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COMMENT

COUNTY SANITATION DISTRICT: THE NEED FOR A LEGISLATIVE RESPONSE TO PUBLIC EMPLOYEE STRIKES

I. INTRODUCTION

For more than fifty years the National Labor Relations Act (Act),1 pursuant to section seven,2 has protected the private employee's right to strike. The Act, however, does not cover federal, state and local government employees3 because the federal and state governments have prohibited public employee strikes by statute.4

2. 29 U.S.C. § 157 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." (emphasis added). The courts have interpreted "concerted activities" to include strikes. See, e.g., Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 474-75 (1955); Amalgamated Ass'n M.C.E. v. Wisconsin Employment Relations Bd., 340 U.S. 383, 389 (1951).
3. The term "employer" includes any person acting as an agent of an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof.
Moreover, the common law rule prohibiting strikes in the public sector has been repeatedly affirmed by federal and state courts. In recent years, states have begun to authorize a limited right to strike for their employees through specific legislation or judicial interpretation of collective bargaining laws. Before 1985, however, no court had ruled that public employee strikes were valid in the absence of legislation.

In County Sanitation District No. 2 v. Los Angeles County Employees Association, the California Supreme Court held that local public employees may strike under common law so long as their work stoppages do not interfere with public health and safety. The court further ruled that public employers would no longer be entitled to post-strike damages because all public employee strikes were illegal. The County Sanitation decision marked a dramatic change in California labor law because it overruled a long line of cases sup-


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

10. Id. The County Sanitation decision did not, however, specify whether tort remedies would be appropriate for a strike which harmed public health or safety. Id. at 592, n.40, 699 P.2d at 854, 214 Cal. Rptr. at 443.
porting a ban on all government employee strikes.11

This comment will examine the public employee strike law in California before the County Sanitation case and the justifications offered by the California Supreme Court for ending the strike ban. This comment will also explore the measures which the California Legislature and local public employers should adopt to protect public health and safety as well as promote labor peace during future strikes.

II. THE DEVELOPING STRIKE LAW OF CALIFORNIA

In Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen,12 the California Supreme Court first addressed the public employee strike issue by ruling on the validity of a statute permitting strikes by local transit employees. The court sustained the constitutionality of the transit statute because of the similarity in language with section seven of the National Labor Relations Act.13 The California Supreme Court also noted, in dictum, that public employees did not have the right to strike in absence of legislative authorization.14 The lower courts in California, therefore, often cited the lack of statutory permission for public employee


12. 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960). The court noted that other jurisdictions had approved statutes authorizing public sector strikes:

No case has been found holding that a statute permitting public employees to strike constitutes an improper delegation of governmental authority, and courts both in this state and elsewhere, although not specifically discussing the delegation point, have recognized that statutes which permit strikes by publicly-employed teachers, electrical workers, maintenance workers, and longshoremen may be validly enacted.

355 P.2d at 910, 8 Cal. Rptr. at 6 (citations omitted).

13. The Los Angeles Transit court cited section 3.6(c), the “concerted activities” provision of the Los Angeles Metropolitan Transit Authority Act. Id. at ____, 355 P.2d at 906, 8 Cal. Rptr. at 2-3. Section 3.6(c) was identical to section 7 of the National Labor Relations Act. See supra note 2. In 1964 the Los Angeles Metropolitan Transit Authority merged into the Southern California Rapid Transit District. See Cal. Pub. Util. Code § 31000 (West 1973). The transit employees retained all rights which they had enjoyed under the previous Act. Id. § 31003.

14. 54 Cal. 2d at ____, 355 P.2d at 906, 8 Cal. Rptr. at 2 (citing 31 A.L.R.2d 1142, 1159-61).
strikes in upholding the strike ban. However, despite the agreement among the lower courts, the California Supreme Court Justices have disagreed about the validity of the strike ban.

Firefighters are the only public employee group the California Legislature has specifically prohibited from striking. Subsequent statutes, such as the Meyers-Milias-Brown Act (MMBA), do not expressly permit or prohibit strikes. The MMBA allows public employee organizations to “meet and confer” with the county and municipal employers in California. The statute does not, however, provide any guidance concerning procedures when the parties reach an impasse in bargaining other than advising the parties to appoint a mediator. In contrast, the Educational Employer-Employees Relations Act (EERA) provides extensive post-impasse procedures such

15. The common law rule [that] public employees do not have the right to bargain collectively or to strike is predicated expressly on the necessity for and lack of statutory authority conferring such right. Where a statute authorizes collective bargaining and strikes it includes them within the methods authorized by law for fixing the terms and conditions of employment. Those who advocate the right to strike should present their case to the Legislature.

City of San Diego, 8 Cal. App. 3d at 313, 87 Cal. Rptr. at 261-62 (emphasis added). For other California cases following this reasoning, see Los Angeles School Dist., 24 Cal. App. 3d at 145, 100 Cal. Rptr. at 808; S.F. State College, 13 Cal. App. 3d at 867, 92 Cal. Rptr. at 136; Almond, 276 Cal. App. 2d at ----, 80 Cal. Rptr. at 520.

16. Compare Justice Grodin’s concurring opinion in El Rancho Unified School Dist. v. Nat’l Educ. Ass’n, 33 Cal. 3d 946, 962, 663 P.2d 893, 192 Cal. Rptr. 123, 133 (1983) (“[T]he Legislature has taken hold of the field [public employee bargaining] in such a way as to cast substantial doubt upon the continuing validity [assuming it was once valid] of the familiar generalization concerning the illegality of public employee strikes”) with Justice Richardson’s dissenting opinion in Int’l Bhd of Elec. Workers, Local 1245 v. City of Gridley, 34 Cal. 3d 191, 210, 666 P.2d 960, 971-72, 193 Cal. Rptr. 518, 529-30 (1983) (“Public employee strikes are illegal. They cannot and should not be condoned . . . My colleagues should forthrightly, clearly, and unmistakably acknowledge this.”).

17. Cal. Labor Code § 1962 (West 1971) states in part that “employees. . . shall not have the right to strike, or to recognize a picket line of a labor organization while in the performance of their official duties.” §§ 3500-3511. After County Sanitation, the Court of Appeals ruled that the § 1962 was still valid. Vernon Fire Fighters’ Ass’n v. City of Vernon, 181 Cal. App. 3d 710, 223 Cal. Rptr. 871 (1986). In Vernon, the Court of Appeals distinguished County Sanitation:

It is extremely unlikely that the outcome of County Sanitation Dist. could affect the legal relationship of the parties herein because firefighters are prohibited by section 1962 of the Labor Code from having a right to strike. . . . In fact, the opinion appears to reaffirm and approve the ban of the section. . . . It is clear the County Sanitation Dist. decision does not apply to legislative prohibitions against strikes.

19. County Sanitation, 38 Cal. 3d at 571, 699 P.2d at 839, 214 Cal. Rptr. at 428.
21. Id. at § 3505.2.
22. Id. §§ 3540-3549.1.

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as fact-finding panels and binding arbitration. 23

A legislative study conducted in 1973 recommended ending the total ban on public sector strikes. 24 The study revealed that the lack of a strike threat weakened the bargaining position of public employee unions. 25 The committee did not, however, suggest that employees engaged in “non-essential” functions would be completely free to strike while “essential” employees could never strike due to the difficulty in assessing “essential” services. 26 The committee instead proposed a statute that would require the parties to submit to mediation and fact-finding 27 upon reaching an impasse unless they developed their own binding impasse procedures. 28 Under the committee’s plan, a strike or lockout 29 would occur when an employee organization or a local legislative body rejected the neutral fact-finder’s recommendations. 30 An injunction could be granted to enjoin the strike if: 1) the stoppage would immediately threaten public health and safety; and 2) there were no alternative methods of providing services to the public. 31 Additionally, the court would order the parties to accept the fact-finding panel’s recommendations. 32

Despite the 1973 study, the California Legislature never addressed the public employee strike issue. 33 In absence of legislative

23. Id. §§ 3548.1-3548.8.
25. The study voted unfair practices in which “some public employers — confident that their employees will not strike illegally — fail to respond in good faith to proposals made by employee representatives.” Id. at 478 (quoting California State Assembly, Final Report of the Assembly Advisory Council on Public Employee Relations (March 15, 1973), at 232-33).
26. It is relatively easy to gain consensus that police and fire protection are essential services, and that some minor clerical functions are not. But in respect of the great number of services that lie between the two poles of absolute essentiality and absolute non-essentiality there is not even the beginning of consensus, only disagreement.

Id. at 479 (quoting Final Report, supra note 25, at 230).
27. The fact-finding panel generally consists of members selected by each party plus impartial members. The panel may hold hearings and issue subpoenas of witnesses and evidence. Statutes often provide criteria which the fact-finding panel must consider in making its recommendations. See, e.g., Cal. Gov’t. Code § 3548.2 (West 1980 & Supp. 1986). The EERA also specifies a period within which the panel must issue its report. Id. § 3548.3.
29. A lockout has been defined as “the withholding of employment by an employer from his employees for the purpose of resisting their demands or gaining a concession from them.” C. Morris, 2 The Developing Labor Law 1034 (2 ed. 1983).
31. Id. at 484 (citing Final Report, supra note 25, at 237-40).
32. Id.
33. County Sanitation, 38 Cal. 3d at 571, 699 P.2d at 839, 214 Cal. Rptr. at 428. For a
direction, however, the number of strikes in the California public sector remained high.\(^{34}\)

III. THE **County Sanitation** Case

County Sanitation District No. 2 is the labor relations representative for the twenty-seven Los Angeles sanitation districts\(^{35}\) that operate sanitary landfills and sewage treatment stations in Los Angeles County.\(^{36}\) The districts employ about 500 workers who operate and maintain these facilities.\(^{37}\) The employees' representative, Service Employees International Union, Local 660, had bargained with District No. 2 each year since 1973, and reached collective agreements through a memorandum of understanding.\(^{38}\)

In 1974, some of the sanitation workers walked out for five days before ratifying the agreement.\(^{39}\) A few years later in 1976, bargaining reached an impasse over the pay issue for cleanup time at the beginning and end of the workers' shifts.\(^{40}\) On July 5, 1976, approximately seventy-five percent of the sanitation employees went on strike.\(^{41}\) Although District No. 2 obtained an injunction on the sec-

\(^{34}\) Between 1974 and 1983, there were 388 strikes in the California public sector. *County Sanitation*, 38 Cal. 3d at 581 n.27, 699 P.2d at 847 n.27, 214 Cal. Rptr. at 436 n.27 (citing *An Analysis of 1981-1983 Strikes in California's Public Sector*, 60 Cal. Pub. Empl. Rel. 7,9 (Mar. 1984)).

\(^{35}\) Through a joint powers agreement, the other twenty-six districts authorized District No. 2 to act on behalf of all the districts in several matters, including personnel and labor relations. 38 Cal. 3d at 568 n.1, 699 P.2d at 837 n.1, 214 Cal. Rptr. at 426 n.1.

\(^{36}\) In 1976 the District operated six sanitary landfills which received about 15,000 tons of waste daily, eleven treatment plants processing about 450 million gallons of raw sewage daily, fair maintenance yards and forty-six pumping stations. 38 Cal. 3d at 568 n.2, 699 P.2d at 837 n.2, 214 Cal. Rptr. at 426 n.2.


\(^{38}\) A memorandum of understanding (MOU) is a written agreement reached by a local public employer and a recognized employee organization. The MOU contains provisions on wages and other terms and conditions of employment which will govern the parties' relationship for a specified period. The local city council or governing body must approve the memorandum. See Cal. Gov't Code § 3505.1 (West 1980). Once the local governing body has approved the MOU, the employee organization may seek a writ of mandamus to enforce wage agreements. Glendale City Employees Ass'n. v. City of Glendale, 15 Cal. 3d 328, 540 P.2d 609, 124 Cal. Rptr. 513, cert. denied, 424 U.S. 943 (1975).

\(^{39}\) *County Sanitation*, 147 Cal. App. 3d at ---- n.4, 195 Cal. Rptr. at 571 n.4.


\(^{41}\) *County Sanitation*, 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.
ond day of the strike, the work stoppage continued for eleven days. The strike ended when the workers voted to accept a one-year agreement containing a 5.1 percent pay raise and increased health benefit payments. The only difference between the District’s pre-strike proposal and the final agreement was that the District originally sought a two-year agreement.

Three years after the strike terminated, the District sued Local 660 for damages incurred during the strike. Striker vandalism against sanitation facilities was a contributing factor for the District’s damages. In August, 1981, the Los Angeles County Superior Court awarded damages to the District. The judgment against the sanitation workers’ union marked the first time that a court had awarded damages to a California public employer after a strike.

The California Superior Court followed the California Court of Appeals’ ruling in Pasadena Unified School District v. Pasadena Federation of Teachers that public employers may recover damages against a striking union. In addition to the verdict against Local 660, the Superior Court held three union officials personally liable for their role in the strike. On appeal, Local 660’s attorney argued that the Los Angeles sanitation case offered an opportunity for the California courts to address the legality of all public em-

42. County Sanitation, 147 Cal. App. 3d at ___, 195 Cal. Rptr. at 568.
43. See L.A. County Sanitation Strike, 30 CAL. PUB. EMPL. REL. 84 (Sept. 1976).
44. Id. Surprisingly, the sanitation workers agreed to a two-year contract the following year. See L.A. Sanitation Workers Take Two-Year Agreement, 720 GOV'T. EMPL. REL. REP. (BNA) 21 (1977).
46. County Sanitation, 147 Cal. App. 3d at ___, n.4, 195 Cal. Rptr. at 571 n.4. On the first day of the strike, management personnel discovered a plywood disk concealed in a sludge line in a sewage treatment facility. Supervisors also found a locked plant vehicle blocking the entrance to a maintenance building. The mechanized gate to that building was also broken. During the course of the strike, calls to an emergency standby generator were cut. Most important, the sanitation workers had increased sludge pumping to abnormally high rates so that the supply of methane gas necessary to operate the pumps was nearly exhausted.
47. Landmark Verdict, supra note 45, at 27. The Los Angeles County Superior Court concluded that the $1,500 fine for contempt of the original strike injunction was insufficient compensation for the District. Id. The Superior Court computed the overtime wages paid to management personnel, offset by wages saved because of the strike, to conclude that the District had suffered damages of $246,904 plus prejudgment interest of $87,615.22 and court costs of $874.65. 147 Cal. App. 3d at ___, 195 Cal. Rptr. at 568.
48. Landmark Verdict, supra note 45, at 27.
50. Id. at 111, 140 Cal. Rptr. at 48.
51. The Superior Court assessed damages against Victor Hochee, Local 660’s general manager, Harvey Gluck, the union’s chief negotiator, and Jack Roberts, a union business agent. 51 CAL. PUB. EMPL. REL. at 27.
employee strikes. 52

In order to reach their decision, the California Court of Appeals applied the common law strike ban to the County Sanitation case, 53 and affirmed the lower courts ruling. The court, however, hinted that the California Supreme Court may change the common law rule. 54 The original award for damages, however, was slightly modified by the California Court of Appeals because the District paid excessive overtime to supervisors during the strike. 55

Within three months, the California Supreme Court agreed to hear the case. 56 When the court finally arrived at a decision in May, 1985, all of the Justices except Malcolm Lucas agreed that damage awards against public employee unions were illegal. Despite the apparent consensus on the damages issue, the Justices issued five opinions. 57 Justices Grodin and Mosk joined Justice Broussard's plurality opinion which states that public employee strikes are legal.

Justice Broussard's plurality opinion analyzed the local public employees' bargaining statute, the MMBA, to support his conclusion that there are no statutory obstacles to public employee strikes in California. 58 Broussard's opinion also rejected the following rationales for the common law strike ban because they no longer reflected

52 Id.
53 County Sanitation, 147 Cal. App. 3d at —, 195 Cal. Rptr. at 570.
54 The Court of Appeals noted that recent decisions of the California Supreme Court indicated that the strike issue was still unresolved:

While we recognize that often "coming events cast their shadows before" and certain expressions in decisions (citations omitted) may have prophetic value, as an intermediate appellate court we remain bound by the presently well-settled rules that deny public employees the right to strike and which subject those who do engage in such unlawful labor practices to tort actions for damages. If these rules should no longer represent the considered view of our Supreme Court, it is the exclusive province of that body to so declare.

Id., See also Seal Beach Police Officers Ass'n v. City of Seal Beach, 146 Cal. App. 3d 1099, n.1 194 Cal. Rptr. 713, 715 n.1 (1983), vacated, 146 Cal. 3d 1099, 685 P.2d 1145, 205 Cal. Rptr. 794 (1984) ("It is not 'well-settled' that public employees have the right to strike.").

55 The Court of Appeals reduced the damages award to $163,814 because of overcalculation of overtime pay to supervisors who filled in during the strike. The Court, however, sustained the prejudgment interest award. 147 Cal. App. 3d at —, 195 Cal. Rptr. at 576.
56 The Supreme Court agreed to hear the case on January 5, 1984. Id. at —, 195 Cal. Rptr. at 567.
57 Justices Kaus and Reynoso limited their opinion to the tort issue. 38 Cal. 3d at 592-93, 699 P.2d at 854-55, 214 Cal. Rptr. at 443-44. Chief Justice Bird concurred in the plurality opinion, but wrote a separate opinion because the plurality did not explicitly state that the public employee's right to strike is constitutionally protected. Id. at 593-609, 699 P.2d at 855-66, 214 Cal. Rptr. at 444-55. Although Justice Grodin signed the plurality opinion, he also wrote separately to criticize Kaus and Reynoso for avoiding the strike issue. Id. at 609, 699 P.2d at 866, 214 Cal. Rptr. at 455.
58 Id. at 572-73, 699 P.2d at 840-41, 214 Cal. Rptr. at 429-30.
the realities of the public sector bargaining process: (1) strikes challenge government sovereignty;\(^\text{59}\) (2) public employers cannot bargain with strikers because only the state Legislature can set the terms and conditions of public employment;\(^\text{60}\) (3) strikes disrupt the political process,\(^\text{61}\) and (4) public sector strikes are illegal because all government services are essential.\(^\text{62}\)

**IV. THE CALIFORNIA SUPREME COURT OPINION**

**A. Statutory Analysis**

On appeal to the California Supreme Court, the Sanitation District argued that the court should not consider the validity of the common law strike ban because the Legislature had already prohibited public employee strikes through section 3509 of the MMBA.\(^\text{63}\) The plurality in *County Sanitation*, however, held otherwise and ruled that section 3509 of the MMBA did not explicitly prohibit public employee strikes. Instead, section 3509, which was drafted similarly to section 1963\(^\text{64}\) of the firefighters' bargaining statute, only prohibited the expansion of Labor Code section 923\(^\text{65}\) to public employees. The court, therefore, concluded that without an explicit no-strike provision in the MMBA, public employees had the right to strike.

In reaching this decision, the court relied on the legislative act to include the no-strike provision in the firefighters' bargaining stat-

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59. *Id.* at 574-76, 699 P.2d at 842, 214 Cal. Rptr. at 431-32.
60. *Id.* at 576-77, 699 P.2d at 842-43, 214 Cal. Rptr. at 432.
61. *Id.* at 577-79, 699 P.2d at 843-45, 214 Cal. Rptr. at 432-34.
62. *Id.* at 579-81, 699 P.2d at 845-46, 214 Cal. Rptr. at 434-35.
63. *Id.* at 572-73, 699 P.2d at 840, 214 Cal. Rptr. at 429. *Cal. Gov't Code § 3509* (West 1980) states that "[t]he enactment of this chapter shall not be construed as making the provisions of section 923 of the Labor Code applicable to public employees." For identical provisions in other California public sector bargaining laws, see *Id.* §§ 3536 (state employees) and 3549 (public school employees) (West 1980).
64. *Cal. Labor Code § 1963* (West 1971) provides that "[t]he enactment of this chapter shall not be construed as making the provisions of section 923 of this code applicable to public employees."
65. *Cal. Labor Code § 923* (West 1971) provides:

The individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference . . . of employers . . . in the designation of such representatives as in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

*Id.* In *Petri Cleaners, Inc. v. Automotive Employees, Local 88*, 53 Cal. 2d 455, 349 P.2d 76, 2 Cal. Rptr. 470 (1960), the Court had interpreted section 923 to include protection for the private sector employee's right to strike.
ute. Not only did the firefighters’ bargaining statute prohibit the expansion of section 923 to public employees, but it also explicitly denied firefighters the right to strike in section 1962. Similarly, the court in County Sanitation reasoned that if the MMBA was to prohibit public employee strikes, the Legislature would have explicitly stated in the statute its intent to ban public employee strikes.

In County Sanitation, the California Supreme Court ignored its previous decision in Los Angeles Transit, which held that explicit statutory authority is necessary for public employee strikes to be lawful. The Los Angeles Transit decision relied on similar provisions for “concerted activities” in the transit employees’ statute and in section seven of the National Labor Relations Act, which protects the right to strike for private employees. Subsequent to the Los Angeles Transit decision, the MMBA was enacted without an explicit provision granting public employees the right to strike. Therefore, according to the Los Angeles Transit ruling, the MMBA provides an implied strike prohibition. The court in County Sanitation, however, arrived at a different interpretation of the MMBA and held that the statute’s silence on the strike issue did not deny public employees the right to strike.

The court additionally cited an earlier California Supreme Court decision, San Diego Teachers Association v. Superior Court. In San Diego Teachers, the court refused to rule on the legality of public sector strikes, but acknowledged that section 3549 of the teachers’ collective bargaining statute did not prohibit teachers from striking. The court primarily addressed the issue of whether the Public Employees Relations Board (PERB) or the courts had initial jurisdiction over strike injunction cases involving unfair labor practices. The failure of the San Diego Teachers court to rule on the legality of public employee strikes provided little precedential value for the County Sanitation Court.

67. See supra note 14 and accompanying text.
68. See supra note 13 and accompanying text.
69. 24 Cal. 3d 1, 593 P.2d 838, 154 Cal.Rptr. 893 (1979).
70. Cal. Gov’t Code § 3549 (West 1980).
71. 24 Cal. 3d at 13, 593 P.2d at 846, 154 Cal. Rptr. at 901 (“section 3549 does not prohibit strikes but simply excludes the applicability of labor Code section 923’s protection of concerted activities.”).
72. Id. at 7, 593 P.2d at 842, 154 Cal. Rptr. at 897.
73. “[I]t is unnecessary here to resolve the question of the legality of public employee strikes if the injunctive remedies were improper because of the district’s failure to exhaust its administrative remedies under the EERA.” Id.
B. The Sovereignty Argument

After finding that the MMBA did not prohibit public employee strikes, the plurality of County Sanitation discussed the status of the governmental employer as one justification for banning strikes. During the first half of the twentieth century, courts often enjoined public sector strikes on the theory that a work stoppage was a rebellion against the authority of the government. This theory became known as the sovereignty argument.

With the rapid expansion of government services, however, public employers have implicitly recognized that some services are more important than others. For example, public employers would seek an injunction to end a police or firefighters' strike, but would not seek injunctions in most teacher strikes. The status of public employees as loyal servants of the sovereign government began to disappear in the 1960s as the public and private sectors began to provide services in the same areas, such as health care and transportation. Public sector workers began to challenge employers who gave them lower rates than what private sector employees, who performed the same tasks, were earning.

The County Sanitation court noted the decline of the sovereignty argument in areas other than labor relations. For example, the California Supreme Court has abolished government immunity from tort liability. Increasing government tort liability, however,

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74. The County Sanitation opinion cited two major cases which relied on the sovereignty argument. In City of Cleveland v. Division 268, Amal. Ass'n, 41 Ohio Op. 236, 239 (1949) the Ohio court asserted that: "[i]t is clear that in our system of government, the government is a servant of all the people. And a strike against the public, a strike of public employees, has been denominated . . . as a rebellion against government. . . . And if they destroy government, we have anarchy, we have chaos."

In Norwalk Teachers Ass'n v. Bd. of Educ., 138 Conn. 269, 83 A.2d 482 (1951), the Connecticut Supreme Court recognized the legality of public sector collective bargaining but condemned strikes because government employees are public servants.

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 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 on its task. These 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 enterprise. 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.


76. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). The Court found that "[t]he rule of governmental immunity for tort is an anachro-
affects the public less drastically than strikes. When the government pays a tort judgment, it uses its liability insurance. However, in order to maintain adequate insurance, the government must raise taxes or shift revenues from other services to the insurance fund. While taxpayers may resent paying higher taxes, they may not perceive the link between tort judgments and taxes because expenditures in other service areas such as education also affect the tax rate. The effects of a public sector strike are more immediate. Recent strikes by sanitation and other municipal workers in Philadelphia and Detroit menaced the health of city residents.\textsuperscript{77}

The second justification for the public employee strike ban is that public employers cannot negotiate with strikers because the terms of public employment have traditionally been determined by the Legislature.\textsuperscript{78} However, the passage of public sector bargaining laws has now given public employers the authority to negotiate directly with employees.\textsuperscript{79}

\textsuperscript{77} The Philadelphia strike ended when the sanitation employees obeyed a contempt order of the Court of Common Pleas. Uncollected garbage and trash piled up to an estimated 40,000 tons. See \textit{Philadelphia Garbage Workers Agree to go Back to Work Under Court Order 24 Gov't Empl. Rel. Rep. (BNA) 976 (1986)}. In contrast, the circuit court and Michigan appeals court refused to issue a back-to-work order because they preferred having the municipal union and the City of Detroit reach their own settlement. See \textit{AFSCME Ends Walkout in Detroit With Ratification of New Agreement, 24 Gov't Empl. Rel. Rep. (BNA) 1039 (1986)}.

\textsuperscript{78} In \textit{Nutter v. City of Santa Monica, 168 P.2d 741, 747 (1946)} the Second District Court of Appeals rejected the argument that section 923 authorized public employers to settle by contract any term and conditions of employment which are not fixed by law. In \textit{City of L.A. v. L.A. Bldg'g Trades Council, 94 Cal. App. 2d 36, 210 P.2d 305 (1949)}, the Court of Appeals emphasized that "[t]he employer-employee relationship in the city's service is governed by statutory law and administrative regulation; it is not fixed, either in whole or in part, by contract, as in the field of private industry," 94 Cal. App. 2d at 44, 210 P.2d at 310. The Court of Appeals concluded that the defendants could not lawfully either:

\begin{quote}
strike or picket for the purpose of enforcing demands as to the conditions of employment in respect to which neither the city nor the Department of Water and Power is obligated to bargain collectively. To hold to the contrary would be to sanction government by contract instead of government by law.
\end{quote}

\textit{Id.} at 46, 210 P.2d at 311.

\textsuperscript{79} The MMBA, for example, permits local public employers and recognized employee organizations to "meet and confer" over wages, hours, and other terms and conditions of employment. \textit{See supra} note 20.

\textit{See also} Justice Grodin's concurring opinion in \textit{El Rancho Unified School Dist. v. Nat'l Educ. Ass'n, 33 Cal. 3d 946, 663 P.2d 893, 192 Cal. Rptr. 123 (1983)}, in which he noted that the Legislature now accepted the collective bargaining process as a means of establishing terms and conditions of public employment. \textit{Id.} at 963, 663 P.2d at 903, 192 Cal. Rptr. at 134.
C. The Political Process Debate

It has been argued that public employee strikes force public employers to make large concessions, lead to tax increases or shift resources away from the government to its employees, in a manner unrelated to the political process.80 The court in County Sanitation attacked the argument that public strikes distort the political process on the ground that not all government services are "essential."81 As the public and private sectors begin to provide the same services in the same areas, the traditional notion that government services are inherently essential no longer exists.

The court in County Sanitation also listed four reasons why public employers are often able to resist the demands of strikers.82 First, public sector strikers lose wages during the strike just like their private sector counterparts83 and are forced to return to work without holding out for their demands. Secondly, the public employer resists strike demands in order to avoid protest from the public. Protest from the public is likely to occur when the public perceives the threat of higher taxes which may result from concessions made to the union.84 Thirdly, when a government directly charges its citizens for water, sanitation, and sewage services, the concessions made may cause an increase in price to these services.85 Finally, the government often has the option of subcontracting out services to the private sector86 instead of agreeing to striker demands. Thus, the County Sanitation court concluded that the public will oppose an early settlement to a strike if higher taxes or the reduction of government services were to occur.87 The court also found "little empirical evidence" to suggest that public employers yield quickly to strik-

81. The plurality opinion in County Sanitation reasoned that "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 any cost." 38 Cal. 3d at 578, 699 P.2d at 844, 214 Cal. Rptr. at 433.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id. The Court noted that the cities of Warren, Michigan and San Francisco, California had subcontracted their entire sanitation system to private firms after strikes.
87. The proponents of a flat ban on public employee strikes . . . fail to adequately consider public sentiment towards most strikes and assume that the public will push blindly for an early resolution at any cost. In fact, public sentiment toward a strike often limits the pressure felt by political leaders, thereby reducing the strike's effectiveness.

Id. at 579, 699 P.2d at 844-45, 214 Cal. Rptr. at 434.
For example, the County Sanitation court cited the air traffic controller strike where the public employer withstood a strike for a long period of time. Furthermore, the Los Angeles Sanitation District settled with its workers after the 11-day strike on precisely the same terms that the District offered prior to the strike. Citing a Pennsylvania Governor's Commission Report, the County Sanitation court concluded that a limited right to strike would be more acceptable to the public because of the "boundaries" which the courts can apply to strikes.

The discussion on the affects of government employee strikes on the political process echoes a major debate among academic commentators during the late 1960s. Professors Harry Wellington and Ralph Winter of Yale Law School contended that municipal employers were vulnerable to work stoppages by their employees. This vulnerability, however, makes it likely that most of the strikers' demands will be met. A primary assumption of Wellington and Winter's argument was that the private sector cannot provide most of the services provided by government. Wellington and Winter also noted that because many government activities are monopolistic, there is no competition to push down the wages paid to employees and prices charged by the government, directly or through taxes.

88. Id.
90. See supra notes 43-44 and accompanying text.
91. 38 Cal. 3d at 579, 699 P.2d at 845, 214 Cal. Rptr. at 434. The Governor's Commission to Revise the Public Employee Law of Pennsylvania, Report and Recommendations, reprinted in 251 GOV'T EMPL. REL. REP. E-1, E-3 (1968) stated that public opinion would support a limited right to strike:
"The limitations on the right to strike which we propose...will appeal to the general public as so much fairer than a general ban on strikers that the public will be less likely to tolerate strikes beyond these boundaries. Strikes can only be effective so long as they have public support. In short, we look upon the limited and carefully defined right to strike as a safety value that will in fact prevent strikes."
Id. (emphasis in original).
92. Wellington and Winter, supra note 80, at 1124.
93. Wellington and Winter observed that "[t]here usually are not close substitutes for the products and services provided by government..." Id. at 1120.
94. Id. at 1121.
In response to Wellington and Winter, Professor Alan Burton and his assistant Charles Krider provided support for the County Sanitation court's decision when they argued that market restraints prevent strikers from receiving many of their demands and lost wages. They initially concluded that the public employer will not make concessions if the cost of these concessions will be passed on to the public through increased taxes. Furthermore, the public employer will not agree to strike demands if the price of government services is raised. Finally, the public employer is in a strong position to subcontract out work instead of settling the strike.95

Government services are generally inelastic, specifically, taxpayers do not change their demands for government services when a municipality raises the price of its services.96 In the private sector, however, demand regularly responds to price increases caused by high labor costs.97 When a private company increases its employees' wages after a strike settlement, it generally raises prices to cover higher labor costs. If consumers are unwilling to pay higher prices, demand falls and the company must lay off employees in an attempt to reduce prices to the pre-settlement level. Eventually, the private sector union will be pressured to give back past wage and benefit increases in order to protect the seniority of its members. Wellington and Winter concluded that these economic restrictions are generally "much less important" in the public sector.98 Instead, striking public employee unions place political pressure on local governments.99

The public, which has become accustomed to government services, will press for an early strike settlement.100 Furthermore, striking government employees may begin a political campaign to remove local officials who oppose their demands.101 Similarly, private corpo-


96. See supra note 80, at 1120.

97. Id. at 1117. ("Within the market or markets for this product, most — but not all — of the producers must bargain with a union representing their employees, and their union is generally the same through the industry. A price use of this product relative to others will result in a decrease in the number of units of the product sold.").

98. Id. at 1120-21.

99. H. Wellington and R. Winter, The Unions and the Cities 25, 26 (1971). ("The public employee strike[s]' sole purpose is to exert political pressure on municipal officials.").

100. Wellington and Winter, supra note 80, at 1124.

101. The United States Supreme Court has recognized that public employees may influence their government employers through the political process. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228-29 (1977).
rate employees may attempt to convince shareholders that the current management should be ousted. Corporate employees, however, will probably be unable to oust current management because shareholders usually want management to maximize profits by minimizing labor costs.\textsuperscript{102}

Since the late 1960s, market restraints have begun to affect public sector labor relations. The passage of Proposition 13 in California reduced revenues for local governments by seven billion dollars.\textsuperscript{103} Voters in other states have also adopted limitations on local government taxation of spending.\textsuperscript{104} In addition, the Reagan Administration has authorized substantial cuts in aid to state and local governments.\textsuperscript{105}

The results of these new fiscal restrictions is that public employers feel new pressures from the public to limit the size of wage settlements for government employees.\textsuperscript{106} Local governments are now more willing to impose cost cutting measures on their labor force. Public employers have also begun to feel the impact of the new spending limitations in the form of smaller wage increases or even layoffs.\textsuperscript{107}

\textbf{D. The Essential Services Issue}

The \textit{County Sanitation} court rejected the theory that all government services are essential.\textsuperscript{108} Quoting a dissenting opinion from the Indiana Supreme Court, the \textit{County Sanitation} court's plurality opinion observed that both the public and private sectors provide ser-

\begin{itemize}
\item \textsuperscript{102} See Wilson, \textit{The Replacement of Lawful Economic Strikers in the Public Sector in Ohio}, 46 OHIO ST. L.J. 629, 656 n.120 (1985).
\item \textsuperscript{104} Approximately twenty-three states had adopted a taxation or expenditure limitation by 1982. Kearney, \textit{Labor Relations in the Public Sector} 317 (1984).
\item \textsuperscript{105} Local and state governments lost \$13 billion in federal aid in the fiscal 1982-83 budget as well as \$2.3 billion in revenues from the 1981 federal tax bill. \textsc{Id.} (citing Pierce, \textit{New Rounds of Cuts Hit States, Localities}, 4 \textsc{Public Administration Times} 3 (1981)).
\item \textsuperscript{106} See Sackman, \textit{Redefining the Scope of Bargaining in Public Employment}, 19 B.C.L. REV. 155, 159 (1977) ("Taxpayer opposition to the cost of public services has been mounting steadily. The public has reacted strangely to the perception that inept managers have given away the shop. In order to make known their dissatisfaction, taxpayers have resorted to the political process to override the collective bargaining process.").
\item \textsuperscript{107} See Anderson & London, \textit{Collective Bargaining and the Fiscal Crisis in New York City: Cooperation for Survival}, 10 \textsc{Fordham Urb. L.J.} 373, 392 (1982) (during the second half of the 1970s, New York City reduced its workforce by 20%).
\item \textsuperscript{108} 38 Cal. 3d at 579, 699 P.2d at 845, 214 Cal. Rptr. at 434 ("In our contemporary industrial society the presumption of essentiality of most government services is questionable at best.").
\end{itemize}
vices in areas such as education, health, transportation and utilities.\textsuperscript{109}

Despite the overlapping functions, only private sector employees working in the above-mentioned areas may strike. Employees in both sectors, however, should have the right to strike because their functions are equally important.

The \textit{County Sanitation} plurality opinion relied on \textit{United Transportation Union v. Long Island Railroad},\textsuperscript{110} a United States Supreme Court decision which recognizes the increasing difficulty of determining whether certain services are uniquely "public" or "private" in nature. In \textit{United Transportation Union}, the Court implicitly rejected the idea that government ownership determines whether or not a service is "essential."\textsuperscript{111} Following the United States Supreme Court, the \textit{County Sanitation} plurality opinion emphasized that:

The \textit{United Transportation Union} case thus underscores the conclusion that it is the nature of the service provided which determines its essentiality and the impact of its disruption on the public welfare, as opposed to a simplistic determination of whether the service is provided by public or private employees.\textsuperscript{112}

Although the \textit{County Sanitation} court repudiated the notion

\textsuperscript{109} Id. In his dissent to \textit{Anderson Fed'n of Teachers School City}, 252 Ind. 558, 251 N.E.2d 15 (1969), \textit{cert. denied}, 399 U.S. 928 (1970), Chief Justice De Bruler of the Indiana Supreme Court maintained that the public or private status of an operation is irrelevant to the essentiality of services:

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 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).

\textsuperscript{110} 455 U.S. 678 (1982).

\textsuperscript{111} The Court reversed the Second Circuit Court's holding that the operation of the railroad was an "integral state governmental function" which could not be displaced by the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982). \textit{Id.} at 682. The Railway Labor Act permits strikes by railway employees. \textit{Id.} at 681. The United States Supreme Court further held that the railroad workers retained their right to strike even after New York State acquired the railroad. The Court concluded that application of the Act would probably not harm the "separate and independent existence" of New York. \textit{Id.} at 690.

\textsuperscript{112} 38 Cal. 3d at 580, 699 P.2d at 846, 214 Cal. Rptr. at 435 (emphasis in original).
that all government services are essential, the court conceded that the loss of certain services may threaten public health and safety.\textsuperscript{113} The plurality opinion in \textit{County Sanitation} attempted to balance the public's concerns over health and safety with the public sector union's concern over its collective bargaining position. A balance can be accomplished by the court first recognizing a general public employee right to strike; and then acknowledging the state Legislature's ability to create public health and safety exceptions to this general rule. Additionally, the plurality reasoned that the strike threat would improve the public sector union's bargaining position.\textsuperscript{114} The plurality agreed with labor mediator Theodore Kheel's assertion that realistic bargaining would not take place until public employees had a credible strike threat.\textsuperscript{115}

The California Supreme Court applied the new health and safety standard to find that the Los Angeles Sanitation strike did not threaten the public.\textsuperscript{116} The court found no health or safety threat because management personnel was able to fill the sanitation workers' positions during the 11-day strike.\textsuperscript{117} Despite this ruling, the new case-by-case standard for assessing the legality of public strikes has been opposed.\textsuperscript{118}

\textbf{E. Justice Lucas' Dissent: Problems with the New Standard}

In his dissenting opinion in \textit{County Sanitation}, Justice Lucas attacked the new public health and safety standard articulated by the plurality opinion. Justice Lucas argued that the total ban on

\begin{footnotesize}
\begin{enumerate}
\item[113.] Id.
\item[114.] Id. at 583, 699 P.2d at 847-48, 214 Cal. Rptr. at 437.
\item[115.] The court quoted Kheel to support its assertion that strikes improve bargaining. Kheel stated that "[W]e should acknowledge the failure of unilateral determination, and turn instead to true collective bargaining, even though this must include the possibility of a strike. We would then clearly understand that we must seek to improve the bargaining process and the skill of the negotiators to prevent strikes..." Id. at 583, 699 P.2d at 848, 214 Cal. Rptr. at 437.
\item[116.] Id. at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439.
\item[117.] Id.
\item[118.] The Sanitation District asked the United State Supreme Court to review the case on grounds that a California trial court could refuse to enjoin future sanitation strikes even though strikers were dumping untreated sewage into the Pacific Ocean. These actions would violate the Federal Water Pollution Control Act and the Federal Resource Conservation and Recovery Act of 1976. The union responded that the Court should deny review because the District failed to raise the federal issues until after the state court judgment. In addition, the state court ruling relied on the MMBA, a California labor statute. See \textit{Supreme Court Will Not Review Public Employee Strike Rights}, 23 Gov't Empl. Rel. Rep. 1685 (1985). The Supreme Court denied the District's writ of certiorari without comment. --- U.S. ---, 106 S. Ct. 408 (1985).
\end{enumerate}
\end{footnotesize}
strikes is necessary because "public strikes may devastate a city within a matter of days, or even hours, depending on the circumstances." Justice Lucas' main objection to County Sanitation was that the court should have waited for the Legislature to enact strike legislation before ruling on the legality of strikes. Justice Lucas noted the absence of a "comprehensive regulatory scheme" in California which would prevent public employees from striking on the expiration of their contract. According to Justice Lucas, most of the other states which have permitted public employee strikes have explicitly provided which groups of employees could not strike and required mediation and advance notice before a strike. Furthermore, Justice Lucas predicted that the new standard for strike injunctions would fail because neither labor nor management would be able to assess which services were "essential" to public health and safety. Finally, Justice Lucas pointed out that difficult unfair labor practice cases which were ordinarily heard by PERB will now appear before the courts. Justice Lucas, however, argued that PERB was better equipped to hear these cases.

The California Legislature should address the issues raised by Justice Lucas. The new "health and safety" standard is vague, and does not absolutely prohibit public employee strikes except those involving firefighters and law enforcement personnel who are explic-
ity prohibited by statute.\textsuperscript{126} States\textsuperscript{127} which have permitted public employee strikes by statute have specifically prohibited particular groups from striking. California should follow and enact similar statutes. Second, the new standard created by \textit{County Sanitation} may actually endanger public health and safety. Public employees under this standard will not be required to follow mandatory impasse procedures or give notice to their employer or the public before striking. Therefore, public employees could walk off their jobs leaving public services unattended. Moreover, local public employers are uncertain whether remedial measures such as discipline and replacement of strikers would be accepted by the California courts.\textsuperscript{128}

To identify the economic weapons available to public employers and to ease public concerns about the loss of “essential” services, the California Legislature should pass new bargaining legislation for local public employers and employees. This legislation should address the following issues: (1) classification of employees whose services are necessary; (2) impasse procedures to reduce the number of strikes; (3) the role of PERB in determining whether a strike involves unfair labor practices or a clear and present danger to public health and safety; and (4) replacement of strikers.

V. PROPOSED STRIKE LEGISLATION IN CALIFORNIA

A. Classification of “Essential” Employees

Justice Broussard’s plurality opinion specifically invited the Legislature to determine which employees perform essential services which cannot be interrupted.\textsuperscript{129} The California Legislature should

\textsuperscript{126} Justice Broussard’s plurality opinion in \textit{County Sanitation} explained that “[t]his [health and safety] standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against [strikes by] firefighters and law enforcement personnel) . . .” 38 Cal. 3d at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439. The MMBA, under municipalities, may refuse to recognize bargaining units of law enforcement personnel. Cal. Gov’t Code § 3508 (West 1980).

\textsuperscript{127} \textsc{Alaska Stat.} § 23.40.200(b) (correctional institution employees, hospital employees); \textsc{Minn. Stat. Ann} § 179A.03 (West Supp. 1986) (professional engineers employed by the State, confidential and supervisory employees are “essential employees” who may not strike); \textsc{Ohio Rev. Code Ann.} § 4117.15(A) (Page Supp. 1984) (emergency medical or rescue personnel, attendants at State psychiatric hospitals); \textsc{Pa. Stat. Ann.} tit. 43, § 1101.1003 (Purdon Supp. 1985) (court employees); \textsc{Mont. Code Ann.} § 39-32-110 (1985) (nurses may not strike unless they have given 30 days written notice and there is an open health care facility within a 150-mile radius).

\textsuperscript{128} \textsc{See} \textsc{Cox, Local Government Tallies What’s Left After Strike Ruling}, \textsc{L.A. Daily Journal}, Aug. 20, 1985, p.1, at col. 6.

\textsuperscript{129} The Legislature has already prohibited strikes by firefighters under any circumstances. It may conclude that other categories of public employees perform such essential services that a strike would invariably result in imminent danger to public
permit strikes for a short period of time by employees such as teachers and sanitation workers whose services are important, but not "essential." Other state legislatures have already classified essential public employees for purposes of determining who may strike. The Alaska Legislature has already adopted a three-tier system where certain employees may not strike, some may strike for a short period, and others may strike for an indefinite period.

The California Legislature should also note that management employees are a crucial factor in the public employer's ability to withstand a strike. Management employees provide essential services during a strike because they perform and thus maintain the services previously provided by the striking employees. During the Los Angeles sanitation strike, supervisors manned the sewage treatment and other important facilities. California should, therefore, follow the example of other states by specifically prohibiting strikes by managerial employees because of the essential services they provide during a strike. As a further precaution, the Legislature might also consider excluding management from any bargaining unit. The difficulty with having bargaining units composed of managerial employees is that the public employer may be left without a bargaining representative because managerial employees generally serve in that role.

When considering which public services are "essential," the California Legislature should be aware that abstract determinations of "essentiality" may be ineffective and counterproductive. Moreover, theoretical determinations that a public service is essential may also lead to the conclusion that private sector service employees, such as transportation employees, may not strike. A recent commentary, however, suggests that the proper inquiry to "essentiality" is whether alternative sources of service remain available during a pub-
A new proposal for dealing with the "essential" services problem is the reduction in size of bargaining units so that no more than one-fourth of the employees who provide a service may strike at one time. This multiplication of bargaining units could take either of two forms. First, the existing unit would be broken down by location, with representation by four different unions. The second proposal allows one union to win majority support among all the employees who provide the service, but requires a division of the units into four independent locals.

The concept of smaller units presents two problems. The first problem faced by the employer is the sympathy strike. While one unit is on strike, employees in the other units, providing the same service, may refuse to cross the picket line. Therefore, the division of bargaining units may not prevent a complete work stoppage. A suggested resolution to the sympathy strike problem is that the employer seek staggered collective bargaining agreements from the different unions providing the same services. It was also suggested that negotiations for collective bargaining agreements be sufficiently staggered so that the four individual units would negotiate different agreements providing different packages of benefits.

Another problem associated with smaller units is that the union's ability to put financial pressure on the employer is reduced. Even though a smaller percentage of people would engage in a work stoppage, the interruption in the routine business activity would undoubtedly be felt in the pockets. In the public sector, unlike in the private sector, the employer will not incur a financial loss as a result.

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135. [A] strike is tolerable so long as alternative sources of supply remain available. When a single firm dominates the product market, however, its workforce is essential to the maintenance of supply. If that firm's workforce strikes, the entire supply of the good ceases. Given such "workforce essentiality", even strikes against services whose demand schedules are not unusually in elastic will impose unacceptable losses on consumers. Conversely, when workforce essentiality is absent, either because the market includes many firms or because the dominant firm can employ nonunion labor during the strike, the interruption of even essential services remains marginal and therefore tolerable.

136. Id. at 620.
137. Id. at 621.
138. Id. at 622.
139. Id. at 622-23. The practice in which one unit strikes on behalf of all the units for a certain demand, the employer may combat the problem of union "whipsawing" by providing through contract or statute that benefits won by one suit will be incorporated into the contracts of other units or their expiration. Id. at 627.
of a strike. A possible solution suggested which would directly impinge on the government’s pocket would be to reduce the municipal budget according to the reduction in the workforce. A twenty-five percent reduction in the workforce would result in a twenty-five percent reduction in the municipal budget. This proposal, however, is not likely to succeed because public sector unions would no longer be able to represent all the employees who perform a certain service. Furthermore, the local government is unlikely to accept a reduction in its budget during a strike because it must reduce the services provided to its constituents. As constituents become more displeased with the loss of services, they are less likely to re-elect the current administration.

Finally, the California Legislature should assess the practical impact the new “health and safety” standard, established by the County Sanitation court, has on injunctions. The experience of the Pennsylvania courts in dealing with teacher strikes provides a list of factors which the California Legislature might use in setting its own rules for strike injunctions.

B. Mandatory Impasse Procedures

Almost all of the other states which have authorized public employee strikes by statute have required that public employee organizations and representatives of local governments engage in dispute resolution procedures after reaching an impasse on crucial issues in their negotiations. These procedures permit labor and manage-

140. *Id.* at 624-25.

141. The factors are: the percentage of the local population affected by the strike, the severity of the service disruption, the impossibility of completing the school year or other programs mandated by law, loss of gov’t. funds, wages lost by non-striking employees, and potential or actual violence during a work stoppage. See Decker, *The Right to Strike for Pennsylvania’s Public Employees — The Scope, Limits & Ramifications for the Public Employee*, 17 *Duq. L. Rev.* 755, 766-67 nn.82-88 (1979). The California Legislature might also consider the Alaska standard for strike injunctions:

A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular class. “Total equities” includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory [bargaining] obligations. . . .

**ALASKA STAT. § 23.40.200(c) (1985).**

142. **ALASKA STAT. § 23.40.200(c) (1985)** (binding arbitration for those employees who may not strike at all and those who may strike for a limited period); **HAWAI'I REV. STAT. § 89-11 (1976 & Supp. 1984)** (mediation, factfinding, arbitration); **ILL. STAT. ANN. ch. 48, § 1614 (Smith-Hurd Supp. 1985)** (mediation and arbitration for security officers, state peace officers & firefighters); **MINN. STAT. ANN. § 179A.16 (W. Supp. 1986)** (arbitration for essential & non-essential employees); **OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1984)** (notice to employer of intent to bargain, mediation, factfinding); **OR. REV. STAT. § 243.726 (1983)** (no strike until 30 days after publication of factfinding report); **PA. STAT. ANN. § 1101.802 (Pur-
ment to continue negotiations with the help of a neutral third party, such as a mediator or arbitrator.

Other states have required binding arbitration for police, firefighters and other "essential" employees. The California Legislature, however, should note that binding arbitration has serious drawbacks. Parties may be tempted to go to arbitration prematurely, thereby undermining the negotiating process. This problem is known as the "narcotic” effect of arbitration. One tactic which may dispel some of the “narcotic” effects is the publication of a neutral factfinder’s recommendations before the parties go to arbitration. Public awareness of these recommendations will increase pressure on the parties to resolve the dispute through their own negotiating skills. The bargaining process would become more important because the parties would begin to negotiate seriously before they reached arbitration.

Another method of dispute resolution which might be imposed if arbitration fails is the public referendum. Professor Raymond Hogler of Pennsylvania State University has proposed that the taxpayer referendum be used to select the best offer the parties, individually, have proposed during arbitration. The referendum provides a democratic alternative to a settlement usually approved by one person, the arbitrator. The California Constitution already permits taxpayer initiatives and referenda. Although these instruments may increase public awareness of the price of government services, they may also hamper the efforts of the public employee collective bargaining process. In light of the facts that the general public usually opposes higher taxes and utility changes and that the general public outnumbers government employees, the threat of a voter referendum may increase the chances of serious union bargaining in the early stages of negotiations.
C. Expanded PERB Jurisdiction

Before the *San Diego Teachers* decision in 1979, PERB had no jurisdiction over strike cases which involved unfair labor practices.\(^{149}\) As noted earlier, in *San Diego Teachers*, the California Supreme Court gave PERB initial jurisdiction over any strike involving unfair labor practices.\(^{150}\) PERB presently has jurisdiction over unfair labor practices arising under the EERA when a collective bargaining agreement is negotiated.\(^{151}\) It appears, however, that once the parties reach an impasse, PERB jurisdiction ends.\(^{152}\) The California Supreme Court has never ruled on the extent of PERB jurisdiction. Instead, a recent court decision, *El Rancho Unified School District v. National Education Association*,\(^{153}\) expanded PERB’s powers by divesting lower courts of initial jurisdiction of a school district’s claim for strike damages.\(^{154}\)

Despite the expansion of PERB jurisdiction over school strikes, PERB has never investigated a strike by employees covered by the MMBA. One reason is that the MMBA was passed seven years before the Legislature created PERB.\(^{155}\) Another reason is the home rule provision of the California Constitution, which grants “charter cities”\(^{156}\) immunity from state legislation covering their “municipal affairs.”\(^{157}\) Therefore, a tension exists between the California Constitution’s provision for municipal autonomy and the California Legislature’s interest in developing a uniform state labor law with regard


\(^{150}\) See *supra* notes 69-72 and accompanying text.

\(^{151}\) Cal. Gov’t Code § 3543.5 (West 1980).

\(^{152}\) One commentator has argued that PERB’s interests do not extend to the period after impasse:

Allowing PERB jurisdiction during the impasse procedures means that, for a time, the interests of the bargaining process are favored over the interests in preventing educational disruption. The impasse procedures were developed to allow this result. After impasse, however, the interests in providing education services predominate once again, and continued exclusive jurisdiction no longer seems justified.

Johnson, *supra* note 149, at 212.

\(^{153}\) 33 Cal. 3d 946, 663 P.2d 893, 192 Cal. Rptr. 123 (1983).

\(^{154}\) *Id.* at 961, 663 P.2d at 902, 192 Cal. Rptr. at 132.

\(^{155}\) The Legislature established PERB in 1975 under a provision of the EERA. Johnson, *supra* note 149, at 203.

\(^{156}\) A California city may become a “charter city” by a majority vote of its electorate. The city charter must be filed with the California Secretary of State. *Cal. Const.* art. XI, §§ 3(a) (West Supp. 1986).

\(^{157}\) “It shall be competent in any city charter to provide that the city governed thereunder may make & enforce all ordinances & regulations in respect to municipal affairs . . . and with respect to municipal affairs shall supersede all laws consistent herewith.” *Id.* at § 5(a) (West Supp. 1986).
to unfair labor practices in the public sector.\textsuperscript{158}

PERB's lack of jurisdiction over local public employee strikes hinders efforts to prosecute unfair labor practices under the MMBA.\textsuperscript{159} One recourse a union may have is to strike. Even when the union strikes, the public employer may be able to commit an unfair labor practice while seeking a court injunction to enjoin the strike.\textsuperscript{160} However, the local government is prohibited from revoking a union charter after a strike because a revocation would end the employer's legal obligation under the MMBA to "meet and confer" with the union.\textsuperscript{161}

In order to establish a uniform strike law after \textit{County Sanitation}, the California Legislature should extend PERB jurisdiction to unfair labor practices committed by municipal governments. There is no reason why PERB should only address teacher complaints regarding unfair labor practices while leaving other local employees with no remedy.

The California Legislature should follow the example of Ohio and Hawaii statutes which utilize PERB's labor relations expertise to determine whether a strike threatens public health and safety. In Hawaii\textsuperscript{162} and Ohio,\textsuperscript{163} the public employer petitions the state employment relations board to determine whether a strike has caused a clear and present danger to the public. Under Hawaii law, PERB can designate which employees are so essential that they must return to work in order to preserve public health and safety.\textsuperscript{164}

The Ohio statute accomplishes a logical balancing between the

\textsuperscript{158} For a detailed discussion of the tension between California's labor law and its home rule provisions, see Comment, \textit{Public Sector Interest Arbitration — Threat to Local Representative Government}, 9 \textit{PACIFIC L.J.} 165 (1978).

\textsuperscript{159} In the absence of PERB jurisdiction, the union, alternatively, may seek relief in the local courts. The Courts, however, are unlikely to rule that a subjective claim of bad faith in bargaining is an unfair labor practice. See Grodin, \textit{Public Employee Bargaining: The Meyers-Millas-Brown Act in the Courts}, 23 \textit{HASTINGS L.J.} 719, 753 n.156 (1972). The courts are less reluctant to find unfair labor practices where the employer institutes unilateral changes in working conditions without bargaining. \textit{Id.} at 753-54.

\textsuperscript{160} The new "health and safety" standard articulated in the \textit{County Sanitation} decision does not expressly prohibit the courts from granting strike injunctions to employees who may have engaged in bad-faith bargaining.


\textsuperscript{163} See \textit{OHIO REV. CODE ANN.} § 4117.16(A) (Page Supp. 1984).

public's desire to minimize government interruptions and the union's right to strike. First, the local employer seeks a three-day restraining order from a trial court based on a showing of "probable cause" that the strike will endanger public health and safety.\textsuperscript{165} The Ohio State Employment Relations Board may then investigate unfair labor practices and seek judicial enforcement of its orders.\textsuperscript{166} If the Board finds that the strike threatens public health and safety, the trial court may issue a sixty-day injunction against the strike and order the parties to bargain.\textsuperscript{167}

The \textit{County Sanitation} court concluded that strikes were a "clear incentive for resolving disputes."\textsuperscript{168} Therefore, it is quite evident that the court intended to emphasize the labor relations aspect of the strike. With guidance from the court, the California Legislature can meet the California Supreme Court's labor concerns by shifting the responsibility of assessing the labor relations aspect of a public employee strike from the lower courts to PERB. The Legislature should enact a statute which prescribes the scope of PERB's investigative powers during a strike. PERB should investigate whether unfair labor practices occurred and issue an advisory opinion to the trial court on the existence of a threat to public health and safety.

D. Replacement of Strikers\textsuperscript{169}

Before \textit{County Sanitation}, local employees could be fired for engaging in an illegal strike regardless of whether the employer committed an unfair labor practice.\textsuperscript{170} The \textit{County Sanitation} decision did not address the crucial issue of replacements for legal strikes.\textsuperscript{171} Case law on strike replacements in states which have permitted public sector strikes by statute is sparse. Only the Idaho Supreme Court has indicated, in dictum, that public employers may replace eco-

\begin{footnotesize}
\begin{enumerate}
\item See \textit{OHIO REV. CODE ANN.} \textsection{} 4117.16(A) (Page Supp. 1984).
\item Id. \textsection{} 4117.13(A).
\item Id. \textsection{} 4117.16(B).
\item \textit{County Sanitation}, 38 Cal. 3d at 583, 699 P.2d at 847, 214 Cal. Rptr. at 437.
\item The structure of this section follows Professor Edward Wilson's analysis of the law of strike replacements in Ohio. See supra note 102. Professor Wilson concluded that temporary replacements are appropriate for public sector strikes. \textit{Id.} at 682-86.
\item \textit{Stationary Eng'rs.}, 90 Cal. App. 3d at 800, 153 Cal. Rptr. at 668. A Los Angeles County ordinance passed in the early 1970s provides that any employee who was absent from his job for three days without leave was presumed to have abandoned it. \textit{Cox, supra note 128}, at 20, col. 3.
\item Leslie Braun of the Los Angeles City Attorney's office stated that strike replacement remains "a burning issue left unresolved" by \textit{County Sanitation}. \textit{Id.}
\end{enumerate}
\end{footnotesize}
nomic strikers.\textsuperscript{172}

1. Private Sector Precedents

If the California Legislature turns to the private sector for guidance on the issue of strike replacements, it will find that the National Labor Relations Board (NLRB) has consistently distinguished between unfair labor practice strikers and economic strikers for replacement purposes.\textsuperscript{173} In \textit{NLRB v. Mackay Radio & Telegraph Co.},\textsuperscript{174} the United States Supreme Court held that private employers who have not committed unfair labor practices may permanently replace economic strikers in order to continue plant operation. The result of \textit{Mackay} and subsequent cases is that the employer, however, cannot fire the economic striker. Instead the employee must be placed on a preferential hiring list if the employee's job is filled by a permanent replacement.\textsuperscript{175} In \textit{Laidlaw Corporation},\textsuperscript{176} the NLRB further defined the \textit{Mackay} doctrine by holding that an employer must seek out a former striker who has unconditionally applied for reinstatement and give the striker priority over new applicants for a position which becomes available upon the departure of a permanent replacement.\textsuperscript{177}

Unlike economic strikers, unfair labor practice strikers in the private sector are entitled to immediate reinstatement upon resolution of the strike.\textsuperscript{178} Even if a strike is the result of an economic dispute and an unfair labor practice (ULP), the NLRB will consider

\begin{enumerate}
\item \textsuperscript{172} Int'l Assoc. of Firefighters v. City of Coeur d'Alene, 99 Idaho at 643, 586 P.2d at 1359. The court voted that the city may discharge strikes for "cause" under the state civil service laws unless a contract protects them or the employer has committed an unfair labor practice. The court stated that "[w]e likewise reject the extreme viewpoint at the opposite end of the spectrum, namely, that the firefighters . . . were insulated from discharge if they chose to exercise their right to strike." \textit{Id.}
\item \textsuperscript{173} See Wilson, \textit{supra} note 102, at 639.
\item \textsuperscript{174} 304 U.S. 333, 345 (1938).
\item \textsuperscript{175} See \textit{NLRB v. United States Cold Storage Corp.}, 203 F.2d 924 (5th Cir.), \textit{cert. denied}, 346 U.S. 818 (1953) (employer committed unfair labor practice by discharging economic strikes prior to filling their jobs).
\item \textsuperscript{177} \textit{Id.} at 1369. The NLRB stated that:

[\textit{E}conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular & substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer reinstatement was for legitimate and substantial business reasons.]

\textit{Id.} at 1369-70.
\item \textsuperscript{178} Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).
\end{enumerate}
the work stoppage an unfair labor practice and the strikers will be entitled to immediate reinstatement. The NLRB has also held that strikers protesting serious unfair labor practices are immune from no-strike clauses and are lawfully permitted to strike.

The distinction between the replacement rules for economic and unfair labor practice strikes has generated much criticism. One major problem is that the strikers may agree to return to work prior to an NLRB finding that the employer has committed an unfair labor practice. Therefore, if the employer already hired replacements on the assumption that he has not committed an unfair labor practice, the employer would still be liable for back pay. Furthermore, during an economic strike, the employer may try to implement the Mackay doctrine and encourage a union decertification election. Under this doctrine, members of the bargaining unit at the beginning of the strike and their replacements may vote in the decertification election within one year of the strike. Since replacements are probably not members of the striking union, the strikers have little support to win the election. If, however, the NLRB holds that an unfair labor practice strike was justified because the employer committed a ULP, then only workers who joined the unit before the strike may vote in a decertification election. The voting rule for unfair labor practice strikes substantially weakens the employer's power to decertify a striking union by hiring replacements before the election.

In searching for guidance from the private sector labor laws, the California courts and Legislature may consider the Mackay doctrine when addressing the public employee strike replacement issue. Public sector labor unions will undoubtedly reject this proposal because it provides public employers the opportunity to permanently replace

183. An economic striker who has been permanently replaced is generally entitled to vote in a decertification election conducted within 12 months of the start of the strike. 29 U.S.C. § 159(c)(3) (1982). A permanent replacement may vote so long as he is employed on the date of the election. A replacement may vote in an election ordered after the strike began if she was employed on the customary payroll date. Macy's Missouri-Kansas Div., 173 N.L.R.B. 1500 (1969).
184. Unfair labor practice strikers are entitled to in a decertification election regardless of the length of the strike, but their replacements may not vote. Rivoli Mills, Inc., 104 N.L.R.B. 169, 182-83 (1953), enforced per curiam, 212 F.2d 792 (6th Cir. 1954).
strikers. Instead, the unions may suggest that the courts and Legislature turn to the state civil service laws for guidance. The California state civil service laws guarantee job protection for state government employees. The civil service system ensures lifelong employment unless the employee's conduct violates the applicable disciplinary statute. Moreover, unfair labor practice strike replacement rules would leave union members without redress power until the California PERB decided the case and issued a reinstatement order. However, until a decision in either forum, union members would be jobless, earning no salary.

2. Civil Service Laws

Presently, California state civil service laws do not address the right to strike issue. However, an argument can be made that the decision in County Sanitation should not be bound to local public employees. Rather, state government employees should also have the right to strike. Consequently, the County Sanitation court's interpretation of the MMBA would be expanded to the state civil service law. Moreover, section 923 of the Labor Code probably does not apply to state employees because their bargaining law contains a section 923 prohibition which is identical to MMBA section 3509. As noted earlier, the County Sanitation decision construed section 3509 as permitting strikes. Therefore, the Legislature may find that the state employees' bargaining law does not prohibit strikes. In effect, the expansion of the County Sanitation decision would force the state to re-examine the effect of its civil service law on strikes.

California law does not address the issue of strike replacements. The state constitution, however, does require that all public employees be hired according to merit. The state may, however, disregard the merit system and hire temporary replacements to fill

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186. The preamble to the state civil service laws states in part that "[s]tate civil service employment is made a career by providing for security of tenure and the advancement of employees within the service insofar as consistent with the best interests of the state." Id. § 18500(b)(3).
188. Compare Cal. Gov't. Code § 3523.5 (West 1980) (prohibition of section 923 rights for state employees) with 3509 (prohibition of section 923 rights to local employees).
189. See supra notes 63-68 and accompanying text.
190. See supra note 171.
191. CAL. CONST. art. VII, § 1(b) (West Supp. 1986) provides that "[i]n the civil service system appointment and promotion shall be made under a general system based on merit and ascertained by competitive examination."
positions up to nine months.\textsuperscript{192} The state's authority to hire replacements for nine months apparently gives it the ability to withstand most strikes. It is unclear, however, whether the state may appoint temporary replacements for public sector strikers. Public sector unions will contend that strike replacements are really "emergency employees."\textsuperscript{193} The State may only make "emergency appointments" for thirty working days. If replacements are "emergency employees," the employer would, therefore, be required to negotiate sooner with the strikers because he may only replace them for six weeks instead of nine months. The limit of the state's ability to replace strikers becomes a question of statutory interpretation for the courts or Legislature.

Despite the state's implied authority to hire replacements, the state is bound to the civil service laws regarding employee discipline and termination. State public employers do not have authority to fire or discipline full-time employees who participate in a legal strike.\textsuperscript{194} The California civil service law does not, however, extend similar protection to probationary employees. Striking probationary employees can be removed from their civil service position by the public employer.\textsuperscript{195} Therefore, the public employer is in a position to permanently replace them.

Although the California civil service law provides the State with the implied power to replace strikers, this governmental authority may conflict with the \textit{County Sanitation} decision. In \textit{County Sanitation}, the California Supreme Court did not distinguish between permanent and probationary employees for the purposes of strike rights. The court believed that such a distinction would unnecessarily divide the members of the public union, weaken the union's bargaining

\textsuperscript{192} Article VII, section 5 of the State Constitution permits the State to make "temporary replacements . . . in a position for which there is no employment list. No person may serve in one or more positions under temporary appointment larger than 9 months in 12 consecutive months." \textit{Id.}

\textsuperscript{193} "Emergency employee" means a person holding an emergency appointment. "Emergency appointment" means an appointment for a period not to exceed thirty working days either during an actual emergency to prevent the stoppage of public business or because of the limited duration of the work. \textit{Id.} § 18531.

\textsuperscript{194} \textit{See supra} note 187.

\textsuperscript{195} Cal. Gov't. Code § 19173 (West 1980) provides that "[a]ny probationer may be rejected by the appointing power during the probationary period [six months] for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility. . . ." \textit{Id.} The probationer may not regain his position unless he demonstrates at a hearing that "there is no substantial evidence to support the reason or reasons for his rejection, or that the rejection was made in fraud or bad faith." \textit{Id.} § 19175.
power, and reduce the effectiveness of strikes. As a result, the distinction would undermine the court’s desire to improve the collective bargaining balance through the use of strikes.\textsuperscript{196}

The purpose of the MMBA is to permit flexibility in governmental employer-employee relations.\textsuperscript{197} Enforcement of the California civil service laws, which limit the rights of probationary employees, would force the union to bargain differently on behalf of probationary employees as opposed to permanent employees. Furthermore, the California Supreme Court has already held that the MMBA can pre-empt civil service laws on crucial matters such as layoffs.\textsuperscript{198} Therefore, there is little support in favor of allowing the civil service laws to govern the state laws on strike replacements.

3. Constitutional Due Process Rights

The fourteenth amendment to the United Stated Constitution provides that “[n]o state shall deprive a person of life, liberty or property without due process of law.”\textsuperscript{199} The due process clauses of the United States\textsuperscript{200} and California Constitutions\textsuperscript{201} are identical in scope and purpose\textsuperscript{202} and may be used to restrict the employer’s ability to fire strikers and hire replacements.\textsuperscript{203}

In Board of Regents v. Roth\textsuperscript{204} and Perry v. Sindermann,\textsuperscript{205} the

\begin{itemize}
  \item \textsuperscript{196} See supra note 115 and accompanying text.
  \item \textsuperscript{197} San Joaquin County Employees Ass’n v. San Joaquin County, 39 Cal. App. 3d 83, 113 Cal. Rptr. 912 (1974).
  \item \textsuperscript{198} In Los Angeles County Civil Services Comm’n v. Superior Court, 23 Cal. 3d 55, 588 P.2d 249, 151 Cal. Rptr. 547, the court ruled that the MMBA’s meet-and-confer provisions compelled the Civil Service Commission to participate in labor-management bargaining sessions over layoffs. The court noted that granting the Commission unilateral discretion over civil service rules would damage labor relations:
  \begin{quote}
    The damage of undermining employee rights, though, is equally apparent if civil service commissions may freely and without negotiation alter the content of their rules. . . . To carve out for the commission a unilateral authority over civil service rules would place an unjustifiable burden on public employees’ right to representation. On the other hand, guaranteeing public employees an opportunity to have their views seriously considered (with the possibility that a nonbinding agreement will be adopted) serves employees’ interests without destroying the commission’s merit objectives.
  \end{quote}
  \textit{Id.} at 63, 588 P.2d at 253, 151 Cal. Rptr. at 551.
  \item \textsuperscript{199} U.S. CONSt. amend. XIV.
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} CAL. CONST. art. I, § 7 (West 1980).
  \item \textsuperscript{202} Gray v. Whitmore, 17 Cal. App. 3d 1, 94 Cal. Rptr. 904 (1971).
  \item \textsuperscript{203} The State public employer’s replacement of its employees is a form of State action, which must conform with the guarantees of the federal constitution. Replacement deprives public employees of a property interest in their jobs which is protected by the due process clause. See infra notes 204-217 and accompanying text.
  \item \textsuperscript{204} 408 U.S. 564 (1972).
\end{itemize}
issue addressed by the United States Supreme Court was whether a public employee's right to due process of law was violated after being terminated without a hearing. To determine the scope of a public employee's right to due process of law, the court established a two-step test. First, the public employee has the burden of proving that a governmental employment decision deprived her of a property or liberty interest in employment. If the employee has no such interest, she must resort to state statutes or regulations for establishing her cause of action. But if the employee is able to prove that she had a property or liberty interest in her employment, then she would be entitled to a hearing before being deprived of that interest.

In Cleveland Board of Education v. Loudermill, the United States Supreme Court recently held that once an individual has acquired a property interest under state law, that individual receives the benefits of the federal due process clause before being deprived of that interest. Loudermill, a classified civil service employee, was dismissed when his employer discovered that he had omitted a previous felony conviction from his job application. Ohio law permitted dismissal only for cause and granted a post-termination hearing. Loudermill claimed that the due process clause required that he receive a pretermination hearing before being deprived of his property interest in continued employment. Because it was established that Loudermill had a property interest in his employment, under Ohio law, the court concluded that he was entitled to a pretermination hearing.

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205. 408 U.S. 593 (1972).
206. Id. at 569, 595.
207. The United States Supreme Court has named three factors which must be shown to establish a liberty interest. First, the employee must show that his reputation in the community was harmed by loss of his position. See Paul v. Davis, 424 U.S. 693, 708-12 (1976). Second, the public employer's false statements about the public employee's conduct on his job caused the harm to the employee's reputation. See Codd v. Velger, 429 U.S. 624, 627 (1977). Third, the employer must have made these comments in a public forum outside of the employee's lawsuit. See Bishop v. Wood, 426 U.S. 341, 348 (1976).

208. Id. at 569-71 & n.8.
209. Id. at 603.
211. Id. at 1491-93.
212. Id. at 1489-90.
213. Id. at 1490.
214. Id.
hearing before being deprived of that interest.\textsuperscript{215} The \textit{Loudermill} decision established that an individual holding a property interest in continued employment was entitled to due process rights: “a pretermination opportunity to respond (to the charges),”\textsuperscript{216} and a full post termination hearing.\textsuperscript{217}

Public employees in California acquire a property interest in continued employment once they are tenured.\textsuperscript{218} The due process clause, however, will not prevent the state employer from permanently replacing strikers with tenure. In California, due process will probably be satisfied, in a strike situation, when the public employer notifies the strikers that they must return to work by a certain date. The employer must then hold a hearing to determine if the employee was actually participating in a strike.\textsuperscript{219} Under California law, however, a tenured employee who was found to have participated in a strike can still be permanently replaced.

4. Permanent Replacement Violates the Public Policy Behind County Sanitation

Although the California civil service laws and the due process clause do not prohibit permanent replacement of strikers, the \textit{County Sanitation} decision indicates a different result.\textsuperscript{220} In \textit{County Sanitation}, the court concluded that the threat of strikes gives the unions a stronger bargaining tool to create an equal bargaining relationship with management. Therefore, replacement of strikers would undermine the policy of a balanced bargaining relationship. Under the \textit{Mackay} rule, a balanced bargaining relationship would be destroyed.

The permanent replacement of strikers would virtually prevent the strikers from regaining their jobs and public employers would be able to maintain a much stronger bargaining position. Finally, the use of permanent replacements is likely to incite violence and destroy chances of a peaceful settlement. The strikers will likely feel threatened by replacements because they face losing all of their ac-

\textsuperscript{215} Id. at 1494 ("The need for some form of pretermination hearing . . . is evident from the balancing of the competing interests at stake.").
\textsuperscript{216} Id. at 1496.
\textsuperscript{217} Id.
\textsuperscript{218} The California service laws provide tenure, or job security, for State employees. Cal. Gov't. Code § 18500 (West 1980).
\textsuperscript{219} See Wilson, supra note 102, at 680.
\textsuperscript{220} Id. Wilson's argument that the Ohio pre-replacement hearing which permits replacement of lawful economic strikers can be applied to California law. "Offering a pre-replacement notice and an opportunity to be heard should meet the constitutional guarantees set forth in \textit{Loudermill}."
cumulated benefits, especially pensions. In addition, permanent replacement shows the employer's willingness to jeopardize the jobs of lawful strikers who have followed the impasse procedures required under the proposed California legislation. Permanent replacements would undoubtedly permit the public employer to "break" the strike in spite of the County Sanitation court's desire to improve labor relations through the use of strikes.

The hiring of temporary replacements for strikers is a viable alternative that could effectively balance the employer's need to continue services with the employee's right to strike. While the strikers may lose wages, the public employer may hire temporary replacements at a wage scale lower than the one stated in the previous collective bargaining agreement. The employer can justify this practice because the replacements are temporary and not bound to the existing collective bargaining agreement. The employer is also able to cut strike losses while the strikers maintain their property interest in continued employment. Therefore, the public employer's ability to hire permanent replacements in order to "break" the strike is greatly reduced.

VI. CONCLUSION

The decision in County Sanitation has precedential value. By overruling the common law strike ban in the California public sector, the decision, theoretically, now permits any state court to legalize public employee strikes where the Legislature has not specifically prohibited such strikes.

The decision also illustrated the judicial innovation in law making. Without the Legislature addressing the strike issue in the public sector, the California Supreme Court held that public employee strikes are legal. The court's standard, however, was vague. Lower courts will now have the heavy burden of determining the "health and safety" standard on a case-by-case basis.

To remedy this ambiguity, the California Legislature should act promptly and set forth public sector strike guidelines. Without legislative guidance, the courts may not adequately understand the labor relations factors involved in a decision to issue a strike injunction. Therefore, in order to clarify the "health and safety" standard, the Legislature should classify those employees who are essential to the maintenance of public services. The Legislature should also consider

221. Id. at 686. Wilson proposed temporary replacement as a means of protecting strikers' rights in Ohio and maintaining services to the public.
a recent proposal to reduce the size of bargaining units, and to create a viable post-impasse procedure. Additionally, public employee strikes should be lawful only after the parties have submitted to mediation and fact-finding. Binding arbitration for employees who may not strike, such as police and firefighters, should also be authorized.

The powers of the California PERB should be expanded to include the investigation of unfair labor practice strikes involving local public employers and employee organizations. The California Legislature should also follow the public sector bargaining laws in Ohio and Hawaii by requiring PERB to investigate whether a strike has begun to threaten public health and safety before issuing a permanent injunction. To protect the public in strikes involving important services, the Legislature should permit the courts to grant a two or three-day restraining order while PERB investigates the strike.

Finally, the Legislature should authorize the temporary replacement of strikers. Temporary replacements would allow the public employer to continue operations while preserving the employment rights of strikers. If the California Legislature adopted the private sector rule permitting permanent replacement of strikers, the benefits of the limited strike rights recognized in County Sanitation would be eliminated.

Lawrence Spivak