University of Dayton Law Review

Volume 11 | Number 2 Article 6

1-1-1986

Labor Law: The California Supreme Court Confers a Limited Right to Strike upon California's Public Employees through Judicial Fiat

Lori E. Shaw
University of Dayton

CASENOTES

LABOR LAW: THE CALIFORNIA SUPREME COURT CONFERS A LIMITED RIGHT TO STRIKE UPON CALIFORNIA'S PUBLIC EMPLOYEES THROUGH JUDICIAL FIAT—*County Sanitation District No. 2 v. Los Angeles County Employees' Association, Local 660*, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985).

I. INTRODUCTION

Historically, virtually all public employees within the United States have been prohibited from engaging in any form of work stoppage.[1] While in recent years several states have enacted legislation sanctioning work stoppages by public employees in certain limited situations,[2] no *court* had sanctioned such actions through judicial fiat prior to 1985. In *County Sanitation District No. 2 v. Los Angeles County Employees' Association, Local 660*,[3] the California Supreme Court became the first state court to recognize the right of public employees to strike, where such employees are not expressly prohibited by statute from doing so, and where such work stoppage creates no substantial, imminent threat to the health and safety of the public.[4]

This note will examine the propriety of the California Supreme Court's action in *County Sanitation District* and will address the issue of whether the court should have deferred to the legislature in this area of public employee labor relations law. In addition, it will analyze the strength of the court's reasons for rejecting the common-law prohibition of public sector strikes. Finally, the note will discuss the potential impact of the California Supreme Court's precedent-shattering decision.

---

1. For a discussion of the traditional legal approach toward public sector strikes, see Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055 (1982).

2. *See* ALASKA STAT. § 23.40.200 (1984); HAWAII REV. STAT. § 89-12 (1976 & Supp. 1984); ILL. ANN. STAT. ch. 48, § 1617 (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 179A.18 (West Supp. 1985); MONT. CODE ANN. § 39-31-201 (1985); OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1984); OR. REV. STAT. § 243.726 (1983); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1985); VT. STAT. ANN. tit. 21, § 1730 (1978).

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

4. *Id.* at 585–87, 699 P.2d at 849–51, 214 Cal. Rptr. at 438–40.

II. FACTS AND HOLDING

The plaintiff, Los Angeles Sanitation District Number 2, is one of twenty-seven sanitation districts (hereinafter jointly referred to as the Sanitation District) within Los Angeles County.[5] Each district is responsible for providing sewage transportation and for operating and maintaining sewage treatment facilities and landfill disposal sites throughout the county.[6] As a local public employer, the Sanitation District is governed by the Meyers-Milias-Brown Act (MMBA),[7] which sets forth the California legislature's approved methods of resolving disputes between local public employers and public employee organizations.

Since 1973, the defendant, Local 660 of the Los Angeles County Employees' Association, has been the certified bargaining representative of the blue-collar employees of the Sanitation District.[8] Through negotiation, the Sanitation District and Local 660 were able to reach agreement on either binding labor contracts or memorandums of understanding[9] in 1973, 1974, and 1975.[10] In 1976, however, negotiations between Local 660 and the Sanitation District concerning a new wage and benefit agreement reached an impasse, and the parties were unable to agree upon a new memorandum of understanding."[11] As a result, on July 5, 1976, approximately seventy-five percent of the Sanitation District's five hundred employees struck the Sanitation District.[12] The Sanitation District responded by seeking injunctive relief against the employees. An injunction was subsequently granted in the form of a restraining order that prohibited the strike.[13] Despite the order, however, the strike continued until July 16, 1976, at which time the members of Local 660 voted to accept a tentative agreement.[14] This agreement contained the same terms as the agreement rejected by the

---

5. County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660 (County Sanitation Dist. II), 38 Cal. 3d 564, 567–68, 699 P.2d 835, 837, 214 Cal. Rptr. 424, 426, *cert. denied*, 106 S. Ct. 408 (1985).

6. *Id.*

7. 1961 Cal. Stat. 1964, § 1, at 1441 (codified as amended at CAL. GOV'T CODE §§ 3500–3511 (West 1980)).

8. *County Sanitation Dist. II*, 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

9. A California statute provides: "If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination." CAL. GOV'T CODE § 3505.1 (West 1980).

10. *County Sanitation Dist. II*, 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

employees prior to the strike.[15]

Upon settlement of the strike, the Sanitation District brought a tort action against Local 660 in the California Superior Court of Los Angeles County.[16] The superior court held that the strike violated the public policy of the state of California and as such was unlawful.[17] As a result, the Sanitation District was awarded compensatory damages in the amount of $246,904.00,[18] prejudgment interest in the amount of $87,615.22, and costs in the amount of $874.65.[19]

Local 660 appealed the trial court's decision to the California Second District Court of Appeal. The appellate court noted that the propriety of public employee strikes had not recently been addressed by either the California legislature or the supreme court. Nevertheless, it felt bound to follow judicial precedent that prohibited such strikes in the absence of legislative authorization.[20] Accordingly, the appellate court affirmed the superior court decision.[21]

The appellate court's decision was subsequently appealed to the California Supreme Court. In a four to one decision, the supreme court reversed the lower court decisions,[22] holding that strikes by public employees are not per se illegal.[23] The court, however, recognized that the

---

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* This figure included wages and FICA payments of $304,227, earned compensatory time off valued at $16,040, miscellaneous security, equipment, and meal expenses totalling $55,080, and health care benefits paid to striking employees in the amount of $6,000. *Id.* at 568 n.4, 699 P.2d at 837 n.4, 214 Cal. Rptr. at 426 n.4. The amount was reduced by $134,443, which represented wages, FICA, and retirement benefits that the Sanitation District did not have to pay on behalf of striking workers. *Id.*

19. *Id.* at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

20. County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660 (County Sanitation Dist. I), 195 Cal. Rptr. 567, 569 (1983) (opinion withdrawn from official reporter) (citing Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 687, 355 P.2d 905, 905, 8 Cal. Rptr. 1, 1 (1960)), *rev'd*, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985). *See also infra* notes 48–52 and accompanying text.

21. *County Sanitation Dist. I*, 195 Cal. Rptr. at 576. While the appellate court affirmed the superior court decision, it also invited the supreme court to rule on the issue:

> [A]s 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.

195 Cal. Rptr. at 570.

22. *County Sanitation Dist. II*, 38 Cal. 3d at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443.

23. *Id.* at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438. "[W]e conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law." *Id.*

interruption of certain essential services provided by the government would threaten the health and safety of the public,[24] and that both the legislature[25] and the judiciary[26] have the power to limit the right to strike with regard to certain categories of public employees. The court, therefore, enunciated the following standard for determining the propriety of judicial action: "[S]trikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public."[27] In determining the legality of the strike by members of Local 660, the court applied this same standard.[28] Although the supreme court found that a lengthy strike by sanitation workers might have posed a substantial and imminent threat to the health or safety of the public, the strike in question was of such short duration that no threat ever existed.[29] Thus, the supreme court found the strike by members of Local 660 to be legal.[30]

III. BACKGROUND

In the United States, no employee, public or private, has a constitutional right to strike.[31] At early American common law, those involved in strikes were often charged with conspiracy[32]—a criminal offense. In addition to such criminal sanctions, striking workers were faced with tort actions[33] brought by their employers.[34] It was not until 1921 that the United States Supreme Court officially adopted the position that strikes by private sector employees are lawful.[35] In *American*

---

24. *Id.* at 580, 699 P.2d at 846, 214 Cal. Rptr. at 435.
25. *Id.* at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438.
26. *Id.* at 585–86, 699 P.2d at 849–50, 214 Cal. Rptr. at 438–39.
27. *Id.* at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439.
28. *Id.* at 586–87, 699 P.2d at 850, 214 Cal. Rptr. at 439.
29. *Id.*
30. *Id.* at 587, 699 P.2d at 850, 214 Cal. Rptr. at 439.
31. County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660 (County Sanitation Dist. II), 38 Cal. 3d 564, 588, 699 P.2d 835, 851–52, 214 Cal. Rptr. 424, 440–41, (citing International Union, Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 259 (1949)), *cert. denied*, 106 S. Ct. 408 (1985). "The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this court has characterized as a 'fundamental right' . . . ." *Local 232*, 336 U.S. at 259.
32. *See* United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C.), *aff'd mem.*, 404 U.S. 802 (1971).
33. The action brought in *County Sanitation Dist.* falls into this category. *County Sanitation Dist. II*, 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.
34. *See, e.g.*, Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1971) (recognizing a cause of action by plaintiff school district for damages suffered relating to an illegal teachers' strike).
35. *See* American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921) (recognizing the economic necessity for concerted action by employees).

Steel Foundries v. Tri-City Central Trades Council,[36] the Supreme Court concluded that employees are engaged in an economic struggle with their employer for a share of the "joint product of labor and capital,"[37] and that the strike is a lawful instrument for use in this conflict.[38] Today, the right of private sector employees to strike is largely based upon statutory protections.[39] Such protections, however, have generally been denied to public employees.

A. Public Sector Strikes in the United States

Traditionally, strikes by public employees have rarely been sanctioned in the United States.[40] Federal employees are prohibited by statute from striking,[41] as are a great many state and local employees.[42] In addition, those jurisdictions which lack statutes expressly dealing with the legality of strikes by public employees have relied upon the common law to prohibit such strikes.[43] Recently, however, strike prohibitions have been removed in several states as a number of state legislatures have passed statutes granting certain public employees a limited

---

36. 257 U.S. 184 (1921).

37. *Id.* at 209.

38. *Id.*

39. *See United Fed'n of Postal Clerks*, 325 F. Supp. at 882. On the federal level, for example, such protection is provided by section 7 of the National Labor Relations Act (NLRA). *See* 29 U.S.C. § 157 (1982). Section 7 states in pertinent part: "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 . . . ." *Id.* The Supreme Court has interpreted this provision, which is the heart of the NLRA, as protecting the right to strike. *See, e.g.*, Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

40. *See* Hanslowe & Acierno, *supra* note 1, at 1057.

41. 5 U.S.C. § 7311(3) (1982). "An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he . . . participates in a strike, or asserts the right to strike, against the Government of the United States . . . ." *Id.*

42. *See, e.g.*, ALA. CODE § 11-43-143 (1975) (prohibits firefighters from striking); CONN. GEN. STAT. ANN. §§ 7-475, 10-153 (West Supp. 1984 & Supp. 1985) (prohibit municipal employees and teachers from striking); IDAHO CODE § 44-1811 (1977) (prohibits strikes by firefighters); KY. REV. STAT. ANN. §§ 78.510, 345.130 (Baldwin 1979) (prohibit strikes by county police and by firefighters); MD. EDUC. CODE ANN. § 6-410 (1978 & Supp. 1985) (prohibits strikes by certificated professional individuals, i.e., public school teachers); N.J. REV. STAT. ANN. § 34:13A-16 (West 1985) (provides for compulsory arbitration for police and firefighters); R.I. GEN. LAWS §§ 28-9.1-2, 28-9.2-2, 28-9.4-16, 28-9.5-2 (1956 & Supp. 1984) (prohibit strikes by firefighters, police officers, municipal employees, and state police).

43. *See, e.g.*, Anderson Fed'n of Teachers v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969) (affirming judgment of superior court that the Anderson Federation of Teachers was in contempt of court for violating a court order directing its members to refrain from picketing and striking), *cert. denied*, 399 U.S. 928 (1970); City of Albuquerque v. Campos, 86 N.M. 488, 525 P.2d 848 (1974) (reversing the judgment of the district court that the so-called Little Norris-Laguardia Act, restricting injunctive relief in labor disputes, applied to strikes and work stoppages by public employees).

right to strike.[44] All of these states expressly prohibit strikes by certain specified classes of public employees who are deemed essential by the legislature.[45] Most of these states also allow the courts to prohibit strikes involving nonspecified classes of public employees in the event that such strikes present a "clear and present danger" to the public health and safety.[46] In addition, all but one of the states which permit public sector strikes have developed certain procedural requirements which must be met in order for the strike to be considered lawful.[47]

B. Public Sector Strikes in California

Unlike many states, California's prohibition against strikes by public employees has always been based upon common law.[48] In *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen*,[49] the California Supreme Court recognized: "In the absence of legislative authorization public employees in general do not have the right to strike . . . ."[50] However, in recent years the supreme court has avoided reasserting this position, expressly reserving opinion on the legality of public sector strikes.[51] Despite the recent silence of the su-

---

44. *See supra* note 2.

45. *See, e.g.*, ALASKA STAT. § 23.40.200 (1984) (police and fire protection employees, prison guards and other correctional institution employees, and hospital employees); OHIO REV. CODE ANN. § 4117.14(D)(1)–(2) (Page Supp. 1984) (members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrrections officers, guards at penal or mental institutions, special police persons, psychiatric attendants employed at mental health forensic facilities, and youth leaders employed at juvenile corrections facilities).

46. *See, e.g.*, OR. REV. STAT. § 243.726(3)(a) (1983) ("Where the strike occurring or about to occur creates a clear and present danger to the health, safety or welfare of the public, the public employer concerned may petition the circuit court of the county . . . for equitable relief including but not limited to injunctive relief."); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1985) ("If a strike by public employees occurs after the collective bargaining processes . . . have been completely utilized and exhausted, it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.").

47. For examples of such procedural requirements, see *infra* notes 81–84 and accompanying text. The only state failing to establish a procedural framework is Montana. *See* MONT. CODE ANN. § 39-31-201 (1985). The Montana Supreme Court has construed § 39-31-201 of the Montana Code as allowing public employees to strike. *See* State *ex rel.* Dep't of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974). However, § 39-31-201 does not expressly grant workers the right to strike, nor does it establish any specific procedures for public employee strikes.

48. *But see* CAL. LABOR CODE § 1962 (West 1980) (prohibiting firefighters from striking).

49. 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960).

50. *Id.* at 687, 355 P.2d at 906, 8 Cal. Rptr. at 2 (citing Annot., 31 A.L.R.2d 1142, 1159–61 (1953)).

51. *See, e.g.*, San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979); City of San Francisco v. Cooper, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975); *In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

preme court, California's appellate courts consistently accepted the higher court's earlier dictum as controlling authority and upheld the common law prohibition.[52] The strong position taken by the appellate courts, coupled with the failure of the California Supreme Court to alter its previous position, had the effect of rendering all strikes by public employees illegal. In *County Sanitation District*, however, the supreme court rejected the idea that its decision in *Brotherhood of Railroad Trainmen* settled the issue of the legality of public employee strikes.[53]

IV. ANALYSIS

The decision rendered by the California Supreme Court in *County Sanitation District No. 2 v. Los Angeles County Employees' Association, Local 660*[54] was unprecedented. The supreme court became the only state court to deny the validity of the common-law rule prohibiting strikes in the absence of express statutory authority permitting such strikes. The rejection of the common-law rule is worthy of analysis, as is the possible impact of this rejection upon the policies of other jurisdictions. Before any such analysis may be undertaken, however, the propriety of the court's exercise of power with regard to this particular issue requires examination.

A. The Propriety of the California Supreme Court's Action

When the California Fourth District Court of Appeal applied the common-law rule prohibiting strikes by public employees in *City of San Diego v. American Federation of State, County and Municipal Employees, Local 127*,[55] it indicated that the state legislature was better equipped to deal with the question of whether the right to strike should be conferred upon public employees.[56] The position taken by this court is not without merit. The right of private sector employees to strike is primarily conferred through the legislature,[57] rather than through the judiciary. Until the California Supreme Court decided *County Sanitation District*, no court had undertaken the responsibility of conferring the right to strike upon public employees. This decision

52. *See, e.g.*, Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977); City of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977); Los Angeles Unified School Dist. v. United Teachers-Los Angeles, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972); City of San Diego v. American Fed'n of State, County and Municipal Employees, Local 127, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970).

53. *County Sanitation Dist. II*, 38 Cal. 3d at 570, 699 P.2d at 838, 214 Cal. Rptr. at 427.

54. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985).

55. 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970).

56. *Id.* at 313, 87 Cal. Rptr. 261–62. *See infra* text accompanying notes 78–79.

57. *See supra* note 39 and accompanying text.

raises the question of whether a standard developed by the legislature would have differed in any way from that developed by the California Supreme Court. Another issue that is raised is whether the courts provide the best forum for settling this important controversy.

1. The Power of the Court To Enunciate a New Standard

Prior to examining the legality of the strike by members of Local 660, the California Supreme Court had to determine whether it was permitted to settle the question of strike legality. The Sanitation District argued that the California legislature had already addressed the issue of the legality of public sector strikes. Although section 923 of the California Labor Code permits strikes by employees,[58] the Sanitation District argued that section 3509 of the Meyers-Milias-Brown Act (MMBA),[59] specifically precludes the application of section 923 of the California Labor Code to public employees.[60] The public employer reasoned that because section 923 protects the private employees' right to strike, the express exclusion of this section from the MMBA should be read as a general prohibition of strikes by public employees.[61] The court rejected this argument, noting that although firefighters are governed by a statutory provision identical to section 3509,[62] the legislature had provided an additional provision, section 1962 of the California Labor Code,[63] which affirmatively prohibits firefighters from striking. The existence of the additional provision is indicative of the legislature's intention that section 3509 not serve as a prohibition.[64] The California Supreme Court did not dispute the California legislature's authority to determine the legality of public sector strikes.[65] The court simply found that the legislature had not addressed the issue.[66] It concluded: "On its face, the MMBA neither denies nor grants local

58. CAL. LABOR CODE § 923 (West 1971). Section 923 provides in pertinent part: "It is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference . . . of employers . . . [in] concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* This provision has been construed by the California Supreme Court as protecting the right of private employees to strike. *See County Sanitation Dist. II*, 38 Cal. 3d at 573, 699 P.2d at 840, 214 Cal. Rptr. at 429.

59. CAL. GOV'T CODE § 3509 (West 1980). The statute states: "The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." *Id.*

60. *County Sanitation Dist. II*, 38 Cal. 3d at 572, 699 P.2d at 840, 214 Cal. Rptr. at 429.

61. *Id.* at 572–73, 699 P.2d at 840, 214 Cal. Rptr. at 429.

62. *See* CAL. LABOR CODE § 1963 (West 1971).

63. *Id.* § 1962.

64. *County Sanitation Dist. II*, 38 Cal. 3d at 573, 699 P.2d at 840–41, 214 Cal. Rptr. at 429–30.

65. *Id.* at 571–73, 699 P.2d at 839–41, 214 Cal. Rptr. at 428–30.

66. *Id.*

employees the right to strike."[67]

The Sanitation District further argued that if the legislature was in fact silent on the matter of strikes by public employees, this silence could be taken as an affirmation of the common-law rule, and that legislative action, rather than judicial action, was required to nullify this consent.[68] In response to this argument, the supreme court noted that courts have the right to "redefine" common law.[69] As the common law is created by the courts, it may certainly be modified or abrogated by the courts.[70] While the supreme court convincingly legitimized its decision, the decision itself indicates a serious shortcoming which may not have ensued had the California legislature dealt with the issue.

2. The Weakness of the Court's Decision

Although the California Supreme Court did have the authority to modify the common-law rule with regard to public sector strikes, the court was not necessarily the best forum for changing that rule. While the public employer and the union were represented in the court, the people of California, who may have had the greatest stake in the outcome of the case, were not represented. Had the issue been placed before the California legislature, the concerns of the public might have received greater consideration. While it is impossible to predict whether the legislature would have conferred the right to strike upon public employees, it is possible, in light of the positions developed by other state legislatures, to examine how a standard developed by the legislature might have differed from that developed by the court.

The substance of the rule developed by the California Supreme Court does not differ greatly from that developed by the legislatures of other states.[71] The primary concern of the supreme court was the prevention of any strike which poses a substantial and imminent threat to

---

67. *Id.* at 572, 699 P.2d at 840, 214 Cal. Rptr. at 429.

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

69. *Id.*, 699 P.2d at 848–49, 214 Cal. Rptr. at 437–38. The court's position is supported by its earlier holding in Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974), where it stated:

> "The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice." . . . Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them.

Id. at 394, 525 P.2d at 676, 115 Cal. Rptr. at 772 (citation omitted).

70. *See County Sanitation Dist. II*, 38 Cal. 3d at 584, 699 P.2d at 848, 214 Cal. Rptr. at 437.

71. *See infra* notes 72–78 and accompanying text. *See also supra* note 46 and accompanying text.

the health or safety of the public.[72] This same concern can be seen in the existing state statutes that grant public employees the right to strike.[73] Further, like the rules developed by other states permitting public sector strikes,[74] the standard developed by the court recognizes the right of the California legislature to prohibit strikes by certain classes of essential employees.[75] Moreover, like most other states,[76] the standard developed in California permits a court to prohibit a strike involving personnel not classified by the legislature as essential when a court is of the opinion that the strike poses an imminent threat to the public health and safety.[77] Upon consideration of the standards developed by other state legislatures, it seems likely that the substance of any policy developed by the California legislature would have been quite similar to that developed by the court.

It is quite probable, however, that the California legislature would have implemented certain procedural requirements which are lacking in the plan developed by the California Supreme Court. In *City of San Diego*,[78] the California Fourth District Court of Appeal stated: "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."[79] Unlike the provisions developed by the various state legislatures,[80] the standard developed by the California Supreme Court establishes no procedural framework. The advantage of such a framework is that it provides certain safeguards for the public. For example, state statutes may specifically require that the collective bargaining agreement between the public employer and the public employees expire prior to any strike by public employees.[81] Such a provision has the effect of preventing the public employer from being faced with an unanticipated strike. In addition, it encourages the parties to engage in bargaining before the contract expiration date. Other state statutes compel public employee bargaining units to provide written notification

72. *County Sanitation Dist. II*, 38 Cal. 3d at 580–81, 699 P.2d at 846, 214 Cal. Rptr. at 435. For a more detailed account of this concern for the public's health and safety, see *supra* notes 24–27 and accompanying text.

73. *See supra* note 46 and accompanying text.

74. *See supra* note 45 and accompanying text.

75. *County Sanitation Dist. II*, 38 Cal. 3d at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438.

76. *See, supra* note 46 and accompanying text.

77. *County Sanitation Dist. II*, 38 Cal. 3d at 585–86, 699 P.2d at 849–50, 214 Cal. Rptr. at 438–39.

78. 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970).

79. *Id.* at 313, 87 Cal. Rptr. at 261.

80. *See infra* notes 81–83 and accompanying text.

81. *See, e.g.*, ILL. ANN. STAT. ch 48, § 1617(2) (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 179A.18 (1)(1)(a) (West Supp. 1985).

of their strike intention several days prior to any such strike.[82] Such notification gives the public employer time to prepare for the strike. It also gives both parties a final opportunity to settle the dispute. In addition, state statutes often provide a procedure for the immediate enjoinment of strikes that present a clear and present danger to the public's health and safety.[83] Such measures alleviate confusion regarding the appropriate action to be taken to prevent or halt a strike, delineate who is responsible for taking such action, and establish when such action should occur. The standard established by the California Supreme Court fails to provide any of these safeguards. The establishment of clear procedural requirements is not only advantagous to the parties involved in a dispute and to the court which must resolve such a dispute, but it is also beneficial to the general public.

In conclusion, while the omission of clear procedural requirements[84] provides a strong argument that the legislature was better equipped to deal with an issue of this magnitude and complexity, the California legislature has historically chosen not to address this issue. Thus, the California Supreme Court was forced to address the issue of whether strikes by public employees are legal. Regardless of whether the court found for the Sanitation District or for Local 660, any decision rendered by the court would serve as controlling authority in the state of California. Even if the court had based its decision upon other grounds, and had remained silent on the question of the legality of public employee strikes, the court's decision would effectively have had the same result; silence on this key issue would have countenanced the appellate courts' continued application of the common-law rule, thus denying public employees the right to strike. Both the reasoning behind the application of the common-law rule, and the justifications behind the court's rejection of this rule, deserve attention.

B. The Common-Law Prohibition Against Public Employee Strikes

In order for the California Supreme Court to decide in favor of the sanitation workers, Local 660 had to convince the court that the common-law rule prohibiting public employee strikes should be abrogated as a part of California law.[85] Four basic justifications have been offered for the common-law rule.[86] First, the government is but an ex-

---

82. *See, e.g.*, MINN. STAT. ANN. § 179A.18 (3) (West Supp. 1985) (10 days written notice); OHIO REV. CODE ANN. § 4117.14(D)(2) (Page Supp. 1984) (10 days written notice).

83. *See, e.g.*, OHIO REV. CODE ANN. § 4117.16(A) (Page Supp. 1984); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1985).

84. *See supra* notes 78–83 and accompanying text.

85. *County Sanitation Dist. II*, 38 Cal. 3d at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438.

86. *See id.* at 574, 699 P.2d at 841, 214 Cal. Rptr. at 430.

tension of the people, and when engaged in a strike, public employees are harming those they are intended to serve—the people.[87] Second, the terms of public employment are set by the legislature and thus are not subject to collective bargaining.[88] Third, "granting public employees the right to strike would afford them excessive bargaining leverage . . . ."[89] Finally, "public employees provide essential public services which, if interrupted by strikes, would threaten the public welfare."[90]

1. The Arguments in Favor of the Common-Law Rule

The basic thrust of the first argument, known as the sovereignty argument,[91] is that the government always represents the will of the people, and that their will is always correct.[92] President Franklin D. Roosevelt epitomized this argument when he wrote: " 'A strike of public employees manifests nothing less than intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action . . . by those who have sworn to support it, is unthinkable and intolerable.' "[93] To a great extent, this argument appears to be based upon moral grounds. When striking, public employees betray the trust that has been placed in them by the public.

The second justification, that the terms of public employment are not subject to collective bargaining, is grounded upon the idea that the allocation of public resources should be decided democratically, without undo economic pressure.[94] Public aid recipients, for example, should not be forced to compete with striking public employees for government funds. While the people have delegated to the legislature the power to allocate public funds, they have not granted the legislature the right to redelegate this power to public employees. Additionally, as the terms of employment are ordinarily set by the legislature, a public employer may be powerless to change the terms of employment through any form of collective bargaining.[95]

The third justification offered by proponents of the common-law prohibition is that the economic power wielded by striking employees

87. *Id.*, 699 P.2d at 842, 214 Cal. Rptr. at 431.
88. *Id.*, 699 P.2d at 841, 214 Cal. Rptr. at 430.
89. *Id.*
90. *Id.*
91. *See id.*, 699 P.2d at 842, 214 Cal. Rptr. at 431.
92. *Id.* at 574–75, 699 P.2d at 842, 214 Cal. Rptr. at 431.
93. Anderson Fed'n of Teachers Local 519 v. School City of Anderson, 252 Ind. 558, 563, 251 N.E.2d 15, 18 (1969) (quoting a letter from President Franklin D. Roosevelt to the president of the National Federation of Federal Employees (August 16, 1937)), *cert. denied*, 399 U.S. 928 (1970).
94. *County Sanitation Dist. II*, 38 Cal. 3d at 576, 699 P.2d at 842–43, 214 Cal. Rptr. at 431–32.
95. *Id.*

would distort the political process.[96] Because of the nature of the services performed by public employees, it is asserted that pressure upon a public employer to settle a strike would be immense, much greater than that placed upon an employer in the private sector.[97] Several factors are said to contribute to this pressure,[98] the most notable being that the demand for governmental services is inelastic.[99] It is asserted that governmental services are of such great importance that the public's demand for such services is unaffected by any increase in cost. Also contributing to the pressure placed upon public employers is the fact that market constraints are almost always absent in the public sector.[100] It is generally not possible, for example, for the consumer public to seek a substitute good or service. Therefore, the possibility exists that the public may be forced to pay exorbitant prices for public services.

The final argument in support of the common-law prohibition is that any interruption of governmental services threatens the well-being of the public. Like the argument that public employee strikes distort the political process, this argument is based on the premise that all services provided by the government are essential.[101] However, this argument differs from the aforementioned argument in that it focuses not upon the financial ramifications of public employee strikes, but instead upon the threat that such strikes pose to the health, safety, and welfare of the public.

2. The California Supreme Court's Analysis of the Common-Law Rule

The California Supreme Court found flaws in each of the justifications for the common-law rule. First, with regard to the sovereignty argument, the court noted that the idea that a government can never be opposed by its employees was an idea whose time had passed, particularly as many of the services performed by the government were not services that it traditionally provided.[102] Because of the government's increased activities in "non-governmental" functions, public employees and their employers share the same relationship that private employees have with their employers.[103] The court's analysis of this argument is

96. *See id.* at 574, 699 P.2d at 841, 214 Cal. Rptr. at 430.
97. *Id.* at 577, 699 P.2d at 843, 214 Cal. Rptr. at 432.
98. *See id.*
99. *Id.*
100. *Id.*
101. *See id.* at 579, 699 P.2d at 845, 214 Cal. Rptr. at 434.
102. *Id.* at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431 (quoting Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359–60 (1972)).
103. *County Sanitation Dist. II*, 38 Cal. 3d at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431 (citing Edwards, *supra* note 102, at 359–60).

sound. With regard to certain services, such as transportation, the government may actually be competing with the private sector. As such, public employees who occupy positions that are paralleled in the private sector should have the same rights and privileges that are extended to their private counterparts. One such right is the right to strike. To prohibit such a right, based solely on the argument that public employees owe a higher degree of loyalty to the general public than do their counterparts in the private sector, is to ignore "modern social reality."[104] Accordingly, this justification was refuted.

In its examination of the argument that it is solely the legislature's function to establish the terms of employment, the court concluded that under the provisions of the MMBA, California's public employees already had the right to bargain with their employer.[105] Section 3505 of the MMBA mandates that the governing body of a public agency and the representatives of a recognized employee organization meet and confer in good faith regarding wages, hours, and other terms of employment.[106] By requiring good faith bargaining, the legislature indicated its intention to delegate the determination of employment terms to public employers and public employees. Therefore, regardless of whether public employees are permitted to strike, the legislature will no longer completely dictate the terms of their employment.

In addressing the argument that granting public employees the right to strike would allow them excessive bargaining power, the court disputed the key assumption underlying this argument—the idea that all services provided by the government are essential.[107] The court observed that "[m]odern governments engage in an enormous number and variety of functions, which clearly vary as to their degree of essentiality."[108] If the court is correct in its assertion that not all government-provided services are essential, then it naturally follows that the demand for such services will not be inelastic. Non-essential public services are subject to the same market forces that face private services, most notably consumer pressure for lower prices. This particular market force, when combined with the desire of the public employer to minimize costs, may in fact reduce employee bargaining power. In

---

104. *County Sanitation Dist. II*, 38 Cal. 3d at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431.

105. *Id.* at 576, 699 P.2d at 843, 214 Cal. Rptr. at 432. *See* CAL. GOV'T CODE §§ 3504–3505 (West 1980). Section 3505 of the MMBA grants employee organizations the right to represent their members in employment relations with public agencies. *Id.* § 3505. Section 3504 defines the scope of representation as including wages, hours, and other terms and conditions of employment. *Id.* § 3504.

106. CAL. GOV'T CODE § 3505 (West 1980).

107. *See County Sanitation Dist. II*, 38 Cal. 3d at 577, 699 P.2d at 844, 214 Cal. Rptr. at 433.

108. *Id.*

many instances, a public employer, when faced with a strike situation, may not feel compelled to surrender to union demands because of public pressure against settlement.[109] In these situations, it is the public employees who may feel the need to settle,[110] as they may have more to lose in a prolonged strike situation than does the public employer.[111]

Finally, in examining the argument that the public's health and safety is threatened by public employee strikes, the court again indicated that not every government service is absolutely essential.[112] Many of the functions performed by the public sector overlap with those performed by the private sector.[113] For example, services such as sanitation, transportation, and education are provided by both private and public employees.[114] There is no basis for assuming that the function performed by private sanitation workers is any less important than that performed by public sanitation workers. "[I]t is *the nature of the service provided* which determines its essentiality and the impact of its disruption on the public welfare . . . ."[115] The mere fact that a service is performed by a public employee does not make it essential.

In concluding its analysis, the court considered "the perception that the right to strike, in the public sector as well as the private sector, represents a basic civil liberty."[116] Although the court did not find it necessary to explore the constitutional implications of this case, it did note the close connection between the right to strike and the fundamental right of freedom of association.[117] Regardless of the fact that the right to strike has not been deemed a fundamental right by the United States Supreme Court,[118] it appears unfair to deny this important right

---

109. *See id.* at 579, 699 P.2d at 845, 214 Cal. Rptr. at 434. For example, the federal government was able to withstand the recent air traffic controllers' strike. On August 3, 1981, a strike against the Federal Aviation Administration by members of the Professional Air Traffic Controllers Organization (PATCO) virtually paralyzed airport traffic. Despite the resulting inconvenience and economic loss to the public, President Ronald Reagan refused to meet the striking employees' demands, subsequently discharging those members who refused to return to work. *See* PATCO v. Federal Labor Relations Auth., 685 F.2d 547, 551–52 (D.C. Cir. 1982). It should be noted that the *lack* of pressure by the public to settle the strike may have been in part due to the illegal nature of the strike. *See* 5 U.S.C. § 7311(3) (1982); 18 U.S.C. § 1918(3)–(4) (1982). *See generally* Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983).

110. *See County Sanitation Dist. II*, 38 Cal. 3d at 579, 699 P.2d at 844–45, 214 Cal. Rptr. at 433–34.

111. An obvious detriment to public employees engaged in strike action is lost wages. *Id.* at 578, 699 P.2d at 844, 214 Cal. Rptr. at 433.

112. *Id.* at 579–80, 699 P.2d at 845–46, 214 Cal. Rptr. at 434–35.

113. *Id.* at 579, 699 P.2d at 845, 214 Cal. Rptr. at 434.

114. *Id.*

115. *Id.* at 580, 699 P.2d at 846, 214 Cal. Rptr. at 435.

116. *Id.* at 583, 699 P.2d at 848, 214 Cal. Rptr. at 437.

117. *Id.* at 587–92, 699 P.2d at 851–54, 214 Cal. Rptr. at 440–43.

118. *See supra* note 31 and accompanying text.

to a particular class of persons without strong justification. The analysis provided by the California Supreme Court convincingly supports this conclusion.

We as a nation probably prize freedom above all else. The common-law rule against strikes by public employees provided for a wholesale denial of the freedom of public employees to withhold their labor. Such denial is justified only where it has clearly been established that the public welfare is threatened. By granting public employees a limited right to strike, the California Supreme Court produced a decision worthy of consideration by courts currently advocating the abrogation of the common-law rule.

C. *The Impact of* County Sanitation District

The ruling of the California Supreme Court in *County Sanitation District* should have a powerful impact upon the rights of public employees in the United States. A number of states rely completely upon the common-law rule prohibiting strikes by public employees.[119] Other states statutorily prohibit certain employees from striking,[120] but rely upon the common law[121] to prevent the remainder of their public employees from striking. The California Supreme Court, a well-respected court to which many courts look for guidance, has challenged the validity of the rule upon which these states base their policy. A number of courts are likely to follow the precedent set by this court.

V. CONCLUSION

The California Supreme Court was not faced with an easy decision in *County Sanitation District No. 2 v. Los Angeles County Employees' Association, Local 660.*[122] Both the freedom of the public employee to withhold his or her labor and the freedom of the public to enjoy a healthy, safe community are worthy of protection. While the determination of the rights of public employees may well have been better suited to the legislature, the supreme court was placed in the position of being forced to settle the issue. The court, by rising to this challenge, provided a thoughtful and thorough analysis of the validity of the reasons for the traditional common-law prohibition of public sector strikes. The court concluded that the threat posed to the public by public sector

---

119. *See supra* note 43

120. *See supra* note 42

121. *See, e.g.*, Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); School Dist. No. 351 v. Oneida Educ. Ass'n, 98 Idaho 486, 567 P.2d 830 (1977); Jefferson County Teachers Ass'n v Board of Educ., 463 S.W.2d 627 (Ky. Ct. App. 1970), *cert. denied*, 404 U.S. 865 (1971).

122. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985).

strikes simply was not sufficient justification to warrant a blanket prohibition of public employee strikes, thereby granting public employees a limited right to strike. In so doing, the court struck a balance: it continued to place the safety of the public first, but it significantly increased the freedom of public employees. The California Supreme Court has set a precedent that will most certainly become a beacon in this area of the labor law.

Lori E. Shaw