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Kurt L. Hanslowe

John L. Acierno

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# The Law and Theory of Strikes by Government Employees

*Kurt L. Hanslowe† and John L. Acierno‡*

## INTRODUCTION

The strike is the primary form of labor pressure in a collective bargaining system. The strike as a socio-economic phenomenon, however, has received relatively little systematic analysis. American courts and legislatures have accorded strikes scant legal attention in contrast to the searching constitutional analysis applied to picketing<sup>1</sup> and the detailed statutory treatment given boycotting.<sup>2</sup>

American legal treatment of strikes differs fundamentally from that of Eastern Block socialist countries. American law views the strike primarily as an appropriate aspect of collective bargaining in the private economic sector. Recognition of strikes in the public sector, on the other hand, has been more circumspect. Traditional legal analysis has sought to maintain a sharp distinction between private and public employment. The law treats the private employees' strike as a legitimate aspect of the market or enterprise economy. In contrast, strikes in the public sector are deemed inappropriate because the government is not merely an employer participating in the economy, but is the lawgiver for the economy.

Eastern Block socialist systems, such as Poland's, view all strikes in much the same way as American law regards strikes in the public sector. The strike in such a socialist system is theoretically inappropriate and unnecessary because the socialist economy is built upon principles of cooperation rather than competitive conflict, and all enterprise is in

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† Professor of Law and Professor of Industrial and Labor Relations, Cornell University. B.A. 1947, Yale University; J.D. 1951, Harvard University.

‡ John L. Acierno, third-year student at the Cornell Law School. This article was prepared in somewhat shorter form for submission to the International Labour Law Conference, sponsored by the Institute for State and Law, Polish Academy of Sciences, and held in Warsaw between September 21 and 25, 1981. The entire proceedings of that Conference, including the earlier version of the present article, will appear in *BULLETIN DE DROIT COMPARE DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE*, No. 2, 1982. The present version of the article reflects information acquired at the Warsaw Conference.

<sup>1</sup> *See, e.g.*, *Carey v. Brown*, 447 U.S. 455 (1980); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 345 U.S. 284 (1957).

<sup>2</sup> *See, e.g.*, National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151, 158(b)(4), (7) (1976)). *But see* Kaufman, *Determinants of Strikes*, 35 *INDUS. & LAB. REL. REV.* 473 (1982).

essence public enterprise. Such a system, when functioning perfectly, envisions no exploitation of person by person. Strikes, therefore, can only result from deviations from that norm. Recent labor tensions in Poland led to the drafting of a Trade Unions Law as an attempt to reconcile the principles of a socialist economy with the needs of a collective process gone awry.<sup>3</sup>

The Polish labor relations system, prior to the imposition of martial

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<sup>3</sup> The theoretical difficulties of integrating the strike into a socialist system are well illustrated by the problems encountered in drafting the Trade Unions Law. The law was intended to give unions a "consumption-revindication" (collective bargaining) role going beyond the usual "transmission [of managerial orders]-production" role that unions play pursuant to conventional, Eastern Block, socialist orthodoxy. A "pluralistic" conception of the labor movement was one of the corollaries of the rise of the Solidarity Union. Multiplicity of labor unions is also difficult to integrate with Eastern Block socialist norms. Maria Matey, Head of the Labour Law Section of the Institute for State and Law, and a leading figure in the planning of the Warsaw Labour Law Conference, wrote the following suggestive passages:

The draft law on trade unions accepts collective negotiations as the basic form of operation of trade unions; such negotiations can involve both the settlement of current matters and the conclusion of a variety of "social agreements", collective agreements, and the solution of collective labor conflicts. . . .

As per the draft, should a "collective labor dispute" arise (this is a new term, not found so far in the Polish legislation) both trade unions and the administration [of the enterprise] shall immediately take up negotiations for its solution. If the dispute is not solved in direct negotiations, conciliatory proceedings are provided for, and also the possibility of social arbitration . . . .

As the final measure for solving collective disputes which has [sic] not been solved by any other method, the draft recognizes the the right of trade unions to organize a strike . . . . The definition of strike as formulated in the draft (a strike is the discontinuation of performance of work for the purpose of protection of collective interests of workers and union rights and liberties) excludes strikes of a solely political character which is conform [sic] with trends elsewhere in the world. When passing a strike decision the trade union organ should take into consideration the commensurability of the demand and losses caused by the strike, [and] thus observe nationwide interests.

[There] are different variants regarding the ways of paying compensation for a loss of wage during a legal strike. This compensation has to be paid by the employer. [P]articipation in a strike organized in accordance with provisions of the law shall not be treated a violation of workers' duties. . . . The draft provides for . . . exclusion from the right to strike of certain groups of workers in view of the necessity to safeguard the defensive power of the country, provide the substantial living necessities to the people, ensure normal functioning of the state and economic apparatus, and in view of requirements of transports and communications. The range of those exclusions is still under discussion.

M. MATEY, TRADE UNIONS IN POLAND TODAY: SOCIO-LEGAL PREMISES AND FACTS. Ms. Matey inadvertently reveals the "internal contradictions" of allowing the strikes in a socialist system. Such a system, when functioning perfectly, envisions no exploitation of workers. Strikes, therefore, can only occur because of deviations from that norm. Participants in a legal strike thus are entitled to compensation from the employer. In a socialist system there is a right to work; work is a dignified activity, which it is one's social duty to perform. Hence participation in a lawful strike must be expressly declared not to be a violation of workers' duties to society. Finally, the draft exhorts unions to engage in a sort of market-oriented loss-benefit calculation aimed at measuring the gains sought against the losses likely to be inflicted by proposed strike action.

law in December 1981, was moving toward pragmatic, pluralistic toleration of strikes. Labor relations developments in the public sector in the United States suggest that American law should reevaluate its constitutional and political approach to public sector strikes. This article's purpose is to review the "state of the art" concerning strikes in the United States, and to formulate a framework that places strikes, and especially public sector strikes, into the scheme of American constitutional law and political processes.

## I

TRADITIONAL LEGAL APPROACHES TOWARD PRIVATE  
SECTOR STRIKES

In its early stages, American law restricted labor by treating participation in various forms of union activity under the commodious rubric of criminal conspiracy.<sup>4</sup> Near the turn of the century, criminal sanctions gave way to tort actions, and the tort of intentional infliction of unjustifiable harm governed American labor law development.<sup>5</sup> This theory turned on what constituted economic "justification." Even nonviolent union action, if successful, inescapably inflicted economic harms on those against whom it was directed. A union's liability in tort depended on whether the economic self-interest of the union and its members justified such infliction of harm upon others.

Initially, courts tipped the balance decidedly in favor of the employer. In a series of notable dissenting opinions, however, Justices Holmes<sup>6</sup> and Brandeis<sup>7</sup> recognized that economic pressure by unions constituted a necessary complement to the power of capital, and argued that the interest of the unions and their members justified resultant economic harm to employers.<sup>8</sup> Ultimately, the Supreme Court adopted

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<sup>4</sup> See *Commonwealth v. Pullis*, Mayor's Court of Philadelphia (1806) (reported in 3 J. COMMONS, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1910)).

<sup>5</sup> See *Walker v. Cronin*, 107 Mass. 555 (1871).

<sup>6</sup> *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896) (Holmes, J., dissenting).

<sup>7</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (Brandeis, J., dissenting).

<sup>8</sup> Justice Holmes wrote in 1896:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . .

If it be true that workmen may combine with a view . . . to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that . . . strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day.

this view.<sup>9</sup> In so doing, Chief Justice Taft articulated what Professor Gregory has characterized as the "economic interest approach":<sup>10</sup>

Labor unions are recognized . . . as legal when instituted for mutual help and lawfully carrying out their legitimate objects. . . . They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.<sup>11</sup>

The turn of the century witnessed the emergence of a "civil rights" doctrine<sup>12</sup> even more sympathetic to workers' interests than the economic-interest approach.<sup>13</sup> The civil rights approach entails far-reach-

*Vegeahn v. Guntner*, 167 Mass. at 108, 44 N.E. at 1081 (Holmes, J., dissenting). Similarly, Justice Brandeis wrote in a case involving strikes in support of an unsuccessful primary strike:

As to the rights at common law: Defendants' justification is that of self-interest. They have supported the strike at the employer's factory by a strike elsewhere against its product. They have injured the plaintiff, not maliciously, but in self-defense. They contend that the Duplex Company's refusal to deal with the machinists' union and to observe its standards threatened the interest not only of such union members as were its factory employees, but even more of all members of the several affiliated unions employed by plaintiff's competitors and by others whose more advanced standards the plaintiff was, in reality, attacking. . . . In other words, . . . the contest between the company and the machinists' union involves vitally the interest of every person whose cooperation is sought. May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? Applying common-law principles the answer should, in my opinion, be: Yes, if as matter of fact those who so cooperate have a common interest.

*Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 480-81 (1921) (Brandeis, J., dissenting).

<sup>9</sup> *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1920).

<sup>10</sup> C. GREGORY & H. KATZ, *LABOR AND THE LAW* 82 (3d ed. 1979).

<sup>11</sup> *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. at 209.

<sup>12</sup> See C. GREGORY & H. KATZ, *supra* note 10, at 81-82.

<sup>13</sup> [I]n *National Protective Association v. Cumming* a majority of the court, through Chief Justice Parker, established beyond any doubt the right of a union to sponsor a strike for the closed shop. Briefly he outlined the privilege of any employee to leave his job at will without stating his reasons and his freedom to disclose that he was quitting because he did not wish to work alongside of certain other workmen. If the employer wished to discharge these other workmen as the price of retaining the employee about to quit, he was at liberty to do so. "The same rule," he said "applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to

ing implications: it suggests that organized groups of workers possess a fundamental civil right concertedly to withhold their services if satisfactory terms cannot be agreed upon. The civil rights approach asserts that, absent some identifiable wrong (such as breach of contract, inducement of breach of contract, or other tort going beyond infliction of merely competitive injury, or a separate crime), the mere concerted refusal to work—the strike—stands irrespective of purpose on an equal footing with the individual's liberty to quit.<sup>14</sup> The idea of such a civil right or liberty not only has a strikingly absolute quality, but also creates constitutional reverberations that the law has yet to reveal.

Although the civil rights approach, suggesting constitutional underpinnings for the right to strike, enjoyed some support, the present view is that stated by Mr. Justice Brandeis when he declared that “[n]either the common law, nor the [Constitution], confers the absolute right to strike.”<sup>15</sup> Consequently, protection of the economic strike in the private sector has been largely statutory and somewhat circumscribed, and the courts have not construed the constitution to give even private sector workers an absolute right to strike.

## II

### TRADITIONAL LEGAL APPROACH TOWARD PUBLIC SECTOR STRIKES

American law regards public sector strikes in a manner substantially different from the way it currently views private sector strikes. A strike by employees of the United States government is still a crime.<sup>16</sup>

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stop. *The reason may no more be demanded, as a right, of the organization than of an individual, but if they elect to state the reason their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society. And if the conduct of the members of an organization is legal in itself, it does not become illegal because the organization directs one of its members to state the reason for its conduct.*”

*Id.* at 77 (emphasis in original) (quoting *National Protective Ass'n v. Cumming*, 170 N.Y. 315, 63 N.E. 369 (1902)).

<sup>14</sup> *Id.* at 82. The civil rights theory also has implications for the public sector, because the prevailing public strike prohibitions rest solely on the illegality of the *concerted* withholding of labor, and not on any other form of illegality, such as violence or breach of contract.

<sup>15</sup> *Dorcy v. Kansas*, 272 U.S. 306, 311 (1926); *see infra* note 75. Brandeis's “economic interest” approach presumably influenced his view.

<sup>16</sup> Employees of the federal government are statutorily prohibited from striking under 5 U.S.C. § 7311 (1976), which prohibits an individual from holding a federal position if he “participates in a strike, or asserts the right to strike against the Government of the United States . . . .” In *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971), the court upheld the constitutionality of the strike prohibitions, yet declared unconstitutional the “wording insofar as it inhibits the *assertion* of the right to strike.” *Id.* at 881 (emphasis in original). In 1947, Congress originally denied federal employees the right to strike in § 305 of the Labor-Management Relations Act (Taft-Hartley Act), ch. 120, 61 Stat. 136 (1947). This Act was repealed and ultimately replaced by § 7311.

Strikes by state employees are illegal either by statute<sup>17</sup> or at common law<sup>18</sup> in all but eight states.<sup>19</sup>

The Supreme Court recognized the distinction between private and public sector strikes in *United States v. United Mine Workers*.<sup>20</sup> Pursuant to emergency powers under the War Labor Disputes Act,<sup>21</sup> the United States government intervened in a private labor dispute by "seizing" the affected coal mines, thus officially becoming the employer. The government called upon the Court to determine the applicability of the Norris-LaGuardia Anti-Injunction Act<sup>22</sup> to an intervening public employer. The Court held the Anti-Injunction Act inapplicable, declaring that "[t]here is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges [in this instance, securing injunctive relief] will not be applied to the sovereign without express words to that effect."<sup>23</sup> The Court thus approved the issuance of an injunction against the striking union, a remedy that would not have been available had the employers been private enterprises. The *United*

<sup>17</sup> See e.g., FLA. CONST. art. 1, § 6 (all public employees); ALA. CODE § 11-43-143 (1975) (firemen); ALASKA STAT. § 23.40.200 (1962) (police, fire protection employees, hospital employees, jail, prison, and other correctional institution employees); CAL. LAB. CODE § 1962 (West 1971) (granting firefighters right to organize and join labor organizations but denying them right to strike); CONN. GEN. STAT. ANN. §§ 7-475, 10-153e (West Supp. 1982) (municipal employees and teachers); DEL. CODE ANN. tit. 19, § 1312 (1979) (all public employees); D.C. CODE ENCYCL. §§ 4-125, 4-407 (West 1966) (policemen and firemen); HAWAII REV. STAT. § 89-12(a) (1976 & Supp. 1981) (any public employce not included in appropriate bargaining unit); IDAHO CODE § 44-1811 (1977) (firefighters); IOWA CODE ANN. § 20112 (West 1978) (all public employees); MD. EDUC. CODE ANN. § 6-410 (1978) (public school teachers); MASS. ANN. LAWS ch. 150E, § 9A (Michie/Law. Co-op. 1976) (all public employees or employee organization); MO. REV. STAT. § 105.530 (1978) (all public employees); NEV. REV. STAT. § 288.230 (1979) (state and local government employees); N.H. REV. STAT. ANN. § 273-A:13 (1977) (public employees); N.Y. CIV. SERV. LAW § 210 (McKinney 1973) (public employees or employee organizations); OHIO REV. CODE ANN. § 4117.02 (Page 1980) (all public employees); OR. REV. STAT. 243.736 (1979) (policemen, firemen, guards at correctional institutions and mental hospitals); PA. STAT. ANN. tit. 43, § 215.2 (Purdon 1964) (all public employees); R.I. GEN. LAWS § 3-11-6 (1969) (firefighters and policemen); TEX. REV. CIV. STAT. ANN. art. 5154c(3) (Vernon 1971) (all public employees); VT. STAT. ANN. tit. 21, § 1730 (1978) (strikes that will endanger health, safety or welfare of public); VA. CODE § 40.1-54.2 (1980) (hospital employees); WASH. REV. CODE ANN. § 41.56.120 (1979) (all public employees); WIS. STAT. ANN. § 111.89 (West 1974 & Supp. 1981) (all public employees); see also Cole, *Public Employee Strikes—The Law and Possible Alternatives*, 11 CUM. L. REV. 315, 316 n.16 (1980).

<sup>18</sup> See, e.g., *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969); *Norwalk Teachers Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Anderson Fed'n of Teachers Local 519 v. School City of Anderson*, 252 Ind. 558, 254 N.E.2d 329, cert. denied, 339 U.S. 928 (1970); *Board of Educ. v. Public School Employees' Union*, 233 Minn. 144, 45 N.W.2d 797 (1951); *Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 131 A.2d 590 (1957); see also Annot. 37 A.L.R.3d 1147 (1971) (comprehensive list of cases arranged by state).

<sup>19</sup> See *infra* Appendix.

<sup>20</sup> 330 U.S. 258 (1947).

<sup>21</sup> Ch. 144, 57 Stat. 163 (1943).

<sup>22</sup> Ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. § 101-15 (1976)).

<sup>23</sup> 330 U.S. at 272.

*Mine Workers* opinion, based on the purpose of the Norris-LaGuardia Act, implied that the labor policies pertinent to the private sector had no place in government-labor relations:

[The Norris-LaGuardia Act was designed] to contribute to the worker's "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor . . . in the designation of such representatives . . . for the purpose of collective bargaining . . ." [T]hese considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.<sup>24</sup>

*United Mine Workers* illustrates the American legal consequences of "socializing" an enterprise. The act of government operation, rather than the nature of the enterprise, controls the outcome. The government's "seizure" of the coal mines because of the labor dispute transformed their operation from a private to a public enterprise, changing nothing about the mines' function, but radically altering the rights of the miners. The government subsequently returned the mines to private hands, presumably reestablishing the former legal order. The law thus turns upon a dubious distinction between the public and private sectors.

### III

#### THE RATIONALE OF PROHIBITING PUBLIC SECTOR STRIKES

Two related premises furnish the foundation for the position that public sector strikes (and, indeed, in the view of some, all public sector bargaining) are incompatible with the proper functioning of government. The first is the doctrine of the "government as sovereign." The second premise is that public sector strikes distort democratic political processes. Both are reflected in the predominant constitutional doctrine that denies constitutional protection to striking public employees. In *Norwalk Teachers Association v. Board of Education*, the Connecticut Supreme Court espoused the sovereignty argument.<sup>25</sup> The court declared:

In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely differ-

<sup>24</sup> *Id.* at 274 (emphasis added).

<sup>25</sup> 138 Conn. 269, 83 A.2d 482 (1951).

ent from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare.<sup>26</sup>

On occasion, courts have even deemed strikes by public employees to be revolutionary uprisings to subvert government. According to some courts, public sector strikes portend anarchy and chaos, and render individual rights meaningless.<sup>27</sup> Several American presidents have echoed these sentiments.<sup>28</sup> In perhaps the most famous pronouncement of the sovereignty argument, President Roosevelt stated:

Militant tactics have no place in the functions of any organization of Government employees. . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.<sup>29</sup>

In short, the sovereignty argument asserts that government is the embodiment of the American people, and that those entrusted to carry out

<sup>26</sup> *Id.* at 276, 83 A.2d at 485.

<sup>27</sup> In *City of Cleveland v. Division 268 of Amalgamated Ass'n*, 41 Ohio Op. 236, 239, 90 N.E.2d 711, 715 (1949), the court stated that

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

In *Board of Educ. v. Shanker*, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1967), Justice E. Nunez espoused a similar viewpoint. He quoted Governor Dewey with approval: "Every liberty enjoyed in this nation exists because it is protected by a government which functions uninterruptedly. The paralysis of any portion of government could quickly lead to the paralysis of all society. Paralysis of government is anarchy and in anarchy liberties become useless." *Id.* at 944, 283 N.Y.S.2d at 552.

<sup>28</sup> Commenting on Boston police strike, Calvin Coolidge asserted that "[t]here is no right to strike against public safety by anybody anywhere at any time" (quoted in *Norwalk Teachers Ass'n v. Board of Educ.*, 138 Conn. 269, 273, 83 A.2d 482, 484 (1951)). Woodrow Wilson, commenting on the same strike, stated that the strike is "an intolerable crime against civilization" (quoted in *id.* at 273, 83 A.2d at 484).

<sup>29</sup> *Id.* at 273-74, 83 A.2d at 484 (quoting letter from President Roosevelt to the president of the National Federation of Federal Employees (Aug. 16, 1937)). Similarly, Woodrow Wilson stated:

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

Statement of President Woodrow Wilson, address to Congress (Dec. 2, 1919), *reprinted in* 59 CONG. REC. 31 (1919).

its functions may not impede it.<sup>30</sup>

The second premise underlying the prohibition against public sector strikes—the notion that such strikes distort the “democratic process”—is a refinement of the sovereignty argument. Proponents of this view argue that

if unions are able to withhold labor—to strike—as well as to employ the usual methods of political pressure they may possess a disproportionate share of effective powers in the process of decision. Collective bargaining would then be so effective a pressure as to skew the results of the “‘normal’ American political process.”<sup>31</sup>

The 1966 Taylor Committee of New York<sup>32</sup> articulated a similar view. In its report, the Committee argued that in the public sector, where democratic processes rather than economic power determine the character of employment agreements, the right to strike conflicts with orderly democratic function.<sup>33</sup> The Committee concluded

that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant).<sup>34</sup>

The Committee determined that the right to strike in the private sector entails essentially economic factors and is limited by market constraints,<sup>35</sup> whereas in the public sector “the costs [are] economic only in a very narrow sense and are on the whole political.”<sup>36</sup> Thus from this perspective, economic constraints in the public sector are attenuated at best.

This argument, which accepts a private right to strike as consistent with economic theory but rejects a similar public right as subversive of the “‘normal’ American political process,” is based on a comparison of the benefits of a legal public strike and the costs that it would impose on the public employer and on society. Proponents of the democratic-

<sup>30</sup> The court in *Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 510, 131 A.2d 59, 61 (1957), summarized the sovereignty argument as follows: “[L]ike the common law doctrine of the State’s immunity from liability for any negligence of its agents or servants while engaged in a governmental function . . . the underlying basis for the policy against strikes by public employees is the doctrine that governmental functions may not be impeded.”

<sup>31</sup> Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1123 (1969).

<sup>32</sup> NEW YORK GOVERNOR’S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT (1966). The Committee Chairman was George W. Taylor.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 8-11.

<sup>36</sup> Wellington & Winter, *supra* note 31, at 1117.

process argument contend that public sector strikes would engender few benefits. The analysis asserts that public employers are less likely than private enterprises to exploit their employees because the public employer must pay wages that are competitive with private sector wages.

Furthermore, according to the argument, employer monopsony is apt to be weaker in the public sector because the private sector often provides substitute or competing employment opportunities.<sup>37</sup> In addition, whereas low pay in certain private sector areas is viewed as reflecting a misallocation of resources resulting from employer monopsony power, low pay in a public sector job is seen as a consequence of political decisions "resulting from the pressure of special interests or from a desire to promote the general welfare." In employment "governmental decisions are properly political decisions, and economic considerations are but one criterion among many."<sup>38</sup>

The "democratic process" argument not only sees few benefits in public sector strikes, but also views the costs of granting a right to strike to public employees as considerable. Arguably a right to strike would give public sector employees a weapon more powerful than the strike weapon that their private counterparts wield.

In the private sector, the risk that excessive demands will lead to lowered employment theoretically inhibits unions from pushing wages above a reasonable equilibrium. The "democratic process" argument contends that because public sector employment entails "essential" services,<sup>39</sup> inelastic demands, and few close substitutes, no such natural balance occurs in the public sector. Sovereign employers faced with a public strike, therefore, must either increase taxes or shift money from one government service to another.<sup>40</sup> And because the tax structure af-

<sup>37</sup> Wellington and Winter maintain that two factors limit the monopsony power of the public enterprise:

First, to the extent that most public employees work in urban areas, as they probably do, there may often be a number of substitutable and competing private and public employers in the labor market. When that is the case, there can be little monopsony power. Second, even if public employers occasionally have monopsony power, governmental policy is determined only in part by economic criteria, and there is no assurance, as there is in the private sector where the profit motive prevails, that the power will be exploited.

*Id.* at 1120 (footnotes omitted).

<sup>38</sup> *Id.* at 1116.

<sup>39</sup> Wellington & Winter, *supra* note 31, at 1119-23.

<sup>40</sup> [T]he ability [of] . . . government to accomplish such a change is limited not only by union pressure, but also by the pressure of other affected interest groups in the community. Political considerations, therefore, may cause either no reduction in employment or services, or a reduction in an area other than that in which the union members work. Both the political power exerted by the beneficiaries of the services, who are also voters, and the power of the public employee union as a labor organization, then, combine to create great pressure on political leaders either to seek new funds or to reduce [services].

*Id.* at 1121.

fects each segment of the population differently—a function of the complexity of the tax structure and the limited ability of a particular government to impose certain taxes—the public strike allegedly forces the governmental employer to redistribute income rather than allocate resources.<sup>41</sup> The argument then assumes that questions of income redistribution “are essentially political questions,”<sup>42</sup> which leads to the conclusion that a public sector strike will distort the political decisionmaking process.<sup>43</sup>

American courts applying these considerations have generally held that the strike, as an economic phenomenon, is subject to reasonable classification and regulation, and furthermore, that an absolute prohibition of public sector strikes encounters no constitutional obstacles. Although courts have recognized that the first amendment guarantees public employees the rights of association and free speech, they have consistently upheld prohibitions against public sector strikes.<sup>44</sup> Employees may unionize in the public sector, and even advocate a right of public employees to strike, but they

cannot go further and by concert of action—by striking—compel

<sup>41</sup> *Id.* at 1122.

<sup>42</sup> *Id.*

<sup>43</sup> This point of view is vigorously asserted by Robert S. Summers, who maintains that not just the strike, but all compulsory public sector bargaining, is at loggerheads with constitutional democracy and its processes. He has summarized his argument as follows:

The conflict between political democracy and public sector collective bargaining manifests itself in a variety of important dimensions. First, laws providing for such bargaining divide governmental authority to make and administer law and budgets, and redistribute a share of this authority to private entities—mainly unions—who are not elected by or accountable to the public. This diminishes democracy, for it curtails the extent to which the public, through its elective and appointive representatives, determines the nature and manner of conferral of such government benefits as public school education, police and fire protection, and the like. Second, bargaining statutes restructure processes for the exercise of public authority. They substitute collective bargaining for democratic procedures securing the public an opportunity to participate in ongoing public law making and budget constructing processes. This, too diminishes democracy, for it eliminates or reduces opportunities for public participation in government activit[ies]. . . . Third, bargaining laws (with and without the right to strike) alter the outcomes of public processes for making and administering laws and budgets. . . . Fourth, public sector bargaining eliminates or reduces public accountability of participants for their share in the foregoing processes and outcomes. Unions cannot be voted out of office. . . .

The essentially nondemocratic and antidemocratic character of public sector bargaining is, in substantial measure, inherent. It can be seen merely by reflecting on the various conflicts between the requirements of political democracy and the intrinsic demands of public sector collective bargaining. . . . In sum, public sector bargaining laws are not good for society.

Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1980 GOV'T UNION REV. 5-6.

<sup>44</sup> A typical statement of this view was that of the court in *United Steelworkers v. University of Ala.*, 430 F. Supp. 996, 1001 (N.D. Ala. 1977), *aff'd*, 599 F.2d 56 (5th Cir. 1979): “Employees of a public employer have no constitutional right to strike, and the termination of employees for participation in such a strike does not infringe upon their First Amendment rights of association and free speech, or operate to deny them equal protection of the law.”

their public employer to recognize or bargain with a union. When they do go further and by concert of action—striking—seek to force their public employer to recognize or bargain with a union they have gone beyond the outer limits of their constitutional protections of free expression and association, and they are not constitutionally insulated from being fired or otherwise penalized . . . .<sup>45</sup>

The ban on public sector strikes has also withstood attack under the “involuntary servitude” provision of the thirteenth amendment and similar state constitutional provisions.<sup>46</sup> Similarly, courts have rejected arguments that the ban on public strikes denies public employees equal protection of the laws because they do not enjoy the same right to strike as do their private sector counterparts. In the leading case of *United Federation of Postal Clerks v. Blount*,<sup>47</sup> the court stated:

[I]t is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons. . . . The Equal Protection Clause . . . does not forbid all discrimination. Where fundamental rights are not involved, a particular classification does not violate the Equal Protection Clause if it is not “arbitrary” or “irrational” i.e. “if any state of facts reasonably may be conceived to justify it.”<sup>48</sup>

#### IV

#### A TENTATIVE CASE FOR THE RIGHT TO STRIKE AGAINST THE GOVERNMENT

In the face of the rather overwhelming position to the contrary, constructing a case in support of a right to strike by public employees poses a formidable challenge. One must remember, however, that the legitimation of private sector unionism evolved against strong opposition. Initially, the law spurned unions as illegal—indeed criminal. Their

<sup>45</sup> *Johnson v. City of Albany*, 413 F. Supp. 782, 797 (M.D. Ga. 1976) (citations omitted).

<sup>46</sup> In *Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instructions*, 214 So. 2d. 34 (Fla. 1968), the Supreme Court of Florida ruled that an injunction against striking teachers was not a violation of the state or federal involuntary servitude provision:

We are not here confronted by an arbitrary mandate to compel performance of personal service against the will of the employee. These people were simply told that they had contracted with the government and that they could, if they wished, terminate the contract legally or illegally, and suffer the results thereof. They could not, however, strike against the government and retain the benefits of their contract positions.

*Id.* at 37; see also *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968).

<sup>47</sup> 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

<sup>48</sup> *Id.* at 883 (citations omitted).

initial legitimation through self-help was followed by reluctant toleration, increased statutory protection and, eventually, by some degree of constitutional recognition.

The first of the American criminal labor conspiracy cases is reminiscent of the law's present attitude toward strikes by public employees. In the *Philadelphia Cordwainers*<sup>49</sup> case, the court believed that the workers' combination interfered with the "natural" laws of the market: "[i]n every point of view this [union activity] is pregnant with public mischief and private injury . . . . [The laws of the union] are not the laws of Pennsylvania. [Is the public then to have,] besides our state legislature, a new legislature consisting of journeymen shoemakers?"<sup>50</sup> The holding has a familiar ring. Just as the private sector union was said to interfere with the "natural laws" of the market, public sector unions are today said to interfere with "normal" political processes through economic coercion. The private sector union was said to be a law unto itself. Public sector unions are said to usurp from the government parts of the latter's law-making authority.

Despite early admonitions against private sector unionism, legislatures eventually enacted statutes securing the rights of organization and collective bargaining, and the courts upheld their constitutionality.<sup>51</sup>

<sup>49</sup> *Commonwealth v. Pullis*, Mayor's Court of Philadelphia 1806, reprinted in 3 J. COMMONS, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1910).

<sup>50</sup> *Nelles, The First American Labor Case*, 41 YALE L.J. 165, 190 (1931) (quoting Recorder Moses Levy, who presided in *Commonwealth v. Pullis*).

<sup>51</sup> The United States Supreme Court, through Chief Justice Hughes, declared with respect to the Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. § 151 (1976)):

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

*Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930) (citations omitted). Seven years later, Chief Justice Hughes, again writing for the Supreme Court, said with respect to the National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1976)):

[T]he statute . . . safeguard[s] the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

*That is a fundamental right.* Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.

*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (emphasis added).

Similar protections have been extended to public sector bargaining,<sup>52</sup> except that the protected behavior generally excludes the right to strike.<sup>53</sup> A number of considerations, however, call into question the continuing practicality of excluding public strikes: the experience of jurisdictions that permit public strikes; the demonstrated market restraints on and inessentiality of many government services; and the legitimacy of using economic influence in the political arena.

#### A. *Statutory Recognition of a Public Employee's Right to Strike*

Arguments that public strikes are incompatible with democratic process and the Constitution lose some vitality in the face of the significant number of jurisdictions that recognize a right to strike in the public sector. Eight states have granted some of their public employees a right to strike.<sup>54</sup> Typically these statutes permit public sector strikes, unless such strikes endanger the public health, safety, or welfare. The statutes generally prohibit strikes by police and fire-protection employees, employees in correctional facilities, and those in health-care institutions. In some instances, statutes provide binding arbitration to resolve certain disputes for which strikes are proscribed.<sup>55</sup> Thus, the public sector strike has begun to achieve some degree of legitimacy, despite the strong opposition of critics.

The rationale of this public sector strike recognition undercuts the premises relied upon by strike-ban advocates. In advocating public employees' limited right to strike, the Governor's Commission concluded that:

The collective bargaining process will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employe that there are limits to the hardships that he can impose.<sup>56</sup>

#### B. *Market Restraints and Nonessential Services in the Public Sector*

Burton and Krider's critical analysis of public sector market con-

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<sup>52</sup> The right of federal employees to bargain collectively was initially authorized in 1962 by Executive Order 10988. In 1969, Executive Order 10988 was reissued and modified by Executive Order 11491. In 1978, the provisions of Executive Order 11491 were, to a very significant extent, codified as Title VII of the Civil Service Reform Act of 1978. 5 U.S.C. § 7101 *et seq.* (1978).

H. EDWARDS, R. CLARK & C. CRAVER, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 259 (2d ed. 1979).

<sup>53</sup> See generally Annot., 37 A.L.R. 3d 1147 (1970).

<sup>54</sup> See *infra* Appendix.

<sup>55</sup> See *infra* notes 85, 91-93 and accompanying text.

<sup>56</sup> GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYEE LAW OF PENNSYLVANIA, REPORT AND RECOMMENDATIONS, reprinted in 251 GOV'T EMPL. REL. REP. (BNA) E-1, E-3 (1968) [hereinafter cited as PENNSYLVANIA REPORT].

straints further undermines the conservative wisdom of strike-ban proponents.<sup>57</sup> In rebuttal to the arguments of Wellington and Winter<sup>58</sup> and the Taylor Committee,<sup>59</sup> Burton and Krider maintain that economic constraints in the public sector limit the effectiveness of the public sector strike weapon, and thus should enable public officials to resist excessive demands:

First, wages lost due to strikes are as important to public employees as they are to employees in the private sector. Second, the public's concern over increasing tax rates may prevent the decision-making process from being dominated by political instead of economic considerations. . . . A third and related economic constraint arises from such services as water, sewage, and, in some instances, sanitation, where explicit prices are charged. Even if representatives of groups other than employees and the employer do not enter the bargaining process, both union and local government are aware of the economic implications of bargaining which leads to higher prices which are clearly visible to the public. A fourth economic constraint on employees exists in those services where subcontracting to the private sector is a realistic alternative.<sup>60</sup>

The assumption that services rendered by public employees are essential underlies the "lack of market constraints" argument.<sup>61</sup> Former Secretary of Labor Willard Wirtz asserted that "[e]very governmental function is essential in the broadest term. If it weren't the government shouldn't be doing it."<sup>62</sup> Under a stringent test of essentiality, the Wirtz

<sup>57</sup> Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970).

<sup>58</sup> See *supra* notes 31-43 and accompanying text.

<sup>59</sup> See *supra* notes 32-36 and accompanying text.

<sup>60</sup> Burton & Krider, *supra* note 57, at 425.

<sup>61</sup> See *supra* notes 39-43 and accompanying text.

<sup>62</sup> Address by Willard W. Wirtz, 16th International Convention of American Federation of State, County and Municipal Employees (Apr. 1966) (quoted in K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 111 (1967)). Wirtz commented on the essentiality of public sector employees:

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

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

formula would require a reduction of activities in proportions so drastic as to give pause even to the most devoted conservative. Perhaps in a market economy organized along classical lines, in which the government did nothing but maintain the peace and enforce contracts, the Wirtz statement would be defensible. In our complex contemporary industrial state, however, it is unrealistic. Public services vary as to essentiality; many privately-operated services are more essential than public ones. In many categories of employment, among the largest of which is education, public and private activity substantially overlap.<sup>63</sup>

Recently, the Supreme Court implicitly departed from its traditional equation of public ownership of an industry with the essentiality of that industry. In *United Transportation Union v. Long Island Railroad*,<sup>64</sup> the Court held that employees of a formerly-private railroad recently acquired by a governmental entity retained their limited right to strike under the Railway Labor Act. The Court found that the public acquisition did not change the character of the service provided by the railroad, and that the supremacy clause required continued application of federal labor law to the socialized enterprise:

Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.<sup>65</sup>

Under *United Transportation Union*, the public railroad employees continued to enjoy a right to strike notwithstanding their public employment status. Although its basis in the supremacy clause limits its effect on labor law, the case provides insight into the Court's changing view of the essentiality of public services. In *United Mineworkers*, the government's

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<sup>63</sup> In a dissenting opinion, Chief Justice DeBruler of Indiana recognized that the source of funding and management of service enterprises is irrelevant to the essentiality of the 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 school teachers. The form of ownership and management of the enterprise does not determine the amount of disruption caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a political and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector.

It seems obvious to me that a strike by some private employees would be far more disruptive of the society than [a strike by certain public employees].  
*Anderson Fed'n of Teachers Local 519 v. School City of Anderson*, 252 Ind. 558, 569, 251 N.E.2d 15, 21 (1969) (DeBruler, C.J., dissenting) (paragraph headings omitted).

<sup>64</sup> 102 S. Ct. 1349 (1982).

<sup>65</sup> *Id.* at 1355.

seizure of the coal mines rendered those enterprises public services, and changed the rights of the miners despite the fact that the mines' function remained the same.<sup>66</sup> In *United Transportation Union*, however, the court recognized that the circumstance of public intervention need not necessarily alter the rights of employees. The Court implicitly held that the railroad became no more essential after its public acquisition than it was when privately operated. The case thus represents a significant departure from the Court's earlier holding that a service becomes essential when it comes under government control.

The absence of an unavoidable nexus between public services and essentiality undercuts the argument that public officials will be compelled to settle strikes quickly and at any cost. Burton and Krider maintain that because the essentiality of every public service varies, public officials will not necessarily be pressured to settle every strike. The pressure to settle will depend on the essentiality of the service.<sup>67</sup> The case of the air-traffic controllers' strike surely demonstrates governmental ability to hold the line firmly against a strike for a considerable period, even in the face of substantial inconvenience.<sup>68</sup> Indeed, rather paradoxically, the government's resourcefulness and resolve manifested in the air-controller case tends to undercut the claim that the essentiality of the particular public service involved necessitates the imposition of the absolute strike ban in the first place!

The proponents of the public strike ban also fail to consider public sentiment toward a given strike. They assume that the public will push blindly for the resolution of all strikes at all costs. Public sentiment toward a strike, however, may limit the pressure felt by political leaders, and thereby reduce the strike's effect. In fact, the Pennsylvania Governor's Commission Report<sup>69</sup> emphasized public sentiment toward strikes as an important reason to *grant* a limited right to strike:

[T]he limitations on the right to strike which we propose . . . will appeal to the general public as so much fairer than a general ban on strikes 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 valve that will in fact prevent strikes.*<sup>70</sup>

The Commission thus believed that a limited right to strike would actually relieve political pressures on public officials to settle quickly those strikes that remain illegal. Thus, "public officials are, to some de-

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<sup>66</sup> See *supra* notes 20-24.

<sup>67</sup> Burton & Krider, *supra* note 57, at 427.

<sup>68</sup> See generally *United States v. Professional Air Traffic Controllers*, 653 F.2d 1134 (7th Cir.), *cert. denied*, 454 U.S. 1003 (1981).

<sup>69</sup> PENNSYLVANIA REPORT, *supra* note 56.

<sup>70</sup> *Id.* at E-3 (emphasis in original).

gree, able to accept long strikes. The ability of governments to so choose indicates that political pressures generated by strikes are not so strong as to undesirably distort the entire decision-making process of government."<sup>71</sup>

### C. *Public Sector Bargaining as an Economic Process*

The strike-ban argument distinguishes between political and economic forms of influence. This dominant view of the American democratic process deems political pressure legitimate and economic pressure heretical.<sup>72</sup> Burton and Krider respond that economic pressure is as legitimate as political influence, and that there are no fundamental differences between them. Indeed, economic influence is actually a form of political influence:<sup>73</sup> both seek to influence executive and legislative policies, and to distinguish between them is misplaced.<sup>74</sup>

Viewing public sector bargaining as essentially an economic process limits its political dimensions, either by blurring the line between the private (economic) and the public (political) sector, or by equating the two. Ironically, by subjecting democratic legal processes to an orthodox economic analysis, the Burton and Krider approach produces the unorthodox advocacy of public sector strikes.<sup>75</sup> Furthermore, as the market economy deviates from its pure, classical model and increasingly becomes a mixed and pluralistic one, the case for public strikes strengthens. Once the functional line between public and private enterprise becomes blurred, a corresponding blurring occurs between political and economic activity, rendering the absolute prohibition of all public sector strikes difficult to defend. The deviation of the American system from

<sup>71</sup> Burton & Krider, *supra* note 57, at 427-28.

<sup>72</sup> *See id.* at 429.

<sup>73</sup> *Id.* at 428-30.

<sup>74</sup> [E]ven assuming it is possible to operationally distinguish economic power and political power, a rationale for utilizing the distinction must be provided. Such a rationale would have to distinguish between the categories either on the basis of characteristics inherent in them as a means of action or on the basis of the ends to which the means are directed. Surely an analysis of ends does not provide a meaningful distinction. The objectives of groups using economic pressure are of the same character as those of groups using political pressure—both seek to influence executive and legislative determinations such as the allocation of funds and the tax rate. . . .

If the normative distinction between economic and political power is based . . . on the nature of the means, our skepticism remains undiminished. . . . [P]olitical pressures as opposed to economic pressures, cannot *as a class* be considered more desirable.

. . . [P]erfectly legal forms of political pressure have no automatic superiority over economic pressure.

*Id.* at 430-31.

<sup>75</sup> Indeed, consider the implications of "deregulation" for the permissibility of public sector strikes. One might well ask why, if unregulated organized economic activity is, generally speaking, a *desiratum*, the same is not also true of organized activity of public employees, including air controllers.

classical economic models and the corresponding reevaluation of public strike prohibitions resemble the developments in Poland prior to the military crackdown, albeit derived from opposite points of the ideological spectrum.

Ironically, the conservative argument that public sector bargaining and striking is undemocratic (because government activity is *ex definitione* in the public interest) closely parallels the socialist view that striking by workers is antisocial—indeed revisionist and reactionary—conduct in a system operated for the benefit of all. Deviations from pure models confront both views. The argument for the public sector strike in a capitalist society grows stronger with the growing disparity between reality and the classical ideal of the pure, perfectly competitive, private market economy. Similarly, the case for the strike in a socialist system grows stronger as reality increasingly deviates from the socialist ideal.<sup>76</sup>

The traditional American ban against public sector strikes fails to recognize the artificial distinctions drawn between the public and the private sectors, and between economic and political tactics. Because the traditional arguments advanced to justify the public strike prohibition ignore the realities of current public sector employment, some adjustment of American legal treatment of public strikes is in order. Courts and legislatures should consider at least limited protection for public sector strikes. Furthermore, any constitutional protection extended to strikes must to some extent encompass public strikes as well.

#### D. *Constitutional Protection of Public Bargaining and Strikes*

The right to unionize is a fundamental right of employees that has been extended to public employees by statute and through constitutional adjudication.<sup>77</sup> The right of public employees “to organize collec-

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<sup>76</sup> An awkward tension emerges between economic dogma and political democracy. Neither pure market economics nor perfect socialism permits democratic political decisions that promote policies incompatible with the prevailing economic order. Classical market economists regard protectionist, anti-market political decisions as gravely unwise, if not intolerable. The Polish case demonstrates that an orthodox Communist regime will not tolerate developments—whether economic, social, or political—that run counter to its orthodoxy. The dogmatics of economies seem excessively doctrinaire.

<sup>77</sup> *American Fed'n of State, County & Municipal Employees v. Woodward*, 406 F.2d 137, 140 (8th Cir. 1969) (“[n]o paramount public interest of the State of Nebraska or the City of North Platte warranted limiting the plaintiffs’ right to freedom of association. To the contrary, it is the public policy of Nebraska that employment should not be denied on the basis of union membership.”); *McLaughlin v. Tilendis*, 398 F.2d 287, 288 (7th Cir. 1968) (“It is settled that teachers have the right of free association, and unjustified interference with teachers’ associational freedom violates the Due Process clause of the Fourteenth Amendment.”); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969) (“[T]he firemen of the City of Charlotte are granted the right of free association by the First and Fourteenth Amendments of the United States Constitution; that right of association includes the right to form and join a labor union . . . .”); *see also United Fed’n of Postal Clerks v. Blount*, 325 F. Supp. 879, 883 (D.D.C.), *aff’d*, 404 U.S. 802 (1971).

tively and to select representatives for the purpose of collective bargaining" has been declared to be "fundamental and constitutionally protected."<sup>78</sup> A right to unionize, however, means little unless it receives constitutional protection in connection with its principal purpose—collective bargaining. If such bargaining is to be meaningful and more than empty talk, employees acting in concert must be able to apply pressure or effectively threaten its application. The right to strike has not yet been elevated to such a constitutional position. Indeed, the prevailing view is that

[t]he right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a "fundamental right" and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act.<sup>79</sup>

Thoughtful judges, however, have questioned the wisdom and propriety of permitting the absolute prohibition of the public sector strike. In a concurring opinion in *United Federation of Postal Workers v. Blount*,<sup>80</sup> Judge Skelly Wright declared that the right to strike is so intimately related to the recognized fundamental right to organize that it should receive some degree of constitutional protection in both the private and public sectors.

If the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness. That fact is not irrelevant to the constitutional calculations. Indeed, in several decisions, the Supreme Court has held that the First Amendment right of association is at least concerned with essential organizational activities which give the particular association life and promote its fundamental purposes. . . . I do not suggest that the right to strike is co-equal with the right to form labor organizations. . . . But I do believe that the right to strike is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or "compelling" justification.<sup>81</sup>

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<sup>78</sup> 325 F. Supp. at 883.

<sup>79</sup> *International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259 (1949) (citation omitted).

<sup>80</sup> 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

<sup>81</sup> *Id.* at 885. Judge Skelley Wright also voiced skepticism about the essentiality argument advanced to justify the public-strike ban:

Hence the real question here, as I see it, is to determine whether there is such justification for denying federal employees a right which is granted to other employees of private business. Plaintiff's arguments that not all federal

In a dissenting opinion, Chief Justice DeBruler of the Indiana Supreme Court also recognized the arbitrariness of the distinction commonly drawn between public and private sector strikes, and contested the "per se rule against strikes by public employees."<sup>82</sup> Instead, he believed that each public sector strike should be evaluated in the context of its effect on the community: "If some strikes by workers within the category of public employees would not appreciably disrupt the community or create anarchy, then there is no justification for treating those public employees differently than private employees . . . ."<sup>83</sup>

Chief Justice Roberts of the Rhode Island Supreme Court echoed similar sentiments in a powerful and compelling statement favoring the enhancement of public sector bargaining power.<sup>84</sup> He called for mandatory alternatives to the strike for public employees who perform

services are "essential" and that some privately provided services are no less "essential" casts doubt on the validity of the flat ban on federal employees' strikes. In our mixed economic system of governmental and private enterprise, the line separating governmental from private functions may depend more on the accidents of history than on substantial differences in kind.

*Id.* at 885-86; see *supra* notes 62-67 and accompanying text.

<sup>82</sup> Anderson Fed'n of Teachers Local 519 v. School City of Anderson, 252 Ind. 558, 568, 251 N.E.2d 15, 21 (1969) (DeBruler, C.J., dissenting).

<sup>83</sup> *Id.*

<sup>84</sup> Chief Justice Roberts wrote:

The majority has asserted that "[t]here is no constitutionally protected fundamental right to strike." Moreover, the majority states that since there is no constitutional right to strike, the teachers must obtain this right in a clear and unmistakable grant from the Legislature. From these contentions, I must dissent.

The right to strike was never explicitly granted to any employees, public or private. The labor union and the strike arose out of economic struggle and not by the action of any legislature. . . .

Nowhere in the NLRA or other labor legislation does Congress expressly grant to employees the right to strike. Rather, . . . this legislation was enacted for the protection of a right already possessed. . . .

Having concluded that the right to strike accrues to labor, not by legislative grant, but by the irresistible thrust of socio-economic forces, I turn to the question of whether the right to strike is within the protection of the constitutional guarantees. The Supreme Court has long recognized that the right of labor to organize and to bargain collectively is a fundamental right with constitutional protection. . . . Obviously, the right to strike is essential to the viability of a labor union, and a union which can make no credible threat of strike cannot survive the pressures in the present-day industrial world. If the right to strike is fundamental to the existence of a labor union, that right must be subsumed in the right to organize and bargain collectively.

. . . The collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism.

. . . I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis. . . . The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest than would many of those engaged in by public employees. . . . In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable.

truly essential services.<sup>85</sup>

These judges persuasively argue that although employees' associational job interests<sup>86</sup> are subject to necessary regulation, they are also entitled to constitutional recognition and protection. This view elaborates on Gregory's "civil rights approach" to unionism.<sup>87</sup> It is also consistent with Justice Brandeis' observation in *Dorchy*<sup>88</sup> that "[n]either the common law, nor the Fourteenth Amendment, confers the *absolute* right to strike."<sup>89</sup> In so saying, Justice Brandeis implied that some right to strike, albeit a limited one, enjoys constitutional protection.<sup>90</sup> Just as the absence of an absolute right to strike permits regulation of the strike, the existence of some degree of constitutional protection precludes its absolute prohibition. An absolute prohibition of strikes is as invalid for public employees as for private enterprise workers. Strikes, as tools to protect and assert economic interests, may indeed be regulated; the regulation, however, must be reasonable, nonconfiscatory and compatible with due process of law.

School Comm. v. Westerly Teachers Ass'n, 111 R.I. 96, 105-10, 299 A.2d 441, 446-49 (1973) (Roberts, C.J., dissenting) (footnotes and citations omitted).

<sup>85</sup> . . . [T]he police power may be exercised where a strike on the part of public employees would curtail an essential public service.

In so doing, however, the Legislature must be cognizant of the guarantees of due process and equal protection. . . . The Legislature of this state has demonstrated its awareness that the police power can be used most efficaciously to prohibit striking by public employees where such a strike could affect adversely the public safety and welfare. It in the past has granted to policemen and firefighters, in prohibiting these groups from striking, a system of compulsory binding arbitration " \* \* \* to provide some alternative mode of settling disputes where employees must, as a matter of public policy, be denied the usual right to strike." In short, where the public welfare demands a curtailment of the right of certain public employees to strike, the General Assembly may act, but it must provide a quid pro quo which effectuates those employees' right to act in concert to protect their economic well-being.

*Id.* at 111-12, 299 A.2d at 449-50 (citations omitted).

<sup>86</sup> These associational rights of labor fall within the fifth and fourteenth amendments' concepts of "liberty." They no more or less derive from these constitutional provisions than does the idea of "property," which also antedates both amendments and has similarly undergone subsequent evolutions. One price of the constitutionally protected right to strike in the public sector, however, might be the need to abandon any entitlement to governmentally-compelled financial support of employee organizations in the form of the "agency shop," for an inescapable aspect of the freedom of association is a freedom not to associate. For further discussion of this problem, K. HANSLOWE, D. DUNN & J. ERSTLING, *UNION SECURITY IN PUBLIC EMPLOYMENT: OF FREE RIDING AND FREE ASSOCIATION* (1978); Hanslowe, *The Fair Share Agency Shop in Public Employment: A Skeptical View*, 18 INDUS. & LAB. REL. REP. 8 (1980).

<sup>87</sup> See *supra* notes 12-14 and accompanying text.

<sup>88</sup> *Dorchy v. Kansas*, 272 U.S. 306 (1926).

<sup>89</sup> *Id.* at 311 (emphasis added).

<sup>90</sup> Section 13 of the National Labor Relations Act supports Justice Brandeis's hint that strikes enjoy a limited degree of constitutional protection. It provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1935). Although the section reserves the restrictions on the right to strike, it plainly assumes that such a right exists.

To achieve that end, any limitations on the right to strike must be accompanied by the substitution of "processes of justice for the more primitive method of trial by combat."<sup>91</sup> The precise contours of such processes are not constitutionally foreordained, but compulsory mediation and arbitration are the most likely candidates: "The sound doctrine of public employment relations is one that assures and guarantees a reasonable and a fair procedure—with independent third party determination if necessary—for settling new contract disputes, and which, therefore, does not include the strike."<sup>92</sup> Arguably, public sector strikes that merely cause public inconvenience are better left unregulated, rather than proscribed, once compulsory conciliation procedures have been exhausted. But in the cases in which this is not so, the strike prohibition must be coupled with "processes of justice." The federal government's policy of *simultaneously* rendering strikes illegal, and asserting the power unilaterally to fix terms and conditions of employment, is an offense to fundamental fairness, and constitutes a confiscatory infringement upon the associational economic interests and civil rights of public employees.<sup>93</sup> This policy denies public workers their principal avenue of effective relief, either in the form of impartial procedures or by self-help. Thus an absolute strike prohibition that is enforced through the sanctions of the criminal law and the contempt power of the courts, and that is *not* accompanied by procedures other than unilateral governmental fiat, does not satisfy the requirements of impartial "processes of justice"

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<sup>91</sup> Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting).

<sup>92</sup> Address by Willard W. Wirtz, 16th International Convention of American Federation of State, County and Municipal Employees (Apr. 1966) *quoted in* K. HANSLOWE, *supra* note 62, at 113 (emphasis added).

<sup>93</sup> PATCO v. Federal Labor Relations Auth., 685 F.2d 547 (D.C. Cir. 1982) illustrates the failure of the federal government to provide fair and impartial processes of justice for employees subject to strike prohibitions. In *PATCO*, the Federal Labor Relations Authority (FLRA), revoked PATCO's status as exclusive bargaining representative following the illegal air traffic controllers' strike on Aug. 3, 1981, and the union's refusal to heed restraining orders and civil and criminal contempt citations. President Reagan also fired the 11,000 striking controllers. The District of Columbia Circuit affirmed the FLRA's determination that PATCO violated §§ 7116b(7)(A) and 7116b(7)(B) of the Civil Service Reform Act, and upheld the revocation of PATCO's exclusive bargaining status. Although the court in *PATCO* upheld the decision of the Administrative Law Judge, the opinion reveals the serious political interference that plagued the quasi-adjudicative administrative proceedings. Judge Robinson, in concurrence, wrote:

The record before us may be free of instances of sensational wrongdoing, but it is filled with a pattern of insidious lapses. The casualness with which interested persons privately approached decisionmakers engaged in formal adjudication; the thoughtlessness with which the decisionmakers exposed themselves to such approaches and permitted them to proceed unchecked; the ignorance of, and unconcern for, the principles that underlie the ex parte rules—all these things signal something fundamentally awry.

and fundamental fairness in fixing the working conditions of public employees.

## APPENDIX

Eight states statutorily permit public employees to strike: Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin. A brief summary of their laws follows:

*Alaska*—In 1972, Alaska passed a statute that places services performed by public employees into one of three categories:

- 1) those services which may not be given up for even the shortest period of time; (2) those services which may be interrupted for a limited period but not for an indefinite period of time; and (3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.

ALASKA STAT. § 23.40.200(a) (1981). Police and fire protection employees, prison guards and other correctional institution employees, and hospital employees perform class one services. Alaska law prohibits these employees from striking under all circumstances. *Id.* § 23.40.200(b). "Public utility, snow removal, sanitation and public school and other education institution employees" perform class two services. Courts may enjoin a strike by employees of the services if the strike "has begun to threaten the health, safety and welfare of the public." *Id.* § 23.40.200(c). Alaska law mandates arbitration in those situations in which employees prohibited from striking have bargained to an impasse or deadlock. Class three includes those employees who do not perform class one or two services. A strike by class three employees is legal, provided that it has been approved by a majority of the striking unit in a secret ballot election. *Id.* § 23.40.200(d).

*Hawaii*—Hawaii prohibits striking by any employee who "(1) is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the board, or (2) is included in an appropriate bargaining unit for which process for resolution of a dispute is by referral to final and binding arbitration, or (3) is an essential employee." HAWAII REV. STAT. § 89-12(a) (1976 & Supp. 1981). All other employees may strike after exhausting all other means of resolving a bargaining impasse. *Id.* § 89-12(b). Firefighters who reach an impasse, however, must settle disputes through binding arbitration. *Id.* § 89-11.

Public employers may agree with bargaining units to resolve disputes through mandatory arbitration. Furthermore, employers may petition the labor board to investigate strikes that may endanger the health or safety of the public. Upon a finding of such danger, the board "shall establish specific requirements that must be complied with and which shall include, but not be limited to . . . [d]esignation of essential positions." *Id.* § 89-12(c)(1).

*Minnesota*—Minnesota grants a right to strike in certain situations to employees other than confidential, essential, managerial and supervisory.

ing employees. MINN. STAT. ANN. § 179.64 (West Supp. 1981). Strikes are permitted where:

(1)(a) The collective bargaining agreement between their exclusive representative and their employer has expired or, if there is no agreement, impasse . . . has occurred; and (b) The exclusive representative and the employer have participated in mediation over a period of at least 45 days . . . ; and (c) Written notification of intent to strike was served on the employer and the director by the exclusive representative . . . .

*Id.* § 179.64. Minnesota also permits strikes if the public employer disregards a valid arbitration decision, *id.* § 179.64(3), or:

(a) The legislative commission on employee relations has not given approval during a legislative interim to a negotiated agreement or arbitration award . . . ; or (b) The entire legislature rejects or fails to ratify a negotiated agreement or arbitration award, which has been approved during a legislative interim by the legislative commission on employee relations, at a special legislative session called to consider it, or at its next regular legislative session, whichever occurs first.

*Id.* § 179.64(4).

Essential employees are defined as “firefighters, peace officers . . . guards at correctional facilities, and employees of hospitals other than state hospitals . . . . [W]ith respect to state employees, ‘essential employees’ means all employees in the law enforcement, health care professional, correctional guards, and supervisory collective bargaining units. . . .” *Id.* § 179.63(11). “Essential” employees and their employers may request that disputes be settled by binding arbitration: “[W]hen either or both parties petition for binding arbitration . . . and the director [of mediation services] has determined that further mediation efforts . . . would serve no purpose,” the director shall certify the matter to the public employment relations board for binding arbitration. *Id.* § 179.69(3a).

*Montana*—In *State ex rel. Dep’t of Highways v. Public Employees Craft Council*, 165 Mont. 349, 352, 529 P.2d 785, 788 (1974), the court interpreted the legislative declaration of public employees’ rights to include a right to strike. The Montana Public Employees Collective Bargaining Act provides:

Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

MONT. CODE ANN. § 39-31-201 (1981). Employees of health care facili-

ties, however, are prohibited from striking if a strike occurs at another health care facility within a radius of 150 miles. *Id.* § 39-32-110. Montana prohibits firefighters from striking “during the term of any contract and negotiations or arbitration of that contract.” *Id.* § 39-34-105. After firefighters and employers have exhausted mediation and factfinding procedures, either party may submit the dispute to final and binding arbitration. *Id.* § 39-34-101.

*Oregon*—Oregon law permits some strikes by public employees other than police officers, firefighters, and guards at correctional or mental institutions. OR. REV. STAT. § 243.736 (1979). Public sector strikes may only be maintained by employees who are members of “an appropriate bargaining unit for which an exclusive representative has been certified . . . or recognized by the employer.” *Id.* § 243.726(1). Employees must exhaust mediation and factfinding procedures as a prerequisite to a legal strike. *Id.* §§ 243.712, 243.726.2(a).

Employees who have agreed to settle disputes through binding arbitration may not strike. *Id.* § 243.726(1). Oregon law permits public employers to seek to enjoin otherwise legal strikes if “a court finds that the strike creates a clear and present danger or threat to the health, safety, and welfare of the public.” *Id.* § 243.726(3)(a). In those cases in which strikes are prohibited, Oregon mandates binding arbitration to settle disputes:

It is the public policy of the State of Oregon that where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of labor disputes . . . .

*Id.* § 243.742(1).

*Pennsylvania*—The Pennsylvania statute specifically prohibits “[s]trikes by guards at prisons or mental hospitals, or employees directly involved with and necessary to the functioning of the courts. . . .” PA. STAT. ANN. tit. 43, § 1101.1001 (Purdon 1970). It excludes from the statutory definition of “public employee” “elected officials, appointees of the Governor . . . management level employees . . . confidential employees, clergymen . . . [and] policemen and firemen.” *Id.* § 1101.301(2). Pennsylvania does allow strikes by the remaining public employees “unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.” *Id.* § 1101.1003.

*Vermont*—Vermont state employees are statutorily prohibited from striking under § 903(b) of the State Employees Labor Relations Act, VT. STAT. ANN. tit. 3, § 903 (1972); the state does, however, allow a limited right to strike for municipal employees. The Vermont Municipal Labor Relations Act prohibits public strikes when:

- (1) It occurs sooner than 30 days after the delivery of a factfinder's report to the parties . . . .
- (2) It occurs after both parties have voluntarily submitted a dispute to final and binding arbitration, or after a decision award has been issued by the arbitrator; or
- (3) It will endanger the health, safety or welfare of the public.

VT. STAT. ANN. tit. 21, § 1730 (1978).

Vermont has also adopted an anti-injunction act prohibiting restraining orders, and temporary and permanent injunctions in labor disputes involving teachers except when a court determines that the labor action

poses a clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent. Any restraining order or injunction issued by a court . . . shall prohibit only a specific act or acts expressly determined . . . to pose a clear and present danger.

VT. STAT. ANN. tit. 16, § 2010 (1969).

*Wisconsin*—Wisconsin enacted an experimental law granting public employees a limited right to strike:

If the parties have failed to reach a voluntary settlement after a reasonable period for mediation as determined by the mediator-arbitrator, the mediator-arbitrator shall provide written notification to the parties and the commission of his or her intent to resolve the dispute by final and binding arbitration. Thereafter, either party may, within a time limit established by the mediator-arbitrator, withdraw its final offer and mutually agreed upon modifications thereof, if any, and shall immediately provide written notice of such withdrawal to the other party, the mediator-arbitrator and the commission. If both parties withdraw their final offers and mutually agreed upon modifications, the labor organization after giving 10 days' written advance notice to the municipal employer and the commission, may strike. Unless both parties withdraw their final offers and mutually agreed upon modifications, the final offer of neither party shall be deemed withdrawn and the mediator-arbitrator shall proceed to resolve the dispute by final and binding arbitration.

WIS. STAT. ANN. § 111.70(4)(cm)(6)(c) (West Supp. 1980).

The right to strike did not apply to firefighters or law enforcement personnel. *Id.* § 111.70(1)(nm). When impasses arise in bargaining between firefighters or police and their public employers, however, either party may petition for final and binding arbitration. *Id.* § 111.77. The public employer may seek to "enjoin an otherwise legal strike that "poses an imminent threat to the public health or safety." *Id.* § 111.70(7m)(b)

Eight states have thus explicitly granted their public employees a limited right to strike. Additionally, several state courts have denied

remedies to public employers during public sector strikes even though they held the strikes to be unlawful. For example, in *Holland School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968), the court declared a teachers' strike illegal, but refused to grant an injunction, stating that "it is basically contrary to public policy . . . to issue injunctions in labor disputes absent a showing of violence, irreparable injury or breach of the peace." *Id.* at 326, 157 N.W.2d at 210. Similarly, in *Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n*, 114 N.H. 245, 317 A.2d 555 (1974), the court held that "in deciding to withhold an injunction the trial court may properly consider . . . whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue." *Id.* at 251, 317 A.2d at 559. Other cases withholding remedies while holding the strikes to be illegal include: *School Comm. of Westerly v. Westerly Teachers Ass'n*, 111 R.I. 96, 299 A.2d 441 (1973); *School Dist. No. 351 Oneida County v. Oneida Educ. Ass'n*, 98 Idaho 486, 567 P.2d 830 (1977); *Joint School Dist. No. 1, Wis. Rapids v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 234 N.W.2d 289 (1975). Thus, although strikes are illegal in the majority of states, several courts have withheld equitable remedies and permitted public employees to continue their "illegal" activities.