *United Mine Workers*, the Court held that the federal government's wartime seizure of private coal mines converted these mines into an essential public service.¹⁸ Although the function of the mines remained the same, the rights of the miners were altered because of the change of ownership. The nature of the ownership, not the nature of the service, was essential.¹⁹ Consequently, the court approved the issuance of an injunction against striking workers, a remedy that would not have been available had the mines remained privately owned.²⁰ The *United Mine Workers* Court implicitly equated government ownership of an industry with its essentiality. However, as the role and function of the government expands into areas in which the private sector competes, the "essentiality" of that role could be attacked.²¹

II. Applying the Common Law Justifications: *County Sanitation District (No. 2) v. Los Angeles County Employees Association*

In *County Sanitation*, the California Supreme Court observed that the right to strike implicates associational rights.²² Avoiding a constitutional morass, however, the majority of the California court held that the four traditional common law justifications prohibiting public sector strikes should no longer be recognized in that state.²³ Consequently, California joined eleven other states that have allowed public sector strikes through judicial opinion or statute.²⁴ The *County Sanitation* court concluded that

17 330 U.S. 258 (1947).

18 *Id.* at 284-89.

19 *Id.*

20 *Id.* at 289-95. The *Mine Workers* Court focused solely upon the nature of the ownership of the mines. The fact that the mines were under government control had significant bearing upon the Court's determination.

21 See *infra* notes 35-36.

22 In *County Sanitation* the sanitation district employed approximately 500 individuals who were represented by the Service Employees International Union. On July 5, 1976, approximately 75% of the district's employees went out on strike after negotiations between the union and the district for a new wage and benefit agreement reached an impasse and failed to produce a new memorandum of understanding. The district was granted a temporary restraining order but the strike continued for 11 days. After 11 days, the employees voted to accept a tentative agreement on a new memorandum of understanding which was identical to the district's offer prior to the strike.

The district then commenced a tort action seeking damages. The Superior Court found the strike to be unlawful and in violation of state public policy and awarded compensatory damages, interest and costs. While specifically reserving the question of whether a right to strike deserves constitutional protection, Justice Broussard concluded:

Although we are not inclined to hold that the right to strike rises to the magnitude of a fundamental right, it does appear that associational rights are implicated to a substantial degree. As such, the close connection between striking and other constitutionally protected activity adds further weight to our rejection of the traditional common law rationales underlying the per se prohibition.

38 Cal. 3d at 591, 699 P.2d at 854, 214 Cal. Rptr. at 443.

23 *Id.* at 586, 699 P.2d at 850, 214 Cal. Rptr. at 438.

24 Twelve states have authorized expressly state and local public sector strikes by either statute or judicial decision: Alaska, (statute); California, (judicial decision); Hawaii, (statute); Idaho, (statute); Illinois, (statute); Minnesota, (statute); Montana, (judicial decision); Oregon, (statute); Ohio, (statute); Pennsylvania, (statute); Vermont, (statute); and Wisconsin, (statute). Strikes by public sector employees in 38 states and by employees of the United States remain illegal. 5 U.S.C. § 7311 (1982) provides in relevant part:

strikes by public sector employees for the purpose of improving their wages or condition of employment are not unlawful at common law unless or until it can be demonstrated that such a strike creates a substantial and imminent threat to public health or safety.²⁵

A. *The Sovereignty Argument*

Addressing the sovereignty argument, Justice Broussard stated concisely that the sovereignty argument "asserts that the government is the embodiment of the people, and hence those entrusted to carry out its function may not impede it."²⁶ Some courts have construed a strike by public employees to be a revolution or mutiny undermining the very foundations of our democratic government. According to the court in *City of Cleveland v. Division 268*,²⁷ public sector strikes promote anarchy and chaos.²⁸ In *Board of Education v. Shanker*,²⁹ the court stated that public sector strikes may even go so far as to render individual rights of no avail.³⁰

In rejecting the sovereignty principle, Justice Broussard and the California Supreme Court majority relied upon an earlier California case which abolished sovereign immunity from tort liability. In *Muskopf v.*

An individual may not accept or hold a position in the government of the United States or the government of the District of Columbia if he—

....

(3) participates in a strike, or asserts the right to strike, against the government of the United States or the government of the District of Columbia.

Furthermore, 18 U.S.C. § 1918 (1982) provides in relevant part:

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

....

(3) participates in a strike, or asserts the right to strike, against the government of the United States or the government of the District of Columbia;

....

shall be fined not more than \$1,000 or imprisoned not more than one year and a day, or both.

25 38 Cal. 3d at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439.

26 38 Cal. 3d at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431. See also *Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 510, 131 A.2d 59, 61 (1957) in which the New Hampshire Supreme Court stated that "[l]ike the common law doctrine of the State's immunity from liability for any negligence of the agents or servants while engaged in a governmental function . . . [t]he underlying basis for the policy against strikes by public employees is the doctrine that governmental functions may not be impeded."

27 41 Ohio Op. 236, 90 N.E.2d 711 (1949).

28 The court explicitly stated:

[I]t is clear that in our system of government, the government is a servant of all of the people. And a strike against the public, a strike by public employees, has been denominated . . . as a rebellion against government. The right to strike, if accorded to public employees . . . is one means of destroying government, and if they destroy government, we have anarchy, we have chaos.

41 Ohio Op. at 239, 90 N.E.2d at 715.

29 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1967).

30 In quoting Governor Dewey with approval, Justice Nunez commented: "Every liberty enjoyed in this nation exists because it is protected by a government which functions uninterruptedly. The paralysis of any portion of government could quickly lead to the paralysis of all society. Paralysis of government is anarchy and in anarchy liberties become useless." *Id.* at 944, 283 N.Y.S.2d at 552-53.

*Corning Hospital District*³¹ the California Supreme Court concluded that "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia."³² Drawing an analogy to *Muskopf*, the majority in *County Sanitation* reached a similar conclusion, criticizing the sovereignty argument as a vague and outdated theory based upon the assumption that the "King can do no wrong."³³ The court stated that "the use of this archaic concept to justify a per se prohibition against public employee strikes is inconsistent with modern social reality and should be hereafter laid to rest."³⁴

The court in *County Sanitation* argued that the sovereignty doctrine does not comport with present socio-economic reality,³⁵ which is dominated by large-scale business and governmental organizations.³⁶ Proponents of this position further propose that the only effective way to combat employer abuse, whether public or private, is to confer upon employees a constitutional right to strike.³⁷

According to the California Supreme Court, the sheer size of government and its assumption of nontraditional services demanded that public sector employees be treated equally to their private sector counterparts.³⁸ In light of the rights conferred upon the private sector, the *County Sanitation* majority understood that government employees would no longer feel constrained by the notion that the King could do no wrong.³⁹ Consequently, the California Supreme Court abandoned a concept they considered archaic, and conferred a right to strike on public sector employees.⁴⁰

Both *County Sanitation* and *Muskopf* leave unclear whether government employees no longer are constrained to adhere to the doctrine of

31 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (rejected the concept of sovereignty as a justification for governmental immunity from tort liability).

32 *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.

33 38 Cal. 3d at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431.

34 *Id.* at 576, 699 P.2d at 842, 214 Cal. Rptr. at 432.

35 *Id.* at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431. See also *Anderson Fed'n of Teachers v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15 (1969) (DeBruler, C.J., dissenting) wherein the Chief Justice argued that many categories of employment, public and private, are substantially indistinguishable. In concluding that the source of funding and management of services enterprises is irrelevant in terms of "essentiality," Justice DeBruler concluded:

There is no difference in impact on the community between a strike by employees of a public utility and employees of a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of disruption caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a political and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector. It seems obvious to me that a strike by some private employees would be far more disruptive of the society than [a strike by certain public employees].

Id. at 569, 251 N.E.2d at 21 (paragraph headings omitted).

36 See Edwards, *supra* note 9, at 359-60.

37 See *County Sanitation*, 38 Cal. 3d at 593, 699 P.2d. at 855, 214 Cal. Rptr. at 444 (Bird, C.J., concurring). See also Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055 (1982).

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

39 *Id.*

40 38 Cal. 3d at 576, 699 P.2d at 842, 214 Cal. Rptr. at 431-32.

governmental sovereignty, or whether an activist, result-oriented judiciary is undermining the common law.⁴¹ The elected legislature functions principally to express the will of the sovereign through the democratic process. The legislature takes the common law, molds it, shapes it, and drafts and promulgates legislation pursuant to it. The legislature, not the judiciary, speaks for the people. As Chief Justice Marshall noted in *Marbury v. Madison*, the primary role of the judiciary is to say what the law is, not to enact and promulgate the law.⁴² This embodies the very essence of judicial duty.

Despite this country's early resistance to private sector unionism, legislatures eventually enacted statutes securing the rights of organization and collective bargaining, and the courts subsequently found these legislative acts constitutional.⁴³ Although similar protections initially drafted by the executive and later ratified by Congress have been extended to public sector bargaining, these statutes exclude the right to strike.⁴⁴

In particular regard to the sovereignty argument, the *County Sanitation* decision remains in the minority. The doctrine of sovereignty fails to be undermined by a socio-economically dynamic society and an era of expansive government growth into areas deemed nontraditional.⁴⁵ Essentially, the government must undertake any activity which its citizens desire it to perform. The sovereignty doctrine focuses not upon the nature of the service performed by the government, but upon the source of governmental expansion—the general public.⁴⁶

41 Some cases, however, resist judicial activism in this area. *See, e.g.*, *Virgin Islands Port Auth. v. S.I.U. de Puerto Rico*, 494 F.2d 452, 455 (3d Cir. 1974) (The court refused to confer the right to strike on Port Authority employees by negative implication, concluding that "the Union and the Authority could not by private agreement waive the illegality of such strikes and evade the express legislative prohibition of strikes.")

42 5 U.S. (1 Cranch.) 137 (1803). *Marbury* involved the appointment of the "midnight" judges by President John Adams, and President Jefferson's subsequent disregard of those appointments on a procedural issue. *Mandamus* was denied because the Supreme Court did not have original jurisdiction.

43 In *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. and S.S. Clerks*, 281 U.S. 548, 570 (1930), Chief Justice Hughes stated:

We entertain no doubt of the constitutional authority of Congress to enact the [Railway Labor Act of 1926]. . . . The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions at work. Congress . . . could safeguard [this right of employees] and seek to make their appropriate collective action an instrument of peace rather than strife.

See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("the right of employees to self organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer," is a fundamental right); *infra* notes 57 & 60.

44 The right of federal employees to bargain collectively was initially authorized in Executive Order No. 10988 (1962). Executive Order No. 10988 was reissued and modified by Executive Order No. 11491 (1969). In 1978, the provisions of Executive Order No. 11491 were, to a very significant extent, codified in 5 U.S.C. §§ 7101-7135 (1982) as Title VII of the Civil Service Reform Act of 1978. The right to strike, however, has been expressly excluded by federal statute. *See supra* note 24.

45 *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), discussed *infra* in notes 104-11.

46 *See* *United States v. United Mine Workers*, 330 U.S. 258 (1947). *See also supra* notes 17-21.

Once the government engages in an activity, the fact that anyone, including the judiciary, may consider these duties or services to be unorthodox or unnecessary becomes irrelevant. These functions and duties emanate from the sovereign authority entrusted to the government. Those hired become agents of the sovereign and perform a function different than those engaged in the private sector. Regardless of how expansive these functions and services become, a strike by public sector employees constitutes an interference with the sovereign authority and contravenes the public good. Consequently, in absence of a statute, public sector strikes remain contrary to policy and precedent, as well as traditional notions of sovereignty.

Logically, it follows that if the right to strike is to be granted to public employees it should be extended by the legislature, not the judiciary. Congress and state legislatures are the proper fora in which changes in the law should be effectuated. The judiciary must not sit as a "superlegislature."⁴⁷ This opinion comports with those views expressed in Justice Lucas' dissent in *County Sanitation*,⁴⁸ and accords with prevailing policy and precedent.

B. *The Government by Contract Argument*

In rejecting this justification, the California Supreme Court argued that the original policy foundation for the rule was substantially undermined, if not obliterated, when the California legislature statutorily conferred extensive bargaining rights upon public sector employees. This unilateral conferral of authority to the executive branch enabled the government and unions to resolve most terms and conditions of employment through the collective bargaining process.⁴⁹ Advocates, including the California Supreme Court, further assert that the common law prohibition has been similarly undermined by state legislation granting public sector employees the right to bargain collectively.⁵⁰ Proponents of this position argue that the second justification also has been significantly weakened by the passage of Title VII of the Civil Service Reform Act.⁵¹ Title VII confers upon federal employees the right to collectively bargain and contemplates that matters relating to conditions of employment will

⁴⁷ See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (sustaining a law requiring employers to give their employees four hours off from work with full pay in order to vote).

⁴⁸ 38 Cal. 3d at 611, 699 P.2d at 867-68, 214 Cal. Rptr. at 456. Justice Lucas concluded that "[t]he decision to allow public employee strikes requires a delicate and complex balancing process best undertaken by the Legislature, which may formulate a comprehensive regulatory scheme designed to avoid the disruption and chaos which invariably follow a cessation or interruption of governmental services." See also *Blount*, 325 F. Supp. at 882 where the trial court recognized that when the right of private employees to strike and to collectively bargain were first recognized and were fully protected it was the result of congressional action. The court concluded that the plight of the public sector employee paralleled that of the private sector and that in the absence of a statute, government employees did not have the right to strike.

⁴⁹ 38 Cal. 3d at 576-77, 699 P.2d at 843, 214 Cal. Rptr. at 431-33.

⁵⁰ *Id.* See also *El Rancho Unified School Dist. v. National Educ. Ass'n*, 33 Cal. 3d 946, 963, 663 P.2d 893, 192 Cal. Rptr. 123 (1983) (Justice Grodin concurred with the majority noting that where the right to collectively bargain has been statutorily conferred, the original policy reasons prohibiting public strikes are significantly undermined.).

⁵¹ 5 U.S.C. §§ 7101-7135 (1982).

be the subject of negotiation between the public sector employer and employee.⁵²

Although weakened, this second justification for barring public sector strikes does not lack merit. The fact that public employees may now establish terms and conditions of employment through collective bargaining rather than through unilateral lawmaking does not necessarily undermine the policy prohibiting public sector strikes. As noted in *El Rancho Unified School District v. National Education Association*,⁵³ the legislature changed California's common law, not the judiciary.⁵⁴ Similarly, in *United Federation of Postal Clerks v. Blount*,⁵⁵ the court observed that Congress acted unilaterally to confer upon federal government employees the right to bargain collectively.⁵⁶

Opinions such as *County Sanitation* are flawed logically. An act of the legislature conferring upon public employees the right to bargain collectively does not simultaneously undermine the common law prohibition upon government strikes. Until the legislature delegates the right to strike to public sector employees, the common law justifications prohibiting government employee strikes remain intact. Although the legislature intended that the right to bargain collectively be exercised effectively, this effectiveness would not necessarily be implemented through a supplemental right to strike.

The judiciary has recognized that the right to organize collectively and to select representatives for the purposes of engaging in collective bargaining constitutes a fundamental right.⁵⁷ However, equating collective bargaining with the right to strike by implication would result in government by contract and not government by law. The ability to establish terms and conditions of employment is conferred upon the executive by a unilateral act of the legislature. The legislature confers the power to engage in the bilateral bargaining process. The authority bestowed upon the executive cannot be altered by a supplemental right to strike where the legislature has not conferred such right unilaterally. Without having express authority, the executive branch would be unable to respond to strike pressure. If the executive branch responded to strike pressure and altered the terms and conditions of employment without having received legislative authority, such action would result in government by contract.⁵⁸ If government by contract is allowed, legislative input into the process is effectively eliminated. Even Judge Wright, an advocate of conferring the right to strike upon the public sector, notes, "I do not suggest that the right to strike is co-equal with the right to form labor organizations."⁵⁹

52 See *supra* note 44.

53 See *supra* note 50.

54 *El Rancho*, 33 Cal. 3d at 963, 663 P.2d at 893, 192 Cal. Rptr. at 133.

55 325 F. Supp. 879 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971).

56 *Id.* at 882.

57 See *supra* note 43 and *infra* note 60.

58 See *City of Los Angeles v. Los Angeles Bldg. & Constr. Trade Council*, 94 Cal. App. 2d 36, 46, 210 P.2d 305 (1949).

59 *Blount*, 325 F. Supp. at 885 (Wright, J., concurring). See also *Bullock v. Mumford*, 509 F.2d 384 (D.C. Cir. 1974); *Port Authority*, *supra* note 41; *Bennett v. Gravelle*, 451 F.2d 1011 (4th Cir.

In the absence of a statute expressly conferring that right, the judiciary would offend traditional notions of sovereignty by equating the right to strike with the right to bargain collectively. Through the legislature, the sovereign unilaterally conferred the right to collectively bargain. The courts later ratified this right.⁶⁰ By granting the right to bargain collectively in both private and public sectors, the sovereign exercised its authority, but did not erode the common law.

To remain consistent with the majority of cases and to comply with traditional notions of constitutional adjudication, the decision to extend the right to strike to public sector employees should rest with the legislature. Meanwhile, to equate collective bargaining with the right to strike by implication would result in government by contract and not government by law.

C. *The Democratic Process Argument*

In addressing the third justification, the *County Sanitation* court initially determined that all government services were not essential, that the demand for certain services was elastic, and that the right to strike would not particularly confer excessive bargaining power.⁶¹ The California Supreme Court asserted that various economic restraints serve to temper the potential bargaining power of striking government employees and thus enable public officials to resist excessive demands.⁶² Others have asserted that public sentiment against a strike will often restrict potential political pressure exercised by the public sector unions, and reduce the strike's effectiveness.⁶³ Advocates of this proposal maintain that this check upon potential political distortion may only be achieved by granting a limited right to strike.⁶⁴ In essence, proponents view a carefully defined right to strike as a safety valve which will in fact prevent strikes,

1971), *cert. dismissed*, 407 U.S. 917 (1972); *Johnson v. City of Albany*, 413 F. Supp. 782, 797 (M.D. Ga. 1976); *Police Officers' Guild v. Washington*, 369 F. Supp. 543 (D.D.C. 1973); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969). *Cf. International Union v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949), *infra* note 127.

60 See *supra* notes 43 & 57. The right to organize collectively and to select representatives for the purpose of engaging in collective bargaining has long been recognized as a fundamental right. See *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1936).

61 38 Cal. 3d at 577-79, 699 P.2d at 843-44, 214 Cal. Rptr. at 432-34.

62 38 Cal. 3d at 578-79, 699 P.2d at 844, 214 Cal. Rptr. at 433-34. See also *Burton & Krider, The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 425 (1970). *Burton and Krider* maintain:

First, wages lost due to strikes are as important to public employees as they are to employees in the private sector. Second, the public's concern over increasing tax rates may prevent the decision making process from being dominated by political instead of economic considerations A third and related economic constraint arises from such services as water, sewage and in some instances, sanitation, where explicit prices are charged. Even if representatives of groups other than employees and the employer do not enter the bargaining process, both union and local government are aware of the economic implications of bargaining which leads to higher prices which are clearly visible to the public. A fourth economic constraint on employees exists in those services where subcontracting to the private sector is a realistic alternative.

63 See *infra* notes 64-67.

64 See, e.g., GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYEE LAW OF PENNSYLVANIA, REPORT AND RECOMMENDATIONS, reprinted in 251 GOVT. EMPLOY. REL. REP. (BNA) E-1, E-3 (1968).

and believe that a blanket prohibition would be construed as unfair. A limited right to strike would be construed by the public as just, but only up to the limits imposed by the legislature. Strikes beyond these boundaries would be intolerable and would lack public support.⁶⁵

For instance, the Pennsylvania Governor's Commission believes that the collective bargaining process would be strengthened by a carefully defined and qualified right to strike.⁶⁶ A limited right to strike would curb potential employer monopsony while at the same time serve notice on the employee that limits exist in regard to the hardships which may be imposed upon the public.⁶⁷ In short, this position maintains that a public sector strike will be effective so long as the public supports it.

Pursuant to these recommendations, the Pennsylvania Legislature enacted a statute which prohibits "[s]trikes by guards at prisons or mental hospitals, or employees directly involved with the necessary functioning of the courts"⁶⁸ The legislature further excluded from the statutory definition of "public employee," "elected officials, appointees of the Governor . . . , management level employees . . . , confidential employees, clergymen . . . , [and] policemen and firemen."⁶⁹ Having carefully defined and qualified the right to strike among public sector employees, the Pennsylvania Legislature permitted strikes by the remaining public employees "unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public."⁷⁰ Other states have followed Pennsylvania's lead and passed similar legislation.⁷¹

To the contrary, the Taylor Committee of New York⁷² determined that only the right to strike in the private sector reflects an economic quality that may be effectively limited by market constraints, while in the public sector the costs are economic only in a very narrow sense and are on the whole political.⁷³ Although it may accord with principles of sovereignty, a legislative conferral of a right to strike may remain economically imprudent.

Professors Wellington and Winter argue that the combination of the right to strike and the usual methods of political pressure may afford public sector unions a disproportionate share of the effective powers in

65 *Id.*

66 *Id.*

67 *Id.* The Pennsylvania Governor's Commission concluded:

The collective bargaining process will be strengthened if the qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employee that there are limits to the hardships that he can impose.

Id.

68 PA. STAT. ANN. tit. 43, § 1101.1001 (Purdon 1970).

69 *Id.* § 1101.301(2).

70 *Id.* § 1101.1003.

71 See, e.g., Hawaii Public Employment Relations Act, HAWAII REV. STAT. §§ 89-1 to 89-20 (1982); and Illinois Public Labor Relations Act; ILL. ANN. STAT. ch. 48, paras. 1601 to 1625 (Smith-Hurd 1983).

72 NEW YORK GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT (1966).

73 *Id.* at 8-11. See also Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1117 (1969).

the political decision process.⁷⁴ The combination of the two devices would enable collective bargaining to skew the results of the normal American political process.⁷⁵ Wellington and Winter advance three factors embodied in the democratic process which undermine the potential for employer monopsony. First, public employers are less likely to exploit their workers because they must pay wages competitive with private sector wages.⁷⁶ Secondly, a number of substitutable and competing private and public employers often exist in the labor market.⁷⁷ Lastly, even if public employees may on occasion have monopsony power, economic criteria only partially determines government policy and no assurance can be found that the power will be exploited since the profit motive does not prevail as in the private sector.⁷⁸

In terms of a cost-benefit analysis, the cost incurred by the general public by conferring a right to strike upon public employees far outweighs any benefits which employees could accrue. Because the government provides essential services, uncompromising demands, and relatively few alternatives, excessive wage demands will skew the political process by forcing either an increase in taxes or possible resource allocation from necessary government services.⁷⁹ No natural balancing device exists in the public sector comparable to that found in the private sector. In theory, in the private sector potential employment reduction checks excessive wage demands.⁸⁰ No such threat exists in the public sector.

Our system of government is based upon enumerated powers, including the power to tax. Because our progressive tax structure affects each segment of the populace differently and because the government has limited ability to impose certain taxes, a public sector strike would compel the government to redistribute income rather than allocate resources.⁸¹

Under the first amendment to the United States Constitution, individuals are guaranteed certain fundamental rights, including the right of association and free speech.⁸² The right to collectively organize, to select representatives for the purposes of collective bargaining, emanates from these rights.⁸³ The Constitution protects these rights from government infringement. Although these rights may be exercised, they must not be exercised in a manner which would result in increasing tax rates or in a reallocation of resources. Because the right to strike can potentially lead to redistribution of income,⁸⁴ public sector employees effectively would be sharing in the determination of political issues.⁸⁵

74 *Id.* at 1123-27.

75 *Id.*

76 *Id.* at 1116-23.

77 *Id.*

78 *Id.*

79 *Id.* at 1119-23.

80 *Id.*

81 *Id.* at 1122-23.

82 *See infra* note 115.

83 *See supra* note 60.

84 Wellington & Winter, *supra* note 73, at 1122-23.

85 *See Summers, Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1980 Gov't.

Collective bargaining represents an economic activity protected under a constitutional umbrella. Yet, this umbrella is pierced if public sector employees are entitled unduly to affect essentially political questions.⁸⁶ As citizens, public sector employees may influence political decisions through lobbying, petitioning and even block voting. If the right to strike is conferred upon public sector employees, however, they may further influence political determinations by wielding a supplemental leverage device not available to the general public.

Further, the sovereignty and the democratic process justifications appear to overlap. The right to strike, even when conferred by statute, may be an improper delegation of legislative authority contrary to principles of sovereignty and the common good. Although the legislative decision to authorize public sector strikes does not violate the doctrine of sovereignty, a violation may occur if the bargaining unit employs the strike as a leverage device.

A right granted by the sovereign nonetheless can be abused. When a strike is used to force the government to reallocate resources or to raise taxes, the political implications exceed the narrow scope of the right as conferred initially by the sovereign. The union and the legislature arguably act as coequals in this situation. At this point, the strike no longer promotes the common good but directly contravenes it. When the effect of the strike exceeds the scope of the right, an invalid exercise of legislative authority occurs. Although the legislature retains ultimate control of the political decision making process, the determination reached directly results from undue influence. Consequently, the public sector bargaining unit would possess a disproportionate share of the powers of political decision. This disserves principles of democratic self-governance and arguably skews the political process.

If granting the public employees the right to strike will skew the political process, violate principles of sovereignty, and allow the collective bargaining unit a disproportionate share of the political process, the legislature should resist the attempt by a minority to confer such rights *so long* as it can be demonstrated that government strikes contravene the common good. If the legislature were to allow public sector employees additional influence (besides the traditional right to vote and to lobby) and skew the political process through the exercise of the right to strike, it would delegate legislative authority improperly.⁸⁷

UNION REV. 5-6 (arguing that both the right to strike and all compulsory public sector bargaining are inconsistent with democratic political philosophy).

⁸⁶ See *Johnson v. City of Albany*, 413 F. Supp. 782 (M.D. Ga. 1976), *supra* note 59.

⁸⁷ The court in *Blount* appropriately summarized the third common law objection to public sector strikes when it concluded:

In the private sphere, the strike is used to equalize bargaining power, but this has universally been held not to be appropriate when its object and purpose can only be to influence the essentially political decisions of Government in the allocation of its resources. Congress has an obligation to ensure that the machinery of the Federal government continues to function at all times without interference. Prohibition of strikes by its employees is a reasonable implementation of that obligation.

325 F. Supp. at 884.

D. *The Essential Services Argument*

As noted in *County Sanitation*, the assumption that all government services are essential underlies the fourth principle barring public sector strikes.⁸⁸ Justice Broussard claims that this assumption is unsupported in light of modern socio-economic reality.⁸⁹ Likewise, Hanslowe and Acierno declared that our complex contemporary industrial state makes it unrealistic to assert that all public services are essential.⁹⁰ They observe that "[p]ublic services vary as to essentiality; many privately-operated services are more essential than public ones. In many categories of employment, among the largest of which is education, public and private activity substantially overlap."⁹¹

In questioning the essential nature of some government functions, both the *County Sanitation* court⁹² and Hanslowe and Acierno⁹³ place great reliance upon *United Transportation Union v. Long Island Rail Road Co.*⁹⁴ They argue that this recent decision by the United States Supreme Court reflects a shift in the common law perspective regarding the essentiality of some government services.

In *Transportation Union* the Supreme Court held that employees of a private railroad which had been acquired by a governmental entity retained their limited right to strike which had previously been conferred upon them under the Railway Labor Act.⁹⁵ The Court determined that the change of ownership did not alter the character of the service provided by the railroad, and the supremacy clause of the United States Constitution⁹⁶ required continued application of federal labor law to the socialized enterprise.⁹⁷ This led Justice Broussard to conclude in *County*

88 38 Cal. 3d at 579-86, 699 P.2d at 845-50, 214 Cal. Rptr. at 434-39.

89 *Id.* Although tangential, Judge Broussard, while attempting to undermine the third rationale prohibiting public sector strikes, observed that:

Modern governments engage in an enormous number and variety of functions, which clearly vary as to their degree of essentiality. As such, the absence of an unavoidable nexus between most public services and essentiality necessarily undercuts the notion that public officials will be forced to settle strikes quickly and at all costs.

Id. at 577-78, 699 P.2d at 844, 214 Cal. Rptr. at 432-34. See also *supra* note 34.

90 Hanslowe & Acierno, *supra* note 37, at 1068. Advocates of this point frequently cite *PATCO v. Federal Labor Relations Auth.*, 685 F.2d 547 (D.C. Cir. 1982), to demonstrate that the government can negate the impact of a public sector strike and hold firm against union demands even in the face of substantial inconvenience.

91 See *supra* note 35 (Justice DeBruiler reaches a similar conclusion).

92 38 Cal. 3d at 580-81, 699 P.2d at 845-46, 214 Cal. Rptr. at 434-36.

93 Hanslowe & Acierno, *supra* note 37, at 1070-71.

94 455 U.S. 678 (1982).

95 *Id.* at 684-90.

96 U.S. CONST. art. VI. The supremacy clause provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

97 455 U.S. at 687. The Supreme Court observed:

Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in area traditionally subject to federal statutory regulation.

Sanitation that the *Transportation Union* decision departed from the United States Supreme Court's earlier decision in *United Mine Workers*.⁹⁸ Justice Broussard read *Transportation Union* to conclude that the nature of the service provided determines its essentiality and the impact of its disruption on the public welfare.⁹⁹ Justice Broussard believed that the guidance of *Transportation Union* was superior to the simplistic determination provided by the Supreme Court in *United Mine Workers* that a service becomes essential once it comes under government control.¹⁰⁰ This led Justice Broussard to conclude that strikes by private workers often pose a more serious threat to the public interest than would many of those which involve public employees.¹⁰¹

Those who argue that the essentiality argument has lost its merit in light of *Transportation Union* ignore the limited precedential value of *Transportation Union*. Because it is founded upon the supremacy clause of the Constitution,¹⁰² *Transportation Union* bears uncertain impact upon the development of a common law right to strike in the public sector. Furthermore, the *Transportation Union* Court relied principally upon *National League of Cities v. Usery*,¹⁰³ which was subsequently overruled by *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁰⁴ Although *National League* had

98 38 Cal. 3d at 580, 699 P.2d at 845-46, 214 Cal. Rptr. at 434-35.

99 *Id.*

100 *Id.*

101 *Id.*

102 Justice Broussard admits to this flaw. 38 Cal. 3d at 580, 699 P.2d at 846, 214 Cal. Rptr. at 434-35.

103 426 U.S. 833 (1976). In 1974 Congress amended the Fair Labor Standards Act in order to extend the Act's minimum wage and maximum hours provisions to almost all employees of states and their political subdivisions. A number of cities and states brought suit against the Secretary of Labor, challenging the validity of the 1974 amendments and seeking declaratory and injunctive relief. The lower federal court dismissed the complaint for failure to state a claim upon which relief might be granted. The Supreme Court reversed and remanded. The *National League* Court observed that, insofar as the 1974 amendments operate directly to displace the states' abilities to structure employer-employee relationships in areas of "traditional" governmental functions, they are not within the authority granted Congress under the commerce clause. By enacting the 1974 amendments, Congress sought to wield its commerce power in a fashion that would impair the states' ability to function effectively in a federal system and did not comport with the federal system of government as envisioned in the Constitution. The Supreme Court concluded that Congress may not exercise its power to regulate commerce to impose upon the states its choices as to how essential decisions regarding the conduct of integral government functions are to be made.

104 469 U.S. 528 (1985). In *Garcia* the Transit Authority brought an action seeking a declaratory judgment, stating that it was entitled to tenth amendment immunity from minimum wage and overtime pay provisions of the Fair Labor Standards Act. The Transit Authority had received substantial federal financial assistance under the Urban Mass Transportation Act of 1964. In 1979, the Wage and Hour Administration of the Department of Labor issued an opinion in light of *National League* that the Transit Authority's operations were not immune from the minimum wage and overtime requirements of the Fair Labor Standards Act. The Transit Authority filed an action in federal district court seeking declaratory relief. The District Court found in favor of the Transit Authority and held that municipal ownership and operation of a mass transit system is a traditional governmental function and under *National League* is exempt from the requirements imposed upon them by Congress. The Supreme Court reversed and remanded and determined that, in affording the Transit Authority's employees the protection of the wage and hour provisions, Congress contravened an affirmative limit on its power under the commerce clause. The Supreme Court initially determined that the *National League* standard, determining the boundaries of state regulatory immunity in terms of traditional government functions, was unworkable and inconsistent with established principles of federalism. These provisions were not destructive of state sovereignty and did not violate any constitutional provisions. Justice Blackman believed that the states' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the

provided some examples of "traditional governmental functions," the *National League* Court failed to provide an adequate general explanation of how to distinguish a "traditional" function from a "nontraditional" one. Consequently, state and federal courts were not able to identify a "traditional" function for purposes of state immunity under the commerce clause.

The *Garcia* holding echoes Former Secretary of Labor Wirtz's comments¹⁰⁵ and the Supreme Court's decision in *United Mine Workers*¹⁰⁶ by giving a broad reading to the essentiality of governmental functions.¹⁰⁷ The difficulty in determining which governmental functions are essential mirrors the difficulty the courts faced prior to *Garcia* in assessing which governmental functions were traditional. Like *Transportation Union*, the *Garcia* case, because it is founded upon the tenth amendment of the Constitution,¹⁰⁸ may hold dubious precedential value. However, it may indicate that the Court is taking a more expansive view of government functions. The Court observed:

The essence of our federal system is that within the realm of authority left open to them under the constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.¹⁰⁹

The *Garcia* Court appears to have focused upon the policy underlying the governmental decision to engage in the activity in question, and not the nature of the service provided. If no clear test exists to determine what constitutes a "traditional" function of government, it is less possible to distinguish an "essential" government function from one that is "nonessential."¹¹⁰ Moreover, the role of the judiciary does not include checking the will of the sovereign. If the sovereign, through its elected

structure of the federal government itself. In this case, Justice Blackman believed the political process effectively protected that role. Consequently, the Supreme Court held that the Transit Authority was not immune from the minimum wage and overtime requirements of the Act.

¹⁰⁵ See *supra* notes 15-16.

¹⁰⁶ 330 U.S. 258 (1947); see *supra* notes 17-20.

¹⁰⁷ See *supra* notes 15-16.

¹⁰⁸ U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

¹⁰⁹ 469 U.S. at 546. The *Garcia* court concluded:

"The science of government . . . is the science of experiment" . . . and the States cannot serve as laboratories for social and economic experiment . . . if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.

Id. (citations omitted).

¹¹⁰ See *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring):

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.

representatives, decides to undertake an activity, regardless of how frivolous or unorthodox, it should be entitled to do so within constitutional limits. To allow the judiciary to determine which governmental functions it considers integral, necessary, or essential would stand contrary to principles of democratic self-governance and breed inconsistency.¹¹¹

An argument emerges from *Garcia* by analogy. Because it is virtually impossible to determine the essentiality of government services, traditional notions of democracy would not allow the judiciary to carve out exceptions in the common law prohibition on public sector strikes based upon an amorphous concept of "essentiality." To allow such strikes through judicial activism would constitute a threat to the public welfare and conflict with principles of sovereignty.

The common law prohibitions upon public sector strikes apparently remain intact. The expansion and diversity of governmental activity, as well as socio-economic changes, have not eroded the common law. Consequently, in the absence of a statute, it remains contrary to the common law to permit public sector employees to inhibit or interfere with essential government functions. Some, however, including Judge Wright and Chief Justice Bird of California, argue that the right to strike emanates from a higher law than the common law—the United States Constitution.

III. Constitutional Considerations

Except for the minority views of Chief Justice Bird, in her concurring opinion in *County Sanitation*,¹¹² and the concurring opinion of Judge Wright in *Blount*,¹¹³ it has been well settled that no constitutional right to strike exists.¹¹⁴ However, the judiciary appears increasingly concerned that a right to strike for the public sector may emanate from enumerated constitutional rights. Until *County Sanitation*, a public sector employee who engaged in a strike against the government found no safe harbor in constitutional waters. Because the constitutional arguments in the opinions of Judge Wright and Chief Justice Bird are found in dicta, and because the right to strike is not enumerated in the Constitution, their views raise questions regarding precedential value as well.

Judge Wright bases his opinion solely upon emanations from enumerated first amendment rights—the rights of free speech and association.¹¹⁵ He asserts that the right to strike may be a fundamental right which warrants elevated constitutional protection.¹¹⁶ He also observes that the right to form labor organizations has been recognized as a fundamental right emanating from the first amendment.¹¹⁷ Judge Wright concludes that the right to strike is "intimately related" to the right to

111 *Garcia*, 469 U.S. at 547.

112 38 Cal. 3d at 593, 699 P.2d at 855, 214 Cal. Rptr. at 444; see *supra* note 2.

113 325 F. Supp. at 885; see *supra* note 1.

114 See *supra* note 1.

115 U.S. CONST. amend. I, in relevant part, provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

116 325 F. Supp. at 885.

117 *Id.*

form labor organizations and deserves some level of constitutional protection.¹¹⁸

Basing constitutional adjudication upon principles of intimacy represents a novel approach indeed. If an intimacy test were applied, courts would encounter difficulty determining which activities merited constitutional protection. A test based upon intimacy resembles a test assessing essentiality. Both standards are unsound in principle and unworkable in practice. Any such rule leads to inconsistent results and at the same time disserves traditional notions of constitutional interpretation. It breeds inconsistency because it has lost sight of these principles.

According to Chief Justice Bird, the right to strike not only emanates from protected first amendment rights, but also can be derived from protected rights in the fifth,¹¹⁹ thirteenth,¹²⁰ and fourteenth amendments.¹²¹ She believes that a constitutional right to strike rests on a number of "bedrock principles" found in both the United States Constitution and the Constitution of the State of California.¹²² Initially, she contends that the right to strike emanates from the basic personal liberty to pursue happiness and economic security through productive labor.¹²³ Secondly, she asserts the prohibition of public sector strikes contradicts the thirteenth amendment's ban upon involuntary servitude.¹²⁴ She concludes that the fundamental freedoms of association and expression support a fundamental right to strike.¹²⁵

Regardless of the views of Judge Wright and Chief Justice Bird, neither public sector nor private sector employees enjoy an enumerated constitutional right to strike. Although the right of association, including the right to organize collectively, is well recognized and protected,¹²⁶ the right to strike has never been granted such elevated status. In fact, the Supreme Court expressed the prevailing view in *International Union v. Wisconsin Employment Relations Board*:¹²⁷

118 *Id.*

119 U.S. CONST. amend. V, as relevant, provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

120 U.S. CONST. amend. XIII states:

(1) Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

(2) Congress shall have power to enforce this article by appropriate legislation.

121 U.S. CONST. amend. XIV in relevant part provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

122 38 Cal. 3d at 594, 699 P.2d at 855-56, 214 Cal. Rptr. at 444-45.

123 *Id.* at 594-97, 699 P.2d at 856-58, 214 Cal. Rptr. at 444-47.

124 *Id.* at 597-600, 699 P.2d at 858-60, 214 Cal. Rptr. at 446-69.

125 *Id.* at 600-604, 699 P.2d at 860-62, 214 Cal. Rptr. at 448-52.

126 *See Blount*, 325 F. Supp. at 883. *See also supra* note 60.

127 336 U.S. 245 (1949). In *Wisconsin Employment*, the collective bargaining agent called meetings during work hours in order to interfere with production and force the employer to resolve the negotiation impasse. The Court held that it was within the power of the State to prohibit the particular course of conduct proscribed.

[T]he right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a "fundamental right" and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act.¹²⁸

This decision led the majority in *Blount* to conclude that, in the absence of any enumerated constitutional right to strike, the federal government may condition employment upon a promise not to withhold labor collectively.¹²⁹ The federal government may also bar public sector strikes, whether because of prerogatives of the sovereign, some sense of higher obligation associated with public service, to protect the functioning of the government without interruption, to protect public health and safety, or for some other justifiable reason.¹³⁰

Until recently, the right to strike was not entitled to constitutional protection. However, both the opinion of the majority and the concurring opinion of Chief Justice Bird in *County Sanitation* amplified the constitutional concerns first expressed by Judge Wright in *Blount*. These opinions raise the issue of whether the right to strike solidly rests upon a bedrock of constitutional principles.

A. *The First Amendment*

Public employees enjoy no fewer rights and privileges than other citizens; all citizens of the United States share constitutional rights equally.¹³¹ Those rights include the first amendment rights of free speech and association.¹³² The right of association may be exercised correlatively with the right of free speech in order to advance beliefs and ideas.¹³³

Because public employees hold a fundamental right of free speech and association, they cannot be prohibited from exercising these rights through union activities.¹³⁴ For example, in *Lontini v. VanCleave*,¹³⁵ which involved a policeman discharged because of union membership, the Tenth Circuit concluded that the officer had a constitutional right under the first amendment to join a labor union and could not be suspended or dismissed from his employment in the absence of a compelling state interest.¹³⁶ Likewise, a public sector employee may not be sanctioned for exercising his constitutional rights by advocating that public employees have a right to strike or that government employees may join unions

128 *Id.* at 259. See also *Blount*, 325 F.Supp. at 883.

129 325 F. Supp. at 883.

130 *Id.*

131 The fourteenth amendment's privileges and immunities clause insures that all citizens of the United States share federal constitutional rights equally. U.S. CONST. amend. XIV; *supra* note 121.

132 See *supra* note 115.

133 See *NAACP v. Alabama*, 357 U.S. 449 (1958).

134 See *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga 1971), *supra* note 59; *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969), *supra* note 59.

135 483 F.2d 966 (10th Cir. 1973).

136 *Id.* at 967.

which advance a similar position.¹³⁷ A constitutional line is drawn, however, at the point of advocacy, a line which public sector employees are not entitled to cross.¹³⁸ While public sector employees are free to associate and advocate, a public sector employee may not strike in order to compel the government to recognize or bargain with a union.¹³⁹

As noted in *United Steelworkers of America v. University of Alabama*,¹⁴⁰ however, if an employee can demonstrate that the motive for his or her termination or suspension was curtailment of, or punishment for, the exercise of employee's rights, judicial relief would be appropriate.¹⁴¹ When employees go further than organization and advocacy to engage in a strike attempting to compel their public employer to recognize or bargain with a union, they have pierced the umbrella of constitutionally protected free speech and association. The government may discharge or otherwise penalize striking employees.¹⁴²

No enumerated right to strike exists in the first amendment when read literally.¹⁴³ Nor does such right exist at common law—neither today nor when the first amendment was drafted in 1791. Consequently, in the absence of a statute conferring a right to strike, a public sector employee will not be protected under either the first amendment or at common law for engaging in an illegal activity.

Further, when the judiciary implies a right to strike, it engages in judicial activism contrary to the great weight of authority.¹⁴⁴ As the court

137 See, e.g., *Aurora Educ. Ass'n v. Board of Educ.*, 490 F.2d 431 (7th Cir. 1973).

138 See *Johnson v. City of Albany*, 413 F. Supp. 782, 797 (M.D. Ga. 1976) ("While they may so associate and advocate and not be retaliated against for doing so, they cannot go further and by concert of action—by striking—compel their public employer to recognize or bargain with a union.").

139 *Id.*

140 599 F.2d 56 (5th Cir. 1979). The *United Steelworkers* decision was an action brought by terminated union members by their union and others seeking injunctive relief, damages, declaratory relief, and other appropriate relief under the Civil Rights Act against university officials for violations of the first, fifth, and fourteenth amendments of the Constitution.

141 *Id.* at 61. See also *Perry v. Sindermann*, 408 U.S. 593 (1972). *Perry* involved a first and fifth amendment challenge to the dismissal of the respondent who was employed in a state college system for ten years. Although the college dismissed the respondent with no explanation or hearing, the Court found no constitutional violation.

142 See *Johnson*, 413 F. Supp. at 797; cases cited *supra* note 59. See also *Jefferson County Teachers Ass'n v. Board of Educ.*, 463 S.W.2d 627 (Ky. 1970), *cert. denied*, 404 U.S. 865 (1971). In *Jefferson County* the Kentucky Court of Appeals affirmed a permanent injunction prohibiting teachers and their union representatives from participating in a strike in county public schools. The court observed:

It is further contended the injunction violates appellant's constitutional rights of free speech and public assembly. Such rights are not absolute but are limited by the countervailing rights of others. The injunction enjoins appellants from 'participating in a concerted work stoppage or strike by the teachers in the public schools of Jefferson County.' It prohibits the commission of illegal acts, and the rights of free speech and public assembly do not license violation of law.

463 S.W.2d at 630.

143 See *supra* note 115.

144 See, e.g., *Board of Educ. v. Kankakee Fed'n of Teachers*, 46 Ill. 2d 439, 264 N.E.2d 18 (1970), *cert. denied*, 403 U.S. 904 (1971); *Board of Educ. v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); *Jefferson County Teachers Ass'n.*, 463 S.W.2d 627; *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968); *Rogoff v. Anderson*, 34 App. Div. 2d 154, 310 N.Y.S.2d 174 (1970); *State v. Heath*, 177 N.W.2d 751 (N.D. 1970); *Abbott v. Meyers*, 20 Ohio App. 2d 65, 251 N.E.2d 869 (1969); *City of Pawtucket v. Pawtucket Teachers' Alliance*, 87 R.I. 364, 141 A.2d 624 (1958); *City of Wauwatosa v. King*, 49 Wisc. 2d 398, 182 N.W.2d 530 (1971).

appropriately concluded in *Blount*: "It should be pointed out that the fact that public employees may not strike does not interfere with their rights which are fundamentally and constitutionally protected. The right to organize collectively and to select representatives for the purpose of engaging in collective bargaining is such a fundamental right."¹⁴⁵ The right to strike, however, does not warrant such protection.

B. *The Thirteenth Amendment*

In addition to first amendment theories, prohibitions upon public employee strikes have been challenged on other constitutional grounds. Despite the advocacy of Chief Justice Bird and Judge Wright, to date nearly all courts reviewing this issue have held that the prohibition of public sector strikes does not violate the United States Constitution, regardless of the grounds under which the ban is challenged.¹⁴⁶

In *County Sanitation* Chief Justice Bird argues that a denial of the right to strike violates an absolute prohibition against involuntary servitude under the thirteenth amendment.¹⁴⁷ Her argument rests upon the assumption that a court can no longer expect an employee to quit his job if the terms or conditions of employment are unacceptable.¹⁴⁸ She argues that the group right to strike has replaced the individual right to change employers.¹⁴⁹

Chief Justice Bird's assumption lacks foundation and her opinion contravenes the great weight of prevailing precedent.¹⁵⁰ An individual in this country can never be forced to work. Further, even if public sector employees are enjoined from striking, they are not compelled to work. Public employees, just as employees in the private sector, may leave their employment at any time, particularly if the terms and conditions of employment are unacceptable. In *Jefferson County Teachers Association v. Board of Education*¹⁵¹ the Kentucky Court of Appeals, in rejecting appellant's claim that the denial of the right to strike violated the thirteenth amendment, concluded: "An injunction of the kind before us does not compel performance of personal service against the will of the employee because he can terminate his contract if he so desires."¹⁵²

An absolute prohibition against slavery and involuntary servitude does exist under the thirteenth amendment. However, absent evidence of the actual compulsion of personal services, any constitutional argu-

145 325 F. Supp. at 883.

146 See *supra* note 144 & *infra* notes 150, 153 & 173.

147 38 Cal. 3d at 597-600, 699 P.2d at 858-60, 214 Cal. Rptr. at 446-49.

148 *Id.* at 598-99, 699 P.2d at 858-59, 214 Cal. Rptr. at 447-48.

149 *Id.* at 599, 699 P.2d at 859, 214 Cal. Rptr. at 448.

150 See, e.g., *City of Evanston v. Buick*, 421 F.2d 595 (7th Cir. 1970); *Western Union Tel. Co. v. International Bhd. of Elec. Workers*, 2 F.2d 993, 994-995 (1924), *aff'd*, 6 F.2d 444 (7th Cir. 1925); *Los Angeles Bldg. and Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305; *Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instruction*, 214 So. 2d 34 (Fla. 1968); *Holland Educ. Ass'n.*, 380 Mich. 314, 157 N.W.2d 206; *Dayton Co. v. Carpet, Linoleum and Resilient Floor Decorators' Union*, 229 Minn. 87, 39 N.W.2d 183 (1949), *appeal dismissed*, 339 U.S. 906 (1950); *In re Block*, 50 N.J. 494, 236 A.2d 592 (1967).

151 463 S.W.2d 627 (Ky. 1970), *cert. denied*, 404 U.S. 865 (1971), *supra* note 142.

152 463 S.W.2d at 630.

ment against the prohibition of public sector strikes based upon the thirteenth amendment lacks merit.

C. *The Fourteenth Amendment*

Courts have rebuffed, with equal facility, fourteenth amendment equal protection challenges to the prohibitions against public sector strikes.¹⁵³ As Justice Brandeis observed for the Supreme Court in *Dorchy v. Kansas*,¹⁵⁴ "[n]either the common law nor the Fourteenth Amendment confer the absolute right to strike."¹⁵⁵ The weight of judicial opinion over the past sixty years has been consistent with this conclusion.¹⁵⁶

Chief Justice Bird argues, however, that the basic personal liberty to pursue happiness and economic security through productive labor rises to the level of a constitutionally protected right under the fifth and fourteenth amendments.¹⁵⁷ She candidly admits, however, that the right to strike has never been included as a liberty interest protected by the Constitution.¹⁵⁸ The right to strike, the chief justice contends, should be a constitutionally protected liberty interest arising out of considerations of fairness and the inherent nature of work.¹⁵⁹

Although the right to strike may arise out of concepts of fairness and the inherent nature of work, the right does not appear among those enumerated and protected in the United States Constitution. The judiciary does not function to write social policy by promulgating changes in the law based on concepts of fairness or the inherent nature of work. That task remains with the legislature. Only after the sovereign has acted can concepts such as these be implicated in constitutional adjudication.

Chief Justice Bird's attempt to equate a worker's interest in the conditions and terms of his employment with a constitutionally protected property interest¹⁶⁰ is similarly unpersuasive, and judicially unsubstantiated. In *Perry v. Sindermann*¹⁶¹ the Supreme Court stated that, in order to find a cognizable and constitutionally protected property right under the fifth and fourteenth amendments, precise rules or explicit understandings must exist to support a claim of entitlement to a benefit.¹⁶² This type of property interest does not exist in an amorphous interest in terms

153 See, e.g., *Jefferson County*, 463 S.W.2d 627, *supra* notes 142 & 151; *Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206, *supra* note 150; *City of Detroit v. Division 26 of Amalgamated Ass'n*, 332 Mich. 237, 51 N.W.2d 228 (1952); *Head v. Special School Dist. (No. 1)*, 288 Minn. 496, 182 N.W.2d 887 (1970), *cert. denied*, 404 U.S. 886 (1970); *City of N.Y. v. DeLury*, 23 N.Y.2d 175, 243 N.E.2d 128 (1968), *appeal dismissed*, 394 U.S. 455 (1969); *Abbott v. Myers*, 20 Ohio App. 2d 65, 251 N.E.2d 869 (1969).

154 272 U.S. 306 (1926). *Dorchy* involved a violation of § 19 of the Court of Industrial Relations Act which prohibited an officer of a labor union from inducing others to hinder, delay, limit or suspend the operations of mining. The Supreme Court held that this Act did not constitute a denial of the liberty guaranteed by the fourteenth amendment.

155 *Id.* at 311.

156 See *supra* note 153.

157 *County Sanitation*, 38 Cal. 3d at 594-98, 699 P.2d at 856-58, 214 Cal. Rptr. at 444-48.

158 *Id.* at 596, 699 P.2d at 857, 214 Cal. Rptr. at 446.

159 *Id.* at 596-97, 699 P.2d at 857, 214 Cal. Rptr. at 446-47.

160 *Id.* at 597-98, 699 P.2d at 858, 214 Cal. Rptr. at 446-48.

161 408 U.S. 593 (1972), *supra* note 141.

162 408 U.S. at 601. See also *United Steelworkers of Am. v. University of Alabama*, 599 F.2d 56, 60 (5th Cir. 1979) ("A person's interest in a benefit is a 'property' interest for due process purposes if

and conditions of employment, since the terms and conditions of employment can change frequently. Further, it is extremely difficult to demonstrate that a public sector employee has a legitimate claim of entitlement in this interest, when the interest cannot clearly be defined. Where no ascertainable or manageable standard exists, inconsistency inures. Inconsistency contravenes existing principles of constitutional adjudication. Consequently, arguments of this nature lack merit.

Some argue that because the fourteenth amendment protects against statutory discrimination, public sector employees should share the same right to strike as their private sector counterparts. As the trial court noted in *Blount*,¹⁶³ in the absence of a fundamental right, the government does not act irrationally or arbitrarily to condition employment upon a promise not to strike.¹⁶⁴ The Supreme Court declared in *McGowan v. Maryland*¹⁶⁵ that the constitutional safeguard of equal protection is transgressed only if the classification rests on grounds wholly irrelevant to the achievement of the state's purpose.¹⁶⁶ Courts presume an act of the legislature to have been exercised within the power constitutionally conferred upon the legislature, despite the fact that in application some laws may result in some inequality. The courts will not set aside statutory discrimination if any statement of facts can be construed to support it.¹⁶⁷

Since no worker possesses a fundamental right to strike, *McGowan* applies. Where no statute exists and the common law applies, the government, as employer of the public sector, may constitutionally condition public sector employment on a promise not to strike. To uphold a statutory prohibition upon public sector strikes requires only a rational basis and a statute that does not discriminate arbitrarily.¹⁶⁸ For example, in *Abbott v. Myers*¹⁶⁹ the Ferguson Act, which specifically provided "[n]o public employee shall strike," was found valid under the equal protection clause.¹⁷⁰ The abundance of case law on point led the *Jefferson County*¹⁷¹ court to conclude matter of factly that "there is a reasonable basis for distinguishing between private and the public employees, particularly in this area. Therefore, to treat them differently is not a denial of equal protection in the constitutional sense."¹⁷²

there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

163 See *supra* note 1.

164 325 F. Supp. at 883.

165 366 U.S. 420 (1961). *McGowan* involved a violation of a statute which generally prohibited sales of merchandise on Sunday. The Court found that this statute did not violate the fourteenth amendment's equal protection clause. *Id.* at 425-26.

166 *Id.*

167 *Id.*

168 See cases cited *supra*, note 153.

169 20 Ohio App. 2d 65, 251 N.E.2d 869 (1969). *Abbott* involved a strike by employees of a county home and hospital. The County Board of Commissioners determined that this strike was prohibited by statute. Consequently, the employees were dismissed. The dismissals were upheld and the court determined that no violation of the Constitution occurred.

170 251 N.E.2d at 876. See also *Fairview Hosp. Ass'n v. Public Bldg. Serv. and Hosp. and Institutional Employees Union*, 241 Minn. 523, 64 N.W.2d 16 (1954).

171 *Jefferson County*, 463 S.W.2d 627.

172 *Id.* at 630.

In light of such precedent, the fourteenth amendment will not protect those challenging the ban against public sector strikes. Unlike a constitutionally protected liberty interest, a public sector employee has no recognized vested property right in his interest in conditions and terms of employment. Consequently, as Justice Brandeis concluded over sixty years ago,¹⁷³ in the absence of a statute conferring such a right upon the public employee, no right to strike under the fourteenth amendment can be found.

D. *Bill of Attainder*

Although not raised in Chief Justice Bird's concurring opinion, a final constitutional challenge involves objections based upon a bill of attainder argument.¹⁷⁴ In light of significant precedent,¹⁷⁵ it appears that such arguments also fail.

In *Di Maggio v. Brown*¹⁷⁶ petitioners claimed that a statute which expressly barred public sector strikes was unconstitutional on its face because it constituted a bill of attainder, imposing excessive fines and inflicting cruel and unusual punishment.¹⁷⁷ The *Di Maggio* court summarily rejected this argument. The court concluded that, in light of the Supreme Court decision in *Cummings v. Missouri*,¹⁷⁸ the statute could not reasonably be said to constitute a bill of attainder.¹⁷⁹ As noted in *Blount*, where no constitutional provision vests an individual with the right to government employment or confers a right to strike, the government may impose reasonable limitations upon conditions of employment.¹⁸⁰ Consequently, a statute that incorporates such limitations upon government employment cannot be construed as a bill of attainder.

IV. Conclusion

Despite the expansive growth of the government into areas considered by some to be nontraditional and notwithstanding our rapidly changing socio-economic structure, public employees have no common law or constitutional right to strike. In the absence of a statute conferring such right, public sector employee strikes continue to be illegal. The contrary opinion of the California Supreme Court in *County Sanita-*

173 See *Dorchy*, 272 U.S. 306, *supra* note 154 and accompanying text.

174 U.S. CONST. art. I, § 9. A bill of attainder is generally defined as a legislative act allegedly directed at a designated person, pronouncing him guilty of an alleged crime, without trial or conviction according to recognized rules of procedure, and passing judgement and attainder upon him.

175 *Di Maggio v. Brown*, 19 N.Y.2d 283, 225 N.E.2d 871 (1967); *Abbott v. Myers*, 20 Ohio App. 2d 65, 251 N.E.2d 869, *supra* notes 144 & 169.

176 See *supra* note 175.

177 19 N.Y.2d at 287-88, 225 N.E.2d at 873. *Di Maggio* involved a proceeding instituted by over 100 ferryboat officers to review a determination made by the N.Y. Department of Marine and Aviation. The determination found that the operators had violated § 108 of the Condon-Wadlin Act, which prohibited strikes by public employees and imposed certain penalties. The court remanded the case for rehearing on other grounds.

178 71 U.S. (4 Wall.) 277, 323 (1866). *Cummings* involved the indictment and conviction of a Catholic priest for not taking an oath required by the state constitution. The Court determined that the provisions of the Missouri Constitution which were challenged constituted a bill of attainder.

179 19 N.Y.2d at 287-88, 225 N.E.2d at 873.

180 325 F. Supp. at 883.

tion District (No. 2) v. Los Angeles County Employees Association represents a minority view. The recent opinion by the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* supports this contention and undermines much of the theoretical basis of the common law argument advanced by the majority opinion in *County Sanitation*.

The constitutional arguments advanced by Judge Wright in his concurring opinion in *United Federation of Postal Clerks v. Blount*, and by the majority and concurring opinions in *County Sanitation*, attempting to confer protected status upon such strikes, do not persuade. No right to strike is enumerated in the United States Constitution and, accordingly, the right to strike is not considered a fundamental right entitled to constitutional insulation. The prohibition upon the right to strike, whether challenged under the common law or the Constitution, remains intact because it offends neither. In the absence of a statute or explicit constitutional permission granted by the sovereign, public sector employee strikes remain illegal.

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