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The Public Employee and His Government: Conditions and Disabilities of Public Employment

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THE PUBLIC EMPLOYEE AND HIS GOVERNMENT: CONDITIONS AND DISABILITIES OF PUBLIC EMPLOYMENT

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Even before Mr. Marbury, the public employee and his government have frequently found themselves on opposite sides of the counsel table. Not that public employees are a particularly litigious lot. Faced, however, with the willingness of administrators to deal with them politically and the unwillingness of legislators to protect them adequately, their resort to the courts was inevitable. But the courts also often provided inadequate protection. Decisions which combined ancient concepts with more than a touch of political realism accorded scant recognition to the substantial interests of the ever-growing number of public employees.

In recent years, the traditional cliches in at least two areas of the law of officers and employees appear to have undergone if not an agonizing, at least a searching, reappraisal. These areas, the subject of this paper, are: first, the constitutionality of conditions of public employment, such as restrictions against political activity, invoking the privilege against self-incrimination and joining certain organizations; and, second, union activity by public employees.

I. Conditions of Public Employment

The recent rash of loyalty oath legislation[1] brought into focus more sharply than ever before the question of the constitutionality of conditions of public employment. The aftermath of this legislation has been a series of decisions by the Supreme Court which, for the first time, enunciate principles that will undoubtedly limit the extent to which local, state and federal governments may control the activities of their employees.

For a long time courts had assumed that conditions of public employment were not subject to the guarantees of the First, Fifth and Fourteenth Amendments.[2] This belief stemmed from the "premise"

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1. See Gellhorn, The States and Subversion App. A, p. 393 (1952), describing the types of state statutes relating to subversive activities; Appendix B at p. 414 lists the statutes by states.

2. The discussion here is limited to the guarantees of speech, religion, assembly and due process contained in the First, Fifth and Fourteenth Amendments. Particular conditions of employment have also been challenged as contrary to bills of attainder and ex post facto laws: Cummings v. Missouri, 4 Wall. 333 (U.S. 1867); United States v. Lovett, 328 U.S. 303 (1946); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 731 (1951) (dissenting opinion by Mr. Justice Douglas). Important objections have also involved conflict with an oath prescribed by state constitution: Imbrie v. Marsh, 3 N.J. 578, 71 A.2d

that government employment is not a right, but a privilege which may be granted, modified or revoked at the will of the sovereign.[3] Hence, the state might attach whatever conditions it wished to the privilege and if the employee did not choose to conform to the conditions, he could resign.

Most frequently cited for this proposition was *McAuliffe v. New Bedford.*[4] In that instance, a policeman was removed for violating a regulation prohibiting any member of the police department from soliciting money for political purposes or serving as a member of a political committee. It was contended that the regulation was invalid as invading the petitioner's right to express his political opinion. In disposing of this contention, Judge (later Mr. Justice) Holmes said:

> "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."[4a]

Struck by this epigrammatic phrase, courts invoked it frequently when the constitutionality of conditions of public employment was challenged.[5] Taken to its logical conclusion, the *McAuliffe* phrase would mean that no matter how unreasonable or arbitrary the conditions of employment, an employee could not complain of their unconstitutionality since he has the option of leaving both the employment and the conditions.

Apparently, however, the courts never carried Holmes' statement to its extreme implications. Inconsistently, it was assumed that conditions of employment must be reasonable. Thus, in disposing of attacks on the constitutionality of such conditions, the courts seldom relied solely on the implications of the *McAuliffe* doctrine, but almost invariably proceeded to discuss the reasonableness of the particular challenged condition.[6]

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352 (1950); Tolman v. Underhill, 229 P.2d 447 (Cal. App. 1951) (invalidating loyalty oaths because of such conflict); *cf.* Shub v. Simpson, 196 Md. 177, 76 A.2d 332, *decision announced,* 75 A.2d 842, *appeal dismissed,* 340 U.S. 881 (1950) (statutory oath held to implement constitutionally prescribed oath). Cases are discussed in Note, 18 A.L.R. 2d 268, 357 (1950).

3. *E.g.,* Crenshaw v. United States, 134 U.S. 99 (1890); Taylor v. Beckham, 178 U.S. 548 (1900); Field v. Giegengack, 73 F.2d 945 (D.C. Cir. 1934).

4. 155 Mass. 216, 29 N.E. 517 (1892).

4a. *Ibid.*

5. *E.g.,* Goldway v. Board of Higher Education, 178 Misc. 1023, 1025, 37 N.Y.S.2d 34, 36 (Sup. Ct. 1942); CIO v. City of Dallas, 19 S.W.2d 143, 147 (Tex. Civ. App. 1946); Rogan v. Cook, 52 A.2d 625, 629 (Md. App. 1947); Steiner v. Darby, 88 Cal. App. 2d 481, 487, 199 P.2d 429, 432 (1948), *cert. granted,* 337 U.S. 929, *dismissed,* 338 U.S. 327 (1949); Hirschman v. Los Angeles County, 231 P.2d 140, 143 (Cal. App., 1951), *aff'd,* 39 Cal. 2d. 698, 249 P.2d 287 (1952).

6. *E.g.,* Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373, 378 (1954); Appeal of Albert, 372 Pa. 13, 92 A.2d 663 (1952); Bell v. District Court of Holyoke, 314 Mass. 622, 51 N.E.2d 328 (1943); Perez v. Board Police Comm'rs of Los Angeles, 78 Cal. App. 2d 638, 178 P.2d 537 (1947); Rogan v. Cook, 52 A.2d 625 (Md. App. 1947); Goldway v. Board of Higher Educ., 178 Misc. 1023, 37 N.Y.S.2d 34 (Sup. Ct. 1942); Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434 (1938).

Indeed, in the *McAuliffe* case itself, Judge Holmes, after stating his oft-quoted dictum, went on to say that

> ". . . the city may impose any *reasonable* conditions upon holding office within its control. This condition seems to us *reasonable*, if that be a question open to revision here."[6a] (Emphasis supplied.)

The source of this requirement of reasonableness was not articulated. Whether it derived from recognition of certain undefined rights in public employment, whether it reflected some unformulated theory whereby constitutional guarantees become relevant in considering conditions of public employment or whether it arose from an unconceptualized and subjective feeling that legislation ought not be arbitrary irrespective of any constitutional provisions,[7] was not enunciated in the opinions.

In 1941, the question of the constitutionality of conditions of employment was squarely presented to the Supreme Court of the United States in *United Public Workers v. Mitchell.*[8] That case challenged the constitutionality of Section 9(a) of the Hatch Act,[8a] which forbids federal employees from taking "any active part in political management or in political campaigns." In upholding the legislation, Mr. Justice Reed states that he does not find any constitutional obstacles. The regulation of public employees was the responsibility of Congress and the President. "If in *their judgment,* efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objec-

6a. 29 N.E. 517, 518.

7. *Cf.* concurring opinion of Mr. Justice Frankfurter in Joint Anti-Facist Refugee Comm'n v. McGrath, 341 U.S. 123, 162-72 (1951).

8. 330 U.S. 75 (1947). Prior to the *Mitchell* case, the court had passed upon the legality of conditions of employment in only a few cases. In *Ex parte* Curtis, 106 U.S. 371 (1882), an employee was indicted for violation of an act that forbade certain employees from giving or receiving money for political purposes from or to other employees of the government. The opinion dealt principally with the contention that since Congress could only act pursuant to delegated powers, and since the Constitution did not specifically authorize such a law, the act was unconstitutional. The court rejected this contention holding that the law was a reasonable means of improving efficiency and integrity in the public service and that such a purpose is within the congressional power under the "necessary and proper" clause of the Constitution. Although questions of freedom of speech and assembly had been presented in the briefs, the court did not discuss those problems. Mr. Justice Bradley dissented vigorously on the ground that the right to accept and be candidate for office is a fundamental right of which "the Legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights." (*Id.* at 376) In United States v. Thayer, 209 U.S. 39 (1908), an employee was indicted for violation of a statute prohibiting solicitation for politcal purposes but the case did not raise any constitutional question. In United States v. Wurzbach, 280 U.S. 396 (1930), a congressman was indicted for violation of an anti-political solicitation statute. The constitutional question was dismissed in a sentence.

8a. 53 STAT. 1147 (1939), as amended, 5 U.S.C.A. § 118i(a) (Cum. Supp. 1950).

tion."[9] By leaving the question of conditions of employment to the judgment of Congress and the President, Mr. Justice Reed seems to accept the *McAuliffe* doctrine and indeed he quotes Judge Holmes' dictum in a footnote to the same paragraph. Nevertheless, later in the opinion, a qualification is introduced: the judgment of Congress and presumably, that of the President, must be reasonably exercised: "For regulation of employees, it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."[10]

Although the source of the requirement of reasonableness is not discussed in this opinion either, here for the first time is an indication that the Bill of Rights is at least a mainspring. Thus, Mr. Justice Reed states:

> "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congressional power but, because there are some limitations, it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid."[10a]

Just which portion of the Bill of Rights limits Congress is not revealed. The examples are not limited to any one Amendment; the First Amendment certainly is apposite to some;[11] the Fifth Amendment probably to all.[12] The very intermingling of these examples is no small indication that neither the basis for the protection offered nor its extent has yet been crystallized.[13]

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9. 330 U.S. 75, 99 (1947) (emphasis supplied).

10. *Id.* at 101. The opinion then discusses at length the reasonableness of the Hatch Act. For full discussion of the Hatch Act and the *Mitchell* decision see Kircheimer, *The Historical and Comparative Background of the Hatch Law*, II Public Policy 341 (1941); Mosher, *Government Employees Under the Hatch Act*, 22 N.Y.U.L.Q. REV. 233 (1947); Esman, *The Hatch Act — A Reappraisal*, 60 YALE L.J. 986 (1951).

10a. 330 U.S. 75, 100 (1947).

11. Earlier, however, Mr. Justice Reed had rejected the contention that Section 9(b) of the Hatch Act contravened the First Amendment with little more than a curt statement that "these fundamental human rights are not absolute." *Id.* at 95. It is not clear whether Mr. Justice Reed meant by this that the First Amendment was not being violated because of the reasonableness of Section 9(b) or whether he thought that conditions of public employment were outside the scope of First Amendment protection.

12. The Due Process Clause has long been held to incorporate freedoms protected by the First Amendment: Gitlow v. New York, 268 U.S. 652 (1925); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? — The Judicial Interpretation*, 2 STAN. L. REV. 140 (1940); Green, *The Supreme Court, The Bill of Rights and the States*, 97 U. OF PA. L. REV. 608 (1949).

13. No such ambiguity exists in the dissenting opinion by Mr. Justice Black in which Mr. Justice Douglas joined. Public employees, the dissent states, are entitled to the same constitutional guarantees as private employees and the prohibition in the Hatch Act is a clear violation of the First Amendment.

The next full discussion of conditions of employment occurs in *Garner v. Board of Public Works of Los Angeles,*[14] one of the first of the loyalty oath cases.[15] The City Charter of Los Angeles barred from employment persons who advocated or affiliated themselves with groups who advocate the overthrow of the government. A city ordinance required every employee to take an oath that within a period subsequent to the enactment of the charter provision, he had not been a member of or affiliated with such a group. The ordinance also required the execution of an affidavit stating, *inter alia,* whether or not the employee was or ever had been a member of the Communist Party or the Communist Political Association. Some of the plaintiffs took the oath, but refused to execute the affidavit; the others refused to do both. All were discharged and brought suit seeking reinstatement.

Although it was vigorously argued that the oath violated constitutional guarantees of free speech, Mr. Justice Clark does not discuss this contention or even mention it specifically.[16]

But the petitioner had also argued that the oath violated Due Process, because the oath was not limited to affiliation with organizations known to the employee to be in the prescribed class. Mr. Justice Clark rejects this argument on the ground that there was no reason to suppose that the oath will be construed as affecting adversely those persons who during their affiliation with a prescribed organization were innocent of its purpose. Rather, he assumed scienter was implicit in each clause of the oath.

This discussion is significant. Here for the first time, the majority opinion recognizes "due process" as a limitation on condition of employment. True, the limitation is negatively derived from its rejection in the instant case; it is advanced indecisively—figuratively and literally in small letters; its extent is not elaborated. Nevertheless, the seed is there.

Equally significant is the opinion of Mr. Justice Frankfurter con-

14. 341 U.S. 716 (1951).

15. The first of the recent loyalty cases was actually Gerende v. Board of Supervisors of Board of Elections of Baltimore City, 341 U.S. 56 (1951). This was an appeal from a decision of the Maryland Court of Appeals, the effect of which was to deny the appellant a place on the ballot for a municipal election on the ground that she refused to file a loyalty affidavit required by Maryland law. The court, after satisfying itself that the Maryland statute would be interpreted so that the affiant need only state that he was not *knowingly* a member of an organization engaged in an attempt to overthrow the government by force or violence, then affirmed the state court without further discussion. There was no discussion whatever of constitutional provisions. Whether the necessity for scienter emphasized by the court stemmed from constitutional safeguards or elsewhere is not revealed.

16. Mr. Justice Clark does say, not as to the Ordinance, but as to the Charter, that to the extent that the oath operates prospectively: "We assume that under the Federal Constitution, the Charter amendment is valid . . . [as] a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States." 341 U.S. 716, 720-21 (1951).

curring in part and dissenting in part. Here for the first time there is an open rejection of the privilege-right thinking that formed the basis of the *McAuliffe* doctrine. Mr. Justice Frankfurter begins by accepting the concept that the Constitution does not guarantee public employment. But it does not follow, he says, that a government may resort to any scheme for keeping people out of such employment.[17] To describe public employment as a privilege, Mr. Justice Frankfurter states, does not "meet the problem." Mr. Justice Frankfurter then seeks to meet the problem by applying the Due Process Clause. This Clause, he finds, does not preclude Los Angeles from requiring its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. On the other hand, the Due Process Clause does *not* allow the City to ask its employees "on pain of giving up public employment, to swear to something they cannot be expected to know."[18] Hence, an oath which is not limited to affiliation with organizations known at the time to have advocated overthrow of government, may not be required. Mr. Justice Frankfurter makes no attempt to amplify the considerations leading to this approach. For the time being, he is content merely to thus firmly introduce the Due Process Clause.

The *Garner* case was followed by *Adler v. Board of Education of the City of New York*.[19] Involved here was a New York statute,[19a] the Feinberg Law, which disqualified for employment in the public school system any person who teaches or advocates or was knowingly a member of an organization which teaches or advocates the overthrow of the government by force or violence.

It was argued that the Feinberg Law and the rules promulgated under it constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of New York. Mr. Justice Minton does not begin his discussion of this contention by weighing the guarantees of the First Amendment against the purposes sought to be secured by the Feinberg Law. Nor does he approach the problem as one involving the First Amendment at all. Quite the contrary; the First Amendment, in his view, is not a relevant consideration, and the reasons given were the familiar ones advanced in the *McAuliffe* case:

> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell*, 330 U.S. 75. They may work for the school system upon the reasonable terms laid down

17. *Id.* at 725.
18. *Id.* at 728.
19. 342 U.S. 485 (1952).
19a. N.Y. Laws 1949, c. 360.

> by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[20]

Here in one breath seems to be a reversion back to the privilege concept. Nevertheless, in the next breath, Mr. Justice Minton goes on to discuss the reasonableness of the Feinberg Law and to state that the law does not deny due process—without stating why, in the wake of his first premise, reasonableness is at all relevant. Manifestly, old concepts do not die quickly; they fade away gradually with occasional resurgences.

Nine months later came the decision in *Wieman v. Updegraff*[21] in which the court for the first time invalidated a state loyalty oath enactment. The State of Oklahoma had adopted a statute prescribing a loyalty oath for all state officers and employees regarding their membership in any "communist front or subversive organization." As interpreted by the Supreme Court of Oklahoma, association alone in the prescribed organization constituted disloyalty and disqualification; it did not matter whether the association by the employee existed innocently or knowingly. Mr. Justice Clark, writing for the Court, reversed the state court which had sustained the oath. The basis of the reversal is contained in the following sentences: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."

The plaintiff,[22] however, relying on the *McAuliffe*-type language in the *Adler* decision, argued that public employment was a privilege and could be bestowed upon such conditions as the state chose. Mr. Justice Clark refers to this argument and rejects it:

> "We are referred to our statement in *Adler* that persons seeking employment in the New York public schools have 'no right to work for the State in the school system on their own terms.' . . . To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United Public Workers,* though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' 330 U.S. at 100. . . . We need not pause to consider whether an

20. 342 U.S. 485, 492 (1952).
21. 344 U.S. 183 (1952).
22. Plaintiff, Updegraff, brought the suit as a citizen and taxpayer to enjoin the necessary state officials from paying further compensation to employees who had not subscribed to the oath.

> abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[23]

Essentially, the Court here follows the line of analysis advanced by Mr. Justice Frankfurter in the *Garner* case. The Court refuses to consider the problem in terms of the privilege-right dichotomy. In *Garner,* Mr. Justice Frankfurter stated that to describe government employment as a privilege does not meet the issue. In the *Updegraff* case, Mr. Justice Clark takes the same view with regard to the "right" side of the dichotomy.

Rejection of these concepts seems justified. The difficulty with the privilege-right concept is that it tends to present the problem in terms of absolutes, that is, whether or not government employees are entitled to any protection against conditions of employment. Thus, courts which reject an attack on the conditions of employment by reasoning that government employment was a "privilege," assign to that term a definition which permitted placing any conditions upon its grant or denial. On the other hand, characterization of government employment as a "right" suggests extreme limit on the governmental power over its employment.[24] So defined, this classification indeed does not meet the issue. For the question is not whether on the one hand the government is free to deal with public employees as it chooses or whether on the other the government can impose no restrictions on public employees. No one seriously contends that the government can not impose some conditions of employment. Likewise, few courts would deny that public employees have a substantial enough interest so that the government may not be wholly unfettered in dealing with them. Indeed the latter value judgment, it would seem, had been made in all those cases where the courts felt constrained to justify the reasonableness of a particular condition of employment under attack.[25] Once these judgments are made, however, the question still remains to what extent the government is to be limited in dealing with public employment. In short, the difficult issue is not one of whether, but one of how much. Here the privilege-right terminology offers little help. Even if one were able to put aside the emotive connotations of these terms and were willing to — assay precise definition, the problem would still be one of finding material from some other source out of which to fashion the definition.

23. *Id.* at 191-92.

24. Compare the opinion in United States v. Curtis, 12 Fed. 824 (C.C.S.D.N.Y. 1882) and the dissenting opinion of Mr. Justice Bradley in *Ex parte* Curtis (same case) 106 U.S. 371, 376 (1882). Compare the majority and dissenting opinions in Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd* without opinion by an equally divided Supreme Court, Mr. Justice Clark not participating, 341 U.S. 918 (1951).

25. See discussion, *supra,* pp. 817-19.

The Court has rather chosen to approach the problem in Due Process terms.[26] Concededly, to declare that Due Process is applicable is also to state a conclusion since initially, at least, it constitutes another way of saying that the government employment is a "privilege" or a "right" of a limited nature.[26a] But the value of the Due Process formulation is that it does not stop there; it accomplishes what the privilege-right dichotomy does not do. For Due Process, once applicable, traditionally raises the question of how much,[27] and it is this issue which is the key one to be decided in this area. Moreover, the issue once framed in Due Process terminology, is placed in a frame of reference that can draw for its solution an existing line of analysis and analogies.

Once government employment has been supplied a Due Process frame of reference, it would seem that the considerations will not be merely the same as those employed in the decisions which were willing to accept a standard of reasonableness,[28] but without any constitutional base for the standard. For Due Process includes also protection of fundamental liberties such as speech and assembly;[29] hence, in a Due Process framework, conditions of employment are likely to be considered not only in terms of whether they are reasonably designed to promote public efficiency; they would also be weighed against the loss to those freedoms traditionally protected by the Due Process Clause.

Conceivably, a broad conception of reasonableness might include

26. In a number of analogous situations, the court has employed the doctrine of unconstitutional conditions. This doctrine holds that although a state has the power to deny or grant a privilege altogether, it cannot impose as a condition for granting of the privilege the relinquishment of constitutional rights: *e.g.*, Terral v. Burke Constr. Co., 257 U.S. 529 (1922) (condition that a foreign corporation give up its constitutional right to use the federal courts held void); Frost v. Railroad Comm'n, 271 U.S. 588 (1926) (foreign private carrier unconstitutionally deprived of property by state requirement that it become a public carrier in order to secure a permit); cf. Hannegan v. Esquire, Inc., 327 U.S. 146, 155-56 (1946); Shawnessy v. United States *ex. rel.* Meyer, 345 U.S. 201 (1953). Although employing the language of privilege, the doctrine of unconstitutional conditions, in effect, has redefined that term to include constitutional guarantees. That doctrine does not, however, help determine which constitutional guarantees are applicable and to what extent.

26a. The Court never pinpoints the reason for concluding that Due Process is applicable. It may be that the Due Process Clause acts as a limitation on legislation even when it does not deal with subjects which are necessarily categorized as life, liberty or property. Such a limitation, of course, might be difficult to formulate in a jurisprudence which derives its absolutes from a constitution rather than from natural laws. Be that as it may, for the present the Court is content to invoke Due Process, leaving for future decisions analysis of its source.

27. Joint Anti-Fascist Refugee Comm'n v. McGrath, 341 U.S. 123, 150, 161-65 (1951), concurring opinion by Frankfurter, J.

28. *E.g.*, in United Public Workers v. Mitchell, 330 U.S. 75, 101 (1946), Mr. Justice Reed stated: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."

29. Gitlow v. New York, 268 U.S. 652 (1925); Palko v. Connecticut, 302 U.S. 319 (1925); Schneider v. Irvington, 308 U.S. 147 (1939); cf. Adamson v. California, 332 U.S. 46 (1947); Rochin v. California, 342 U.S. 165 (1952).

the balancing of the same factors. Psychologically and practically, however, consideration of the reasonableness of conditions of employment was never so oriented. Even where the consideration included such factors as "practice, history and changing educational, social and economic conditions,"[30] it was in terms of whether the conditions of employment were designed to improve the public service. In short, on the one side of the scale was the objective of government efficiency; on the other was the reasonableness of the method chosen to achieve the efficiency. Due Process adds another set of values to the scale: one of basic liberties. It is here that *Wieman v. Updegraff* is likely to serve its most useful purpose. Even without giving such values any favored status,[31] it is probable that the conditions that the government may impose on its employees would be tested more rigorously where such a balance is required than where the conditions are evaluated as a matter of reasonableness alone but outside of the Due Process framework of values.

Acceptance of the Due Process limitations does not mean, however, that the significance of the government interest in protecting the public service will not be recognized and that employment situations will be treated in precisely the same manner as non-employment situations. Due Process is one which is appropriate to the case. Legislation appropriate for public employees may not be suitable for private citizens. Indeed as to public employees themselves, what may satisfy Due Process where the sanction is dismissal may not suffice where criminal sanctions are involved.[32] And what may be acceptable for an

30. United Public Workers v. Mitchell, 330 U.S. 75, 102 (1946).

31. A now famous footnote 4 in United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938) suggested that there "may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." The footnote was cited in several decisions which indicate that the rights guaranteed by the First Amendment occupy a "preferred position." Schneider v. Irvington, 308 U.S. 147 (1939); Thomas v. Collins, 323 U.S. 516 (1945). Mr. Justice Frankfurter takes strong exception to any such principle of constitutional law in his concurring opinion in Kovacs v. Cooper, 336 U.S. 77, 90-97 (1948).

32. Where conditions of employment affect freedom of speech, and their breach involves criminal sanctions, it might be argued that the clear and present danger test should be utilized. As stated by Judge Learned Hand, "the question presented under this test is whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." [This statement of the rule was adopted in Dennis v. United States, 341 U.S. 494 (1951)]. In the case of public employees, the evil would appear to be impairment of the efficiency and integrity of the public service. Following Judge Hand's statement, the first consideration would be the probability that this evil will occur in the absence of the desired condition of employment; the second consideration would be whether the gravity of the danger to the public service to the extent that it is likely to occur, justifies the invasion of speech that is necessary to avoid the danger. The vitality of the clear and present danger test after Dennis v. United States, *supra*, is doubtful and certainly is not likely to be extended to the field of government employment. See Bailey v. Richardson, 182 F.2d 46, 61 (D.C. Cir. 1950); Comment, 46 MICH. L. REV. 942, 950 (1948).

employee in a sensitive position may not be so for one in a routine employment.[33] As Mr. Justice Frankfurter has pointed out, within the Due Process framework the Court "has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another."[34]

Nevertheless, analysis that considers the extent to which freedom of speech and assembly are limited, the reasons for doing so, the available alternatives and the balance between hurt complained of and good accomplished,[35] can neither be cavalier nor cursory. If *Wieman v. Updegraff* compels such analysis, it is a long step forward.[36]

Wieman v. Updegraff, of course, is only the beginning. The limits of governmental power in this area are still to be shaped in future decisions.[37] Necessarily, it will be done slowly. A new constitutional doctrine is fashioned with caution particularly in unreceptive times. Its full development is an evolutionary process, educating as it evolves so that with its maturity comes also receptiveness. But *Wieman v. Updegraff* has planted the seed firmly. The cases that follow will undoubtedly see it nourished until it becomes firmly rooted as part of our constitutional thinking about public employment.

II. LABOR RELATIONS AND PUBLIC EMPLOYMENT

Along with the increased number of public employees,[38] there quite naturally has come an expansion of union activity in government

33. See Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. OF PA. L. REV. 480, 491, 506-08 (1953); Phelps, Brown and Goudsmit, *Toward a Positive Security Program*, 11 BULL. OF THE ATOMIC SCIENTISTS 165 (April 1955).

34. Joint Anti-Fascist Refugee Comm'n v. McGrath, 341 U.S. 123, 163 (1951).

35. *Ibid.*

36. If this analysis is undertaken, it may well be that counsel challenging a condition of employment should seek to depart from the usual practice whereby invalidity is raised on the pleadings alone. Proof of the effectiveness of a condition of employment, the alternative available, the undue scope of condition and similar item [see, *e.g.*, Horowitz, *Report on the Los Angeles City and County Loyalty Programs*, 5 STAN. L. REV. 233 (1953)] may help the plaintiff overcome the presumption against him. Whether this can be done is a problem not peculiar to this area alone, but present whenever the constitutionality of a statute is challenged. See FREUND, ON UNDERSTANDING THE SUPREME COURT 86-92 (1951).

37. *Wieman v. Updegraff* has already made itself felt in state decisions. See, *e.g.*, Haynes v. Brennan, 135 N.Y.S.2d 900 (1954); Hamilton v. Brennan, 203 Misc. 536, 119 N.Y.S.2d 83 (1953) (arbitrary disqualification of policemen from eligibility list because of alleged subversive activity held unconstitutional). The principles of the *Updegraff* case were also strongly argued in *Peters v. Hobby*, where the question was whether procedural due process had been denied. See *e.g.*, Reply Brief for Petitioner, p. 14; 23 U.S.L. WEEK 3265, 3267 (April 26, 1955). That case was decided on nonconstitutional grounds. Peters v. Hobby, 23 U.S.L. WEEK 4311 (June 7, 1955).

38. In 1950, there were 7,015,000 public employees; 2,400,836 were federal employees; 1,103,441 state employees; and 3,418,262 employees of local government units. See U. S. BUR. OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1953 Table No. 423, p. 393 (74th ed. 1953).

employment.[39] The problems in this area generally fall into three categories: (1) union membership; (2) strikes by public employees; (3) collective bargaining.

(1) *Union Membership.*[40] Prior to *Wieman v. Updegraff,*[41] it was generally assumed that the government employer could if it wished prohibit union membership as a condition of employment. Insofar as the *Updegraff* case held that conditions of employment must not offend against Due Process, the question arises whether a prohibition against union activity is so related to the public efficiency that it outweighs the substantial interest of public employees in organizing and joining labor organizations.

A sweeping ordinance prohibiting all city employees from joining labor unions[42] was upheld in *C.I.O. v. City of Dallas.*[43] The court, relying on the *McAuliffe* doctrine, rejected arguments of unconstitutionality. The opinion also took the view that union activity by government employees is "incompatible with the spirit of democracy," and "inconsistent with every principle upon which our Government is founded," and that nothing "is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizens."[44] Apart from the fact that the Dallas ordinance was not limited to employees performing essential services, it is apparent that the court's view of the effects of union activity was not characterized by objectivity or accuracy. Evaluated in a due process framework of values,[45] an absolute prohibition of the Dallas type would seem difficult to sustain.

More frequently, restrictions on union membership have been im-

39. As of January 1, 1949, 706 of 1072 American cities (population over 10,000) had some or all of their employees organized into unions. See MUNICIPAL YEARBOOK OF THE INTERNATIONAL CITY MANAGERS ASSOCIATION 140-43 (1949).

40. For an excellent discussion of this problem, see Note, *Union Activity in Public Employment,* 55 COL. L. REV. 344 (1955); Comment, 45 ILL. L. REV. 364 (1950).

41. 344 U.S. 183 (1952). See discussion *supra* pp. 822-23.

42. Absolute restrictions are infrequent. Exceptions are an Alabama statute which prohibits most state employees from participating in labor organizations (Ala. Acts 1953, Act 720) and a Georgia statute making membership in a labor union by city, county or state policemen a misdemeanor [GA. CODE ANN. §§ 54-909 and 54-9923 (Supp. 1954)]; cf. N.J. Const. Art. 1, § 19 guaranteeing persons in public employment the right to organize and to present their grievances.

43. 198 S.W.2d 143 (Tex. Civ. App. 1946) *rehearing denied* November 29, 1946.

44. *Id.* at 145. The court (Looney, J.) quoted with approval from Railway Mail Ass'n v. Murphy, 180 Misc. 868, 44 N.Y.S.2d 601 (Sup. Ct. 1943), apparently unaware that that decision had been reversed by the Appellate Division, and that the Court of Appeals and the Supreme Court of the United States had affirmed Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

45. See discussion *supra,* at pp. 824-26.

posed upon firemen and policemen.[46] In such cases, one justification offered is that union activity tends to create strikes which in the vital areas of police and fire protection would be detrimental to the public safety.[47] But this reasoning does not seem valid where the state or municipality is already protected by anti-strike legislation[48] or where the union charter itself contains no-strike provisions.[49]

Nor does the quasi-military discipline of police and fire departments provide adequate justification for prohibition against union activity,[50] especially if union activity takes place during off-duty hours. At any event, the many cities which allow union activity by police and firemen have not reported any apparent impairment of service efficiency.[51] Indeed, the existence of an employees' organization through which grievances, real or imagined, can be channeled and aired, may well be a boon to morale. For in semi-military organizations, the individual with a complaint must go through the chain of command and his grievance is not likely to reach the higher levels of officialdom. An employees' organization assures the employee that his complaint will be presented at a responsible level; by the same token it relieves intermediate officers from the necessity of resolving numerous individual complaints on an *ad hoc* and possibly inconsistent basis.[52]

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46. Cases are collected in RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW (1946); Comment, 45 ILL. L. REV. 364, 365 (1950).

47. See Perez v. Board of Police Comm'rs, 78 Cal. App. 2d, 638, 641, 646, 178 P.2d 537, 539, 541-43 (1947); CIO v. Dallas, 198 S.W.2d 143, 148-49 (Tex. Civ. App. 1946); Hutchinson v. Magee, 278 Pa. 119, 122 Atl. 234 (1923).

48. See note 64 *infra*.

49. *E.g.*, the Constitution of the City Fire Fighter's Association, Local No. 22, of Philadelphia, Pa., International Association of Fire Fighters, (affiliated with AFL) provides in Art. II: "We will not strike or take action in any sympathetic strike. Our position is peculiar to most organized workers, as we are sworn to protect the homes and properties of communities in case of fire or other serious hazards." See also Hickman v. Mobile, 256 Ala. 141, 144, 145, 53 So.2d 752, 754, 755 (1951); Agger, *The Government and Its Employees*, 47 YALE L.J. 1109 (1938). The point may be made, however, that unofficial or wildcat strikes are more likely to occur where union activity is permitted.

50. Cases upholding restrictions frequently assign this reason. *E.g.*, King v. Priest, 357 Mo. 68, 84, 206 S.W.2d 547, 554 (1947), *appeal dismissed*, 333 U.S. 852 (1948) where the court, in sustaining a rule of the St. Louis Police Department prohibiting its members from joining a union, said: "The legislature recognized the necessity for order, discipline and authority in the police force. . . . We think the rule in question bears a direct relationship to both the discipline and the government of the police force."

51. *E.g.*, in Philadelphia, the Fraternal Order of Police, while technically not classified as a union, functions as a labor organization representing policemen. According to Philadelphia Police Commissioner Thomas J. Gibbons, this organization, although extremely active, has not impaired the efficiency of the force in any way.

52. In New York, the Mayor's "Interim Order on the Conduct of Relations Between the City of New York and Its Employees" stated: "It has been generally demonstrated that when employees through their chosen representatives are accorded a reasonable and orderly opportunity to present their proposals to their employers regarding the terms and conditions of their employment and are assured adequate machinery for the redress of their grievances, it can result in a better and more efficient functional operation

In some cases, a restriction on union membership has been defended as reasonable on the theory that it prevents divided loyalties.[53] Thus, in one case,[54] a ban on union membership of employees of the Department of Buildings and Safety was upheld on the rationale that such employees could not impartially administer the municipal building code if they were officers of a national union whose members were required to seek permits from the city. Similarly, it has been suggested that police or other government employees engaged in labor disputes should not become affiliated with national unions because of the danger of sympathetic strikes and the possible partiality of such employees in disputes involving their unions or affiliated organizations.[55] The danger seems more imagined than real. That union loyalties will project themselves on a national level or run so deep as to impair loyalty and efficiency is a doubtful premise.[56] The same reasoning would require, for example, that policemen could not be trusted to arrest fellow city employees who have committed crimes or that building inspectors cannot be relied upon to inspect buildings occupied by members of the same fraternal association, church or other group. In any event, even if government employees engaged in labor disputes should not affiliate with national unions, it does not mean that they should be prohibited from union activity where it is of a local variety. Absolute restrictions against union membership, even among police and firemen, it would seem, may well border on the arbitrary. Certainly as a corollary of *Updegraff*, the re-examination of such restrictions is appropriate.

(2) *Strikes by Public Employees.*[57] Where services essential to

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and entity." (Quoted by Burke, *Report of Committee on Municipal Officers and Employee Problems*, 18 NAT. MUNIC. L. REV. 303, 314 (1955).

53. King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947), *appeal dismissed* 333 U.S. 852 (1948); Young v. Board of Bldg. & Safety Comm'rs, 100 Cal. App. 2d 468, 224 P.2d 16 (1950).

54. Young v. Board of Bldg. & Safety Comm'rs, *supra* note 53.

55. See Kaplan, *Policemen in Labor Unions*, 7 CIVIL SERV. L. REP. 61, 64-66 (1951); GODINE, THE LABOR PROBLEM IN PUBLIC SERVICE 66-70 (1951). However in NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947), the Court decided that guards employed in a private plant had the right to be represented by the same union as the other employees, although the guards' duties included protection of plant property from damages by other employees. The National Labor Relations Act now provides otherwise. 29 U.S.C.A. § 159(b)(3) (1947).

56. See footnote 49, *infra*. Even where police and fire associations affiliate themselves with a national union, the affiliation is frequently only a nominal one. The close contacts and interrelationships sometimes found between the various unions of an industry organized along craft lines, do not exist between police and fire unions and the national unions with which they may be associated. Some associations, such as the Fraternal Order of Police, not only have no affiliation with a national union, but also claim that they are not a "union," although they apparently function as one.

57. An excellent discussion is found in Note, *Strikes by Government Employees*, 2 VAND. L. REV. 441 (1949); See generally, ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES (1940).

community health or safety are involved, few would disagree that strikes by public employees should be prohibited. But the courts have not drawn the line at that point and have denied public employees a right to strike under any circumstances.[58] Where no anti-strike legislation exists and where the employees are not engaged in essential services, there is little reason to hold that a strike by public employees is so contrary to the public welfare that it must be enjoined. It may be that the interest of the public and of the employees in freedom of collective action is more substantial than the interest of the public in maintaining non-essential government operations.[59] In today's highly industrialized and unionized society, the question is at least a debatable one. This being so, it would seem more appropriate for the legislature than for the judiciary to determine whether strike activity by employees engaged in non-essential services is illegal. Under this view, in the absence of any legislative ban, a court of equity would refrain from enjoining a peaceful strike by such public employees.[60]

Some courts have indicated that where the government acts in a "proprietary" as opposed to a "governmental" capacity, the government employee should be treated no differently labor-relations-wise than the employee in private enterprise.[61] Whatever the value of the governmental proprietary distinction in tort areas, it fails to afford the basis for a valid dichotomy in labor relations. The determination of whether a given function is governmental or proprietary is influenced by such factors as whether the function is one traditionally engaged in

58. City of Cleveland v. Division 268 of Amalgamated Ass'n, 85 Ohio App. 153, 85 N.E.2d 811 (1949); same parties, 90 N.E.2d 711 (Ohio 1949); Goodfellow v. Civil Serv. Comm'n, 312 Mich. 226, 20 N.W.2d 170 (1945) (discharge for strike activity); Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 210 P.2d 305 (1945) (strike to demand collective bargaining is for unlawful purposes); Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) (declaratory judgment that public employees have no right to strike). Cases are collected in RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 44-50 (1946). Temporary injunctions are generally granted in these cases, since anti-injunction laws are held inapplicable to public employees. United States v. United Mine Workers, 330 U.S. 258 (1947); Note, 55 COL. L. REV. 344, 359-60 (1955).

59. A determination by the legislature that strikes by public employees should be unlawful is not likely to offend Due Process. City of Detroit v. Division 26 of Amalgamated Ass'n, 332 Mich. 237, 51 N.W.2d 228 (1952). *But. cf.* Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kan. 1945), *appeal dismissed,* 326 U.S. 690 (1945); Note, 2 VAND. L. REV. 441, 442 (1949). However, different considerations may be involved if a ban on peaceful picketing is attempted. Thornhill v. Alabama, 310 U.S. 88 (1940); Vogt, Inc. v. Teamsters' Union, 24 U.S.L. WEEK 2019 (Wis. July 12, 1955).

60. By the same token, to strike would not be just cause for discharge. *But cf.* Goodfellow v. Civil Serv. Comm'n, 312 Mich. 226, 20 N.W.2d 170 (1945).

61. Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement & Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954) (employee of an agricultural improvement and power district may strike peacefully to enforce execution of a collective bargaining agreement); see RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 53-56 (1946); *contra,* Cleveland v. Division 268 of the Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees, 90 N.E.2d 711 (Ohio 1949).

by the government, whether it is undertaken for pecuniary profit, and by the precedent peculiar to a given jurisdiction.[62] Such criteria can have little bearing on a decision as to whether strikes should be permitted. It makes little sense, for example, to prohibit a strike among employees in the city's personnel office because it is operated in a governmental capacity, while permitting strikes among employees in the city's water plant, because it is operated in a proprietary capacity.[63]

In a number of states anti-strike legislation has been enacted.[64] In many of these statutes the prohibition applies to all employees, no distinction being drawn either on the basis of governmental and proprietary service or on the basis of essential and non-essential services.[65] Frequently enacted in the wake of strikes which have aroused public indignation, such legislation does not represent a mature approach to public employee labor relations. Granting that the government has the power to treat public employees differently than private employees, (and even if successful in preventing strike activity,[66]) a unilateral approach to labor relations is neither fair nor likely to achieve a high level of efficiency and cooperation. The reason for prohibiting strikes must stem from a sounder rationale than the power to do so. Hence arguments frequently advanced on behalf of strike prohibitions[67] are that (1) strikes against the sovereignty of the government are inherently unlawful; (2) strikes cause such a loss to government prestige as to weaken its authority; (3) they are unnecessary because the government does not function for profit; (4) they compel the government administrator to exercise his discretion in a certain way. The first of these arguments, apart from its absolutist overtones, begs the question. The second argument seems to be of doubtful ac-

63. See Seasongood, *Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936); Barnett, *The Foundations of the Distinctions Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

63. McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.30, 53.103 (3d ed. 1949).

64. The various enactments are discussed in RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW — A SUPPLEMENTARY REPORT 35-50 (1949); 2 VAND. L. REV. 441, 443, 449 (1949).

65. *E.g.*, MICH. STAT. ANN. §§ 17.455(1)-17.455(8) (1947) [constitutionality sustained in City of Detroit v. Division 26 of Amalgamated Ass'n, 332 Mich. 237, 51 N.W.2d 228 (1952)], discussed in *Anti-Strike Legislation in Operation*, 1 CIVIL SERV. L. REP. 36 (1951); Neb. Laws 1947 c. 178; N. Y. Civil Service Laws § 22(2) (Supp. 1954); OHIO REV. CODE ANN. §§ 4117.01-4117.05 (Baldwin 1953); PA. STAT. ANN. tit. 43, § 215.1-215.5 (Purdon Supp. 1954). These statutes generally provide for discharge of the striking employee and prohibitions as to his reemployment for a designated period.

66. If dissatisfaction is strong enough, anti-strike statutes are not likely to prevent unofficial or wildcat strikes. See GODINE, THE LABOR PROBLEM IN THE PUBLIC SERVICE 169 (1951); Schwartz, *Industrial Nationalization and Industrial Relations in Great Britain*, 97 U. OF PA. L. REV. 543, 551-53 (1949).

67. For an excellent analysis of the arguments pro and con anti-strike legislation, see Note, 2 VAND. L. REV. 441, 445-48 (1949).

curacy[68] and a weak foundation upon which to deny government employees freedom of collective action. The third reason erroneously assumes that there is no conflict of interest between government employer and employee;[69] the gains through collective action put that view quickly to rest.[70] To answer the fourth argument is to demur. Attempts to persuade the government official to exercise his discretion are typical of our governmental system. That is precisely the reason for many political and civic campaigns, for lobbying, collective bargaining, and for the advocacy of an attorney. Moreover, there are checks on labor's coercive powers since there is always the danger that a strike will arouse public animosity.[71]

Thus, the only substantial reason for prohibiting strikes would seem to be to protect the public from the adverse effects of a strike. With that the objective, the legislature should weigh the interests in freedom of collective action against the injury to the public health and safety[72] resulting from a strike and decide which services are so essential to the public interest that employees in those services should be prohibited from striking. Obviously, this determination is often a difficult one, requiring as it does an evaluation of the extent to which the public health and safety may be affected by a strike.[73]

Some states have attempted this kind of determination by prohibiting strikes by employees of public utilities since, as a rule, there is a close relation between utilities services and general health and safety. These statutes are also applicable to utilities which are privately owned and operated.[74] Since the consequences of labor disturbances are as serious for privately owned utilities as for those which are publicly owned in terms of potential injury to the public health and safety, the inclusion of such private employees appears justified.

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68. ZISKIND, *op. cit. supra* note 57, at 191, 249.

69. See Baldwin, *Have Public Employees the Right to Strike? — Yes*, 30 NAT'L MUNIC. REV. 515 (1941).

70. ZISKIND, *op. cit. supra* note 57, *passim;* RHYNE, *op. cit. supra* note 64, at 35 *et seq.*

71. Note, 54 HARV. L. REV. 1360, 1365 (1941).

72. It has been suggested that where the disruption of a public service causes particular inconvenience, even if not essential to health and safety, there is public pressure to restore services; hence strikes should not be allowed in such areas because it places the employee in too powerful a bargaining position. Note, 55 COL. L. REV. 344, 362, n. 127 (1955). The premise is a doubtful one since public pressure, particularly when influenced by the press, may also turn against the employees' union. Thus, either side risks second-guessing the public.

73. The difficulty in making such a judgment which is so clearly of a policy nature emphasizes that the judgment should not be made in the aftermath of the heat engendered by a strike, but rather after an objective study of the problem, undertaken under non-adversary conditions. It seems clear also that the judgment is not one appropriate for the judiciary.

74. *E.g.*, IND. ANN. STAT. §§ 40-2401 to 40-2415 (Burns 1947); FLA. STAT. ANN. §§ 453.01-453.17 (Supp. 1947) (does not apply to utility owned and operated by a governmental unit); ILL. ANN. STAT. § 50-111.65 (Brossard Supp. 1947) (does not apply to state or any political subdivision).

Manifestly, it is often difficult to ascertain *in advance* whether a strike, even in essential services, will injure public health or safety since the length of the strike and its scope will affect that determination. Thus, another approach that may be used in the case of public utilities is to permit employees to strike but if the strike becomes too serious, to allow the government to obtain a temporary injunction or other relief. In effect, this is the procedure provided in the National Labor Relations Act in the case of private employees.[75] If coupled with a procedure for resolving the disputes, whether through arbitration, mediation or other means,[76] this is perhaps the most desirable solution in this area and should be used both for private and public employees engaged in essential services.

In the final analysis, it must be recognized that strikes stem from the failure to adjust the problems which give rise to the strikes. Skillful handling of strikes is no substitute for the solution of disputes in their incipiency. To the extent that the collective bargaining process can be effectively employed, the right to strike may well become a nominal one relatively unimportant in the public labor relations problem.

(3) *Collective Bargaining.* In the absence of statutory authority, most courts have held that the public administrator had no power to enter into collective bargaining agreements.[77] The reasons have varied. In some cases, the courts have felt that wages and other conditions of employment were exclusively matters of legislative concern

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75. The National Labor Relation Act provides for example: "(a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate." 29 U.S.C.A. § 178 (1947).

76. State provisions have varied: *e.g.*, MASS. ANN. LAWS c. 150 §§ 3-8 (Supp. 1954) (if governor finds interruption endangers health and safety, he can require a moderator and arbitration or submission to an emergency board; if not settled and emergency still exists, governor may seize and operate plant and facility); MISS. ANN. STAT. §§ 295.010-295.210 (Vernon 1947) (applies to utilities operating under governmental franchise or permit or under governmental ownership and control; if governor thinks strike threatens health and welfare, he may seize plant; unlawful to strike after plant has been seized); N.D. REV. CODE § 37-0106 (1943) (governor may seize public utility in event of strike which endangers life and property).

77. See generally, RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW — A SUPPLEMENTARY REPORT 29-34 (1949). National and state labor acts generally expressly exclude public employees or have been so construed; cases are collected in Note, 55 COL. L. REV. 344, 349 (1955).

and hence the administrator lacked the power to enter into collective bargaining agreements.[78] It is, of course, true that the administrator may not vary wages, classifications, or other conditions legislatively established. In practice, however, the legislature seldom deals with all aspects of personnel administration. Even if the more significant areas such as wages and position classification are excluded from collective bargaining, there generally remains for administrative determination, numerous aspects of personnel administration which may form the subject for collective bargaining.[79]

In other cases, the courts have said that an administrator may not bargain collectively because that power was not expressly granted to the city and the court was unwilling to imply the power as part of the general powers of the city to contract.[80] The conclusion is a doubtful one; certainly in view of the importance of labor relations to any public agency, the power to handle labor problems by whatever methods are currently acknowledged as desirable would seem to rank high among the fairly implied powers. In some cases, the courts have validated bargaining agreements by finding that a proprietary function was involved and reasoning (sometimes circuitously) that in such instances, it may be implied that the government was intended to have the same powers as a private corporation.[81]

Where a home rule city is involved, the power to enter into collective bargaining agreements[82] as to most aspects of public employment would seem clear, since personnel administration is generally recognized as a matter of municipal concern within the typical home rule grant.[83] However, some aspects of labor relations, such as pension or disability compensation might be considered matters of statewide concern[84] and hence subject to general state law. As to such matters, local collective bargaining agreements would have to yield if inconsistent with state-wide provisions. But in the absence of conflict, there would seem no reason why a home rule city could not bargain

78. Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194 (1946).

79. Note, 54 HARV. L. REV. 1360, 1364 n. 42 (1941).

80. City of Cleveland v. Association, 30 OHIO OP. 395 (1945); Miami Water Works Local No. 265 v. City of Miami, 157 Fla. 445, 26 So.2d 194 (1946).

81. Christie v. Port of Olympia, 27 Wash. 2d 534, 179 P.2d 294 (1947); Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement & Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954).

82. The agreement, of course, would be subject to the limitations of the city's Home Rule Charter.

83. *E.g.*, Lennox v. Clark, 372 Pa. 355, 93 A.2d 834 (1953); Goodwin v. Oklahoma City, 199 Okla. 26, 182 P.2d 762 (1947); State *ex rel.* Fischer v. City of Lincoln, 137 Neb. 97, 288 N.W. 499 (1939). *But cf.* Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E. 2d 246 (1946) where the court invalidated an ordinance providing for voluntary check-off of union dues. The decision is criticized in Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 41 (1948).

84. Pension systems, for example, are frequently established on a statewide basis, as are workmen's compensation and occupational disease laws.

collectively even on those subjects of personnel administration which might be appropriate for state legislative action.

Even where the determination of wages and conditions of employment is a matter of administrative determination,[85] many courts have held that it is an illegal delegation of the administrator's discretion to enter into collective bargaining agreements, since it involves delegation to the union of the administrator's power to fix wages and other conditions of employment.[86] The weakness in this reasoning seems to be a factual one. The collective bargaining process does not mean that the decision-making power has been delegated to the union. The decision whether to enter into the agreement or not remains with the administrator. If the administrator does have the authority to fix wages and other conditions of employment, there seems to be no reason why he may not select a collective bargaining process as the means for arriving at his determination.

A variant of the delegation argument is that collective bargaining constitutes a surrender or abdication of discretion. The argument here is that the administrator normally may change his determinations. If, however, he enters into collective bargaining agreement, he precludes such changes and thereby "abdicates" his continuing discretion.[87] It has been suggested[88] as an answer to this contention that administrators frequently enter into binding contracts and that the making of a collective bargaining agreement is similar. But the answer does not seem to lie in analogies to other contractual arrangements such as in supply and construction operations, for there the "surrender of discretion" is one necessarily intended by the legislature, while it may well be that the grant of power to the administrator to make decisions on conditions of employment was intended to permit him to exercise continuing discretion and not to preclude him from doing so because of a collective bargaining agreement. The question, therefore, is basically one of statutory intent. As an original question, if the administrator has been delegated the powers to deal with conditions of employment, his authority should also include the power to enter into agreements within the budgetary period.

85. Under most comprehensive civil service schemes, wages, classification and other conditions of employment are to be adopted as part of the Civil Service Regulations, pursuant to broad guides legislatively established. See, *e.g.*, Philadelphia Home Rule Charter § 7-401.

86. Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal. App. 2d. 34, 210 P.2d 305 (1949) (alternative holding); Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 270; 44 A.2d 745, 747 (1945) ("The City has no right under the law to delegate its governing power to any agency"); Hagerman v. City of Dayton, 147 Ohio. St. 313, 71 N.E.2d 246 (1946).

87. Home Tel. and Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908); Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745 (1945); City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 34, 210 P.2d 305 (1949); City of Cleveland v. Association, 30 Ohio Op. 395 (1948).

88. Note, 55 COL. L. REV. 344, 351 (1955).

Philadelphia has sought to handle the problem in this way. Under the Philadelphia Home Rule Charter, responsibility for all matters of personnel administration is vested in the Personnel Director and the Civil Service Commission.[89] The Personnel Director negotiates a collective bargaining agreement with the union recognized as the collective bargaining agent for public employees. During the negotiation process, the Director consults with the Commission which makes suggestions. Nevertheless, the agreement that is finally concluded provides that it shall be subject to the City's Civil Service Regulations. The Civil Service Commission then reviews the agreement, sending it back for further negotiation and modification when it believes it necessary, and then adopts the agreement as part of the Civil Service Regulations. Since the agreement is subject to the Regulations, any future change in the Regulations will have a superseding effect. Thus, strictly speaking, the contract is merely an illusory one since it is not binding on the Commission. As a practical matter, however, when an agreement is finally reached and adopted by the Commission as part of the Civil Service Regulations, it is not likely that the Commission will depart from the terms of the agreement except under extraordinary circumstances. To do so would not only adversely affect the morale of city employees but would also jeopardize the course of future collective bargaining. This working arrangement has been in effect for three years and city and union officials agree wholeheartedly that it has been a key factor in the harmonious labor relations the city enjoys with its employees.

Of course, the public agency that enters into collective bargaining agreements will have problems not faced by private industry. Thus, for example, even though a majority union is recognized as the exclusive bargaining agent for purposes of negotiating a collective bargaining agreement, it will probably be necessary to provide a procedure whereby minority views are also afforded a hearing.[90] Similarly, check-off privileges may have to be given to minority as well as the majority unions;[91] and the determination of the appropriate bargaining unit may be especially difficult in a complex public agency. However, these and similar problems peculiar to the public agency are

89. §§ 7-100-7401 of the Philadelphia Home Rule Charter. Personnel matters are dealt with by civil service regulations which are proposed by the personnel director and adopted by the Civil Service Commission.

90. It has been suggested that exclusive recognition discriminates against non-union men and rival unions. See City of Cleveland v. Association, 30 Ohio Op. 395, 408 (1945); Mugford v. Mayor and City Council of Baltimore, 186 Md. 266, 270, 44 A.2d 745, 747 (1945); Note, 55 COL. L. REV. 344, 354-55 (1955); Comment, 54 ILL. L. REV. 364, 372 (1950).

91. Compare Kirkpatrick v. Reid, 193 Misc. 702, 85 N.Y.S.2d 378 (Sup. Ct. 1948) and Mugford v. Mayor and City Council of Baltimore, *supra* note 90. Philadelphia, for example, permits voluntary check-off for both majority and minority unions. See OPINIONS OF THE CITY SOLICITOR OF PHILADELPHIA 175 (1952).

not insurmountable and undoubtedly various practical solutions will be found by those agencies undertaking collective bargaining.

There can be little doubt that the values of collective bargaining are present for the government employer as well as for the private one. The desirable course for the future would seem to be for legislatures to remove any obstacles to collective bargaining by public agencies and indeed to establish positive machinery whereby it may be pursued.