

The Right to Strike for California Public School Employees

Despite a long line of California appellate court decisions holding that public school employee strikes are illegal, a California Supreme Court opinion, San Diego Teacher's Association v. Superior Court, indicates that the court views the legality of public school employee strikes as an open question. This comment suggests that the strike power has a constructive role to play in public school employee labor relations. It also examines two bases for the legalization of public school employee strikes: 1) a statutory inference of a right to strike, and 2) protection of the right to strike under the California constitution's "equal protection" provisions.

INTRODUCTION

Despite widespread opposition to public employee strikes, California public school employees should have the right to strike. The existing California law prohibiting public school employee strikes¹ has failed to eliminate or to deter significantly strike activity.² At the same time, there is evidence that the im-

¹ Government Code §§ 3540-3549.3 contain the California public school employee collective bargaining statutes. The statutes do not address the subject of strikes. Government Code § 3549, however, states: "The enactment of this chapter shall not be construed as making the provisions of section 923 of the Labor Code applicable to public school employees. . . . CAL. GOV'T CODE § 3549 (West 1980). Courts have construed the language of Labor Code § 923 referring to concerted activities to confer the right to strike when such language was included in transit worker labor relations statutes. *Los Angeles Metropolitan Transit Auth. v. Bhd. of R.R. Trainmen*, 54 Cal. 2d 684; 355 P.2d 905, 8 Cal. Rptr. 1 (1960). The California appellate courts have therefore construed the express exclusion of the provisions of Labor Code § 923 from the public school employee legislation as expressing legislative intent to withhold the right to strike. *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 100, 106-07, 140 Cal. Rptr. 41, 44-45 (2d Dist. 1977).

² A recent California study of public employee strikes concluded that the

position of legal sanctions prolongs strikes and interferes with the resolution of disputes.³ In the absence of an effective alternative to the strike as an economic labor relations weapon, public school employee strikes should be legal to insure the fair and efficient resolution of disputes.

Although the federal courts have upheld public sector strike prohibitions,⁴ arguments supporting the legalization of public employee strikes need not fall on deaf ears in the state courts. The California Supreme Court has yet to consider the constitutionality of prohibiting public employee strikes.⁵ Moreover, a recent California Supreme Court decision demonstrates that the court considers the narrower issue of the legality of public school employee strikes to be an open question.⁶ Despite a long line of

case law declaring public employee strikes to be illegal is not a deterrent to public employee strikes. Moreover, the resort to legal sanctions resulted in strikes which on the average took twice as long to resolve as those in which the parties relied only on bargaining and negotiating to end the conflict. Cebulshki, *An Analysis of 22 Illegal Strikes and California Law*, 18 CAL. PUB. EMPLOYMENT REL. 2 (1973).

³ *Id.*

⁴ *United Fed'n of Postal Workers v. Blount*, 325 F. Supp. 879, 884, *aff'd mem.*, 404 U.S. 802 (1971) (court upheld a statutory prohibition of strikes by federal employees); *Tennessee Valley Auth. v. Local Union No. 1*, 233 F. Supp. 997 (W.D. Ky. 1962) (court invoked a federal employee strike prohibition to enjoin a strike).

⁵ *Pasadena Unified School District v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 104, 105, 140 Cal. Rptr. 41, 44 (2d Dist. 1977). The California Supreme Court decision in *Los Angeles Metropolitan Transit Auth. v. Bhd. of R.R. Trainmen*, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960), is frequently cited as authority for the assertion that public employee strikes are illegal in California. Specifically, the court stated: "in absence of legislative authorization public employees do not have the right to strike." *Id.* at 688, 355 P.2d at 906, 8 Cal. Rptr. at 2. This statement, however, was dicta. The issue before the court was whether a statute which gave railway workers the right to engage in "concerted activities" should be construed to confer the right to strike. The court concluded that the statute did provide for the right to strike. *Id.* at 694, 355 P.2d at 910, 8 Cal. Rptr. at 7. This case did not raise the issue of the state or federal constitutionality of withholding the right to strike from public employees. Nor did it resolve the issue of the correct statutory construction of other public employee legislation. The California Supreme Court has not yet resolved these issues. See *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

⁶ *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 593 P. 2d 838, 154 Cal. Rptr. 893 (1979). For a detailed discussion of this case, see notes 51-60 and accompanying text *infra*.

California cases applying the common law rule that public employee strikes are illegal,⁷ the court stated that a public school employee strike would not be an unfair labor practice under certain circumstances.⁸ In addition the court stated that California public school employee bargaining statutes do not necessarily prohibit strikes.⁹ The court's statements indicate that the California Supreme Court may be open to a re-evaluation of the legality of public school employee strikes.

Because the state courts are not bound by federal precedent in the interpretation of state constitutions,¹⁰ they may apply a stricter standard of review to the ban of public school employee strikes. Thus, this comment addresses itself to the state forum. Part I of this comment discusses the role of the strike in public sector collective bargaining. Part II examines the policy arguments in favor of legalizing public school employee strikes and discusses two legal bases upon which public school employees may challenge the prohibition of public school employee strikes.

I. THE ROLE OF THE STRIKE IN THE PUBLIC SECTOR

In the private sector the strike performs an essential role in collective bargaining,¹¹ serving three purposes. First, the right to

⁷ See, e.g. *Almond v. County of Sacramento*, 276 Cal. App. 3d 32, 35, 80 Cal. Rptr. 518, 520 (3d Dist. 1977); *Pasadena United School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 100, 105-07, 140 Cal. Rptr. 41, 44-45 (2d Dist. 1972). *Los Angeles Unified School Dist. v. United Teachers*, 24 Cal. App. 3d 142, 145, 100 Cal. Rptr. 806, 808 (2d Dist. 1972); *Trustees of Cal. State Colleges v. Local 1352, San Francisco State College Fed'n of Teachers*, 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134, 136 (1st Dist. 1970); *City of San Diego v. A.F.S.C.M.E.*, 8 Cal. App. 3d 308, 310, 87 Cal. Rptr. 258, 260 (4th Dist. 1970).

⁸ *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 8, 593 P. 2d 838, 849, 154 Cal. Rptr. 893, 898 (1979). The court's discussion indicates that a strike which occurred after exhaustion of impasse procedure would not be an unfair labor practice. The court explicitly reserved the question of the legality of public school employee strikes. *Id.* at 7.

⁹ *Id.* at 13.

¹⁰ See, e.g., *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (admissibility of inculpatory statements obtained in violation of *Miranda* rights); *Cooper v. California*, 386 U.S. 59, 64 (1960) (scope of automobile search exception to the warrant requirement; application of state constitutional harmless error provision); *Brown v. Merlo*, 8 Cal. 3d 855, 865 n.7, 506 P.2d 212, 219 n.7, 106 Cal. Rptr. 388, 395 n.7 (1973) (automobile guest statute held invalid under state constitutional equal protection provisions). See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1976).

¹¹ N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 391 (2d ed. 1965).

strike equalizes bargaining power between employers and employees.¹² Second, the threat of a strike insures good faith bargaining on both sides of a labor dispute. Since a strike imposes losses on labor as well as management, both sides will make concessions to avoid impasse at the bargaining table.¹³ Third, the strike power promotes industrial peace. This result is largely a product of the strike power's first two functions: The equalization of bargaining power brings the parties to the bargaining table. The potential costs of a strike or lockout keeps them there.¹⁴

Nonetheless, states enacting collective bargaining legislation for public employees have almost uniformly refused to authorize public employee strikes.¹⁵ The major policy arguments advanced against public sector strikes were that: (1) the use of the strike power in the absence of private sector market restraints would give public employees excessive bargaining power;¹⁶ (2) the exer-

¹² Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 463 (1971).

¹³ *Id.*

¹⁴ Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 419 (1970).

¹⁵ Only seven states have enacted public employee legislation authorizing a limited right to strike. These states are: Alaska, ALASKA STAT. § 25.40.200 (1972); Hawaii, HAWAII REV. STAT. § 89-12 (1980); Idaho, IDAHO CODE § 44-1811 (1976); Minnesota, MINN. STAT. § 179.64 (West Supp. 1981); Oregon, OR. REV. STAT. ch. 243, § 7266 (1976); Pennsylvania, PA. STAT. ANN. tit. 43, § 1101.1003 (West Supp. 1975-80); and Vermont, VT. STAT. ANN. tit. 21, ch. 20, § 1730 (1978). In these states strikes are limited or forbidden only if the legislature has determined that a particular occupational group provides services which are "essential." For example, Pennsylvania prohibits strikes by prison guards and mental hospital guards, PA. STAT. ANN. tit. 43, § 1101.1001 (West Supp. 1972-73). All other employees are permitted to strike unless such a strike creates an immediate threat to the health, safety, or welfare of the public. PA. STAT. ANN. tit. 43 § 1101.1003 (West Supp. 1975-80).

¹⁶ In the private sector, supply and demand and the employer's profit motive presumably set effective limits on employee demands. As a matter of self-preservation the union will not demand a wage which would increase the product price to the point at which demand falls off and production is cut back. Even if the union were to make excessive demands, the employer would not accede to them if the result would be that the firm became economically unviable. However, because public services are not provided for a profit, opponents of public sector strikes contend that there would be no effective limits on the demands public employees could make. Thus, the use of the strike could put the public at the mercy of a handful of public employees. Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1117-22 (1969).

cise of economic power in public employee contract negotiations would distort the political process and impair public sovereignty,¹⁷ and (3) public sector strikes would pose a serious threat to public health, safety, and welfare.¹⁸ These objections to public employee strikes do not, however, hold up under close scrutiny.

Despite the absence of the usual market restraints in the public sector there are several operative limits on the bargaining power of public employees. Public opposition to rising tax rates insures that politically accountable public employers will refuse unreasonable or politically unacceptable bargaining demands.¹⁹ In addition, where public employee unions have insisted upon wages significantly in excess of the prevailing private sector rate, public employers have subcontracted with private sector labor.²⁰ Moreover, the economic cost of many public sector strikes falls far more heavily on the striking worker than on the public employer.²¹ For example, many transit districts operate on a deficit. Thus when transit workers strike the district actually saves money,²² but the loss of wages during a strike is at least as costly to public sector workers as it is to those in the private sector.²³ All of these political and economic forces impose substantial limits on public workers' bargaining power. Therefore, there is little justification for the concern that legalizing public employee strikes would put the public employer any more at the mercy of union demands than is the private employer.

The argument that public sector strike activity would distort the political process is based on the thesis that the level of public employees wages represents a political decision regarding the allocation of public resources.²⁴ Opponents of the legalization of public sector strikes argue that public employees have the right to lobby and petition. Yet, they argue that the additional use of the strike would introduce an "alien force" into the legislative process.²⁵ This attempted distinction between economic and po-

¹⁷ *Id.* at 1123-25.

¹⁸ *Cf.* Wellington & Winter, *supra* note 16, at 1123-24.

¹⁹ *See* Burton & Krider, *supra* note 14, at 425.

²⁰ *Id.* at 425-31.

²¹ *Id.* at 425.

²² *Id.* at 423.

²³ *Id.* at 425.

²⁴ Wellington & Winter, *supra* note 16, at 1123-24.

²⁵ GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYMENT RELATIONS, FINAL REPORT No. 15, STATE OF NEW YORK (1966).

litical power is problematic.²⁶ Lobbying for public assistance in the form of loans, subsidies, and tax incentives for private sector business frequently relies on an implied threat of loss of employment, revenue, and economic growth. Yet this form of economic pressure is legal, and a recognized part of political processes. It is therefore difficult to discern where the boundary lies between supposedly illegitimate "economic" pressure and political power. Moreover, forcing public employees to rely on political lobbying to win demands can itself result in distortion of political processes, by encouraging patronism.²⁷

The remaining objection to allowing public employees to strike is that public sector strikes jeopardize public health and safety. It is here that the distinction between different occupational groups in the public sector becomes necessary. The first two arguments against the use of the strike in the public sector are based on institutional and economic distinctions between production in the private sector and provision of public services. The argument concerning public health and safety, however, could apply equally to many occupations in the private sector, most notably coal-mining, health care, and transportation.²⁸ Nonetheless, it is a well-established principle of private sector labor relations policy that the strike is a constructive and necessary part of the right to organize and bargain collectively, and that the economic benefit of allowing strikes outweighs the cost of occasional work stoppages.²⁹ Thus, in the private sector an

²⁶ Burton & Krider, *supra* note 14, at 428-32.

²⁷ *Id.* at 431. See also Hight, *Teachers, Bargaining and Strikes: Perspectives from the Swedish Experience*, 15 U.C.L.A. L. Rev. 840, 876 (1968). Hight suggests that the legalization of strikes will shift public employee union activity away from lobbying and towards collective bargaining. The latter process, he contends, is more visible than lobbying and reduces "the influence of a particularly able lobbyist or the access to a particularly susceptible administrative decision maker." *Id.*

²⁸ Hight, *supra* note 27, at 851.

²⁹ National Labor Relations Act, 29 U.S.C. § 151 (1976) contains the following legislative finding: "Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

otherwise legal strike may be prohibited only if the President of the United States declares a National Emergency.³⁰

Given that the threat to public health and safety created by a strike is not unique to the public sector, the question should be whether the disruption of a particular public service presents a threat to public health and safety which is so great as to justify denying the public employee a right which is considered fundamental to his private sector counterpart.³¹ The states which have authorized public employee strikes recognize the differences between public sector services. These states limit the right to strike for workers providing "essential" services so as to protect the public from any serious harm.³² Thus, although the concern for public health and safety is justified regarding strikes in some occupations, a wholesale prohibition of public sector strikes on this ground is overbroad and exacts a high cost in terms of promoting peaceful labor relations.³³

II. PUBLIC SCHOOL EMPLOYEE STRIKES

A. *Potential Benefits of Legalizing Public School Employee Strikes*

The task of weighing the costs and benefits of legalizing strikes in a particular public occupation is inherently a matter of drawing fine lines. It is the thesis of this comment that strikes by public school employees impose a minimum of inconvenience on the public while providing substantial benefits in terms of improved labor relations.³⁴ Several characteristics of the public school employee's job minimize the cost of legalizing strikes. Public education is unique among public services because the school year consists of nine months, approximately one month of which is non-class time.³⁵ Thus, time lost during a strike may be made up by lengthening the school day, decreasing some non-class time, or eliminating some vacation time.³⁶ A strike would have to last at least four months before school days would be irreparably lost. Yet the highest total number of days lost annu-

³⁰ Labor Management Relations Act, 29 U.S.C. § 176 (1976).

³¹ Hight, *supra* note 27, at 850.

³² See note 15 *supra*.

³³ See notes 34-51 and accompanying text *infra*.

³⁴ *Id.*

³⁵ Hight, *supra* note 27 at 841, 850.

³⁶ *Id.*

ally due to illegal strikes by certificated employees between 1972 and 1977 was only 93.³⁷ The long term effect of a work stoppage on the education of school children is therefore likely to be negligible. Also, unlike firemen or policemen, public school employees are not responsible for the protection of life and property. Thus, although public education is an important social institution, interruption of this service does not expose the public to any immediate risks or irreparable harm.

The fact that education is a service which can be deferred for short periods without directly endangering the public also means that school employees have considerably less bargaining power than firemen or policemen might have.³⁸ Moreover, increasing public interest in relying on the private sector to provide education services through the voucher system, is a constant reminder to public school employees that they perform a service for which there is an available private sector substitute. There is, therefore, no reason to expect that public school boards would be at the mercy of union demands if public school employee strikes were legalized.

Even if the arguments that public school employee strikes would disrupt vital public services and give public school employees excessive bargaining power were correct, these objections to the legalization of public school employee strikes assume that the prohibition of strikes is effective. It is well established, however, that the fact that public employee strikes are illegal neither eliminates nor significantly deters them.³⁹ In fact, the length and incidence of public employee strikes have increased dramatically in the last ten years.⁴⁰ Some California commentators have attributed the law's failure to deter illegal strikes to the lack of serious penalties and the failure of management to rigorously enforce sanctions.⁴¹ However, in other states, public

³⁷ *Strikes of Certificated Employees 1972-77*, 36 CAL. PUB. EMPLOYMENT REL. 21-22 (1978). These statistics reflect the total number of days lost to strikes annually. The average length of a public school employee strike is therefore considerably less than 93 days.

³⁸ In Sweden, where public school employee strikes are legal, the public takes public school employee strikes quite lightly. Hight, *supra* note 27, at 875.

³⁹ See note 2 *supra*.

⁴⁰ *Strikes of Certificated Employees 1972-1977*, *supra* note 37, at 21-22. In 1972 certificated employees struck for a total of 5 days; by 1977 the total number of days lost in work stoppages had increased to 93. *Id.*

⁴¹ See, e.g., Taggart, *Legality of Strikes in California Public Education: A*

employee strikes persist even in the face of the most drastic sanctions.⁴²

Because the strike prohibition does not prevent public school employee strikes the main effect of legal sanctions is to delay resolution of the underlying dispute.⁴³ If strikes were legal, public school employers and employees would be forced to negotiate

Management Perspective, 18 SANTA CLARA L. REV. 895 (1978).

⁴² Bernstein, *supra* note 12, at 462-63. The more plausible explanation for the persistence of illegal public school employee strikes is that there is no adequate substitute for the strike as a means of resolving labor disputes. Experience with binding arbitration and fact-finding has shown that the public sector alternatives are rarely as effective as the use of the strike in resolving conflicts. *Id.* at 467. Several major problems arise with the use of binding arbitration. First, binding arbitration introduces nonaccountable third parties into public contract negotiations. Although this is a legal delegation of authority, *see* Los Angeles Metropolitan Auth. v. Bhd. of R.R. Trainmen, 54 Cal. 2d 689, 693, 355 P.2d 905, 910, 8 Cal. Rptr. 1, 6 (1960), it may be more desirable from a political standpoint to leave the final decision in the hands of the public employer who is directly accountable to the public.

Apart from the political problems, arbitration tends to interfere with the efficacy of the bargaining process as a means of impasse resolution. The party with the weaker position has little incentive to bargain in good faith if it has an expectation of a favorable arbitration award. Bernstein, *supra* note 12, at 467. Furthermore, even if the parties do attempt to bargain seriously, the arbitrator may inadvertently penalize them by treating the "best-disclosed" offer as the outer limit of the award. *Id.* at 467. "Either-or" or final offer arbitration, in which the arbitrator must choose between the final offer of each party rather than work out an independent compromise is not a solution to the problem of non-disclosure. In fact, the final offers frequently combine reasonable proposals with entirely unrealistic ones, in the hope that if the parties make a few concessions the arbitrator will be forced to choose their offer and to enforce the excessive demands along with the reasonable compromises. *Id.* at 467. The result of both forms of arbitration is that the resolution rarely reflects the actual positions of the parties. *Id.* at 468. Since the parties reach no real compromise or resolution, the underlying instability and conflict persist. *Id.* at 468.

Fact-finding shares many of the problems of arbitration. It involves the use of non-accountable third parties who actually play the role of mediator rather than that of neutral fact-finder. If the fact-finder's role is advisory, management tends to follow the fact-finder's recommendations only when they support management's position. Comment, *The Right to Strike and the Rodda Act: A Shift in Bargaining Power*, 10 PAC. L.J. 971, 983 (1979) [hereinafter cited as *The Right to Strike and the Rodda Act*]. If the recommendations are binding, then fact-finding has really become binding arbitration and the above-discussed problems of interference with bargaining arise. Either way, the result is that the majority of disputes are settled by management's unilateral action or by resort to illegal strikes.

⁴³ See note 2 *supra*.

the issues, and the delays caused by turning to the courts for anti-strike injunctions would be substantially reduced.⁴⁴ Thus, one of the primary benefits of legalizing public school employee strikes would be quicker and more efficient resolution of disputes.

In addition, at least one commentator has advanced the thesis that the ban on public employee strikes is actually a "legal boomerang."⁴⁵ Briefly stated, the argument is that, in jurisdictions where strikes are illegal, the evolving case law often creates rights for public employees which are greater than rights conferred in states authorizing a limited right to strike.⁴⁶ Yet, in limited right to strike states the courts consistently enforce the protections for the public.⁴⁷ The ironic result is that those states which grant a limited right to strike are more successful in regulating strike activity than those which treat public strikes as illegal.⁴⁸

In light of these policy arguments in favor of legalizing public sector strikes, the existing California law which treats public school strikes as illegal should be re-examined. The persistence of unlawful strikes and the delays in dispute resolution are due in part to the fact that statutory impasse procedures are not an adequate substitute for the strike power.⁴⁹ Legalization of strikes would promote more efficient collective bargaining, reduce the incidence and length of strikes, and would allow for more effective regulation of those strikes which do occur.⁵⁰

⁴⁴ Cebulshki, *supra* note 2, at 11.

⁴⁵ Jascourt, *Is Banning Public Employee Strikes a Legal Boomerang?* 8 J.L. AND EDUC. 57, 58 (1979).

⁴⁶ *Id.* at 65.

⁴⁷ *Id.* at 71.

⁴⁸ *Id.*

⁴⁹ See note 42 *supra*. Under existing law if an impasse is reached the parties may declare an impasse, and a mediator will be appointed by the Public Employment Relations Board. CAL. GOV'T CODE § 3548 (West 1980) If mediation fails, a fact-finding panel may be established. *Id.* § 3548.1. However, the recommendations of the fact-finding panel are strictly advisory. *Id.* § 3458.3. One indicator of the lack of confidence inspired by these impasse procedures is the fact that, during the first fifteen months in which they were in effect, thirteen strikes, boycotts or walkouts occurred, and in no instances were impasse procedures fully utilized. See *The Right to Strike and the Rodda Act*, *supra* note 42, at 983-84.

⁵⁰ See Cebulshki, *supra* note 2, at 11.

B. *Legalization of the Right to Strike for Public School Employees*

1. *San Diego Teachers Association v. Superior Court*

Until *San Diego Teachers Association v. Superior Court*,⁵¹ all California cases had held that there was no federal constitutionally protected right to strike and that public employee strikes were illegal at common law.⁵² The state courts have protected the right to strike for public employees only when state statutes authorized strikes.⁵³ In *San Diego Teachers Association*, the teachers' association and its president sought annulment of contempt citations issued during a teacher's strike. The issue squarely before the court was whether or not the San Diego superior court had jurisdiction to issue a restraining order and preliminary injunction against the strike.⁵⁴ The court concluded that the Public Employment Relations Board (PERB) had exclusive initial jurisdiction to determine whether a strike was an unfair labor practice and to determine what remedy was appropriate.⁵⁵ The court ruled that by failing to wait for a PERB ruling on an unfair labor practice charge, the school board had failed to exhaust its administrative remedies. The superior court was, therefore, without jurisdiction to issue the restraining order and injunction. Because the court did not have jurisdiction the contempt citations were void.⁵⁶

Although the court refused to address the question of the correctness of the San Diego court's ruling that public employee strikes are illegal, it was careful to treat the issue as an open question.⁵⁷ In addition, the court stated that Government Code

⁵¹ 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

⁵² See cases cited in note 7 *supra*.

⁵³ See *Los Angeles Metropolitan Transit Auth. v. Bhd. of R. R. Trainmen*, 54 Cal. 2d 684, 355 P. 2d 905, 8 Cal. Rptr. 1 (1960). See discussion in note 5 *supra*.

⁵⁴ *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 7, 593 P.2d 838, 849, 154 Cal. Rptr. 893, 899 (1979).

⁵⁵ *Id.* at 13, 593 P.2d at 845-46, 154 Cal. Rptr. at 901.

⁵⁶ *Id.*

⁵⁷ *Id.* at 6-8, 593 P.2d at 842-43, 154 Cal. Rptr. at 896-98. The court expressly reserved the issue of the legality of public school employee strikes, stating that it is "unnecessary to resolve the question of the legality of public school employee strikes." Justice Richardson vigorously dissented from the majority's treatment of the strike's legality as an open question. *Id.* at 14, 593 P.2d at 847, 154 Cal. Rptr. at 902.

section 3549, which the California appellate courts had construed as prohibiting strikes, does not forbid public school teachers strikes.⁵⁸

Strictly speaking, these statements by the court are dicta. They may indicate, however, that if the issue were properly raised the California Supreme Court would be willing to reconsider the question of the legality of public school employee strikes. Two legal bases exist to support a finding of legality. First, public school employee strikes could be legalized on the basis of a statutory inference of a right to strike. Second, if the collective bargaining statute is not susceptible to such a construction, the court may be persuaded that the right to strike is protected under the state constitution.

2. Legal Bases for a Right to Strike for Public School Employees

a. *Statutory Inference of a Right to Strike for Public School Employees*

The Rodda Act, codified in Government Code sections 3540-3549.3, defines the collective bargaining rights of California public school employees. The Act does not expressly prohibit public school employee strikes, and does not define a strike as an unfair labor practice.⁵⁹ Thus, it is an open question whether a right to strike may be inferred from the provisions of the act.⁶⁰

Arguably, an inference of a right to strike would be consistent with the language and the purpose of the Rodda Act. The act specifically guarantees the right to participate in organizational activities and to negotiate contracts.⁶¹ Because strikes are the

⁵⁸ *Id.* at 12, 593 P.2d at 846, 154 Cal. Rptr. at 901. See note 1 *supra*.

⁵⁹ CAL. GOV'T CODE § 3543.6 (West 1980).

⁶⁰ See *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 104, 106, 140 Cal. Rptr. 41, 46 (2d Dist. 1977). Before the Supreme Court's decision in *San Diego Teachers Ass'n*, the major obstacle to judicial inference of the right to strike was that the state appellate courts have construed the language of Government Code § 3549 as legislative intent to deny public school employees the right to strike. See note 1 *supra*. However, in *San Diego Teachers Ass'n* the court stated that § 3549 does not prohibit strikes. *San Diego Teacher's Ass'n v. Superior Court*. 24 Cal. 3d 1, 12, 593 P.2d 843, 854, 54 Cal. Rptr. 893, 901 (1979). Thus, the appellate courts' construction of § 3549 is no longer conclusive.

⁶¹ CAL. GOV'T CODE § 3542.1 (West 1980).

usual mechanism for the enforcement of these rights⁶² this section of the code may implicitly authorize strikes. Moreover, the stated purpose of the act is to improve personnel management and employer-employee relations within the California public school systems.⁶³ To the extent that the denial of the right to strike delays the resolution of disputes and impedes the development of mutually acceptable terms of employment these goals are not met. Therefore, an inference of a right to strike might better effectuate the intention of the legislature, and make collective bargaining a more efficient means of regulating public school employee labor relations.

b. A Right to Strike Under the State Constitution

If the California courts continue to construe Government Code section 3549 as forbidding public employees to strike, this exclusionary classification may be challenged under the California Constitution. Although the federal courts have held that the exclusion of public employees from the right to strike is constitutionally valid,⁶⁴ a state court is bound by that interpretation only to the extent that it may not *narrow* the scope of constitutional protection.⁶⁵ Because the California Supreme Court has not decided on state grounds the validity of withholding the right to strike from California public school employees,⁶⁶ the court may rule that this exclusion violates state constitutional rights.⁶⁷ Specifically, the exclusion may violate state rights of "equal protection."⁶⁸

⁶² National Labor Relations Act, 29 U.S.C. § 151 (1976).

⁶³ CAL. GOV'T CODE § 3549 (West 1980) states in pertinent part "It is the purpose of this chapter to promote the improvement of . . . employer-employee relations within the public school systems"

⁶⁴ See, e.g., *United Fed'n of Postal Workers v. Blount*, 325 F. Supp. 879, *aff'd mem.*, 404 U.S. 82 (1971) (court upheld a statutory prohibition of federal employee strikes).

⁶⁵ See note 10 *supra*.

⁶⁶ See note 5 *supra*.

⁶⁷ See note 10 *supra*.

⁶⁸ Art. 1, § 7 of the California Constitution provides that no citizen or class of citizens shall be granted privileges and immunities which are not granted to all citizens. Art. 4, § 16 provides that the legislature shall not pass local or special laws. These provisions are generally construed together as the state constitutional analogue to the equal protection clause of the fourteenth amendment. See, e.g., *Durham v. Los Angeles*, 91 Cal. App. 3d 567, 575, 154 Cal. Rptr. 243, 247 (2d Dist. 1979) (statute denying recovery to persons injured

Except for the areas of criminal law and procedure,⁶⁹ state constitutional law is relatively underdeveloped. The standards of review applied in the disposition of state claims tend to be similar to those used in the disposition of federal claims.⁷⁰ Thus, in order to use the "equal protection" provisions of the California Constitution to invalidate the exclusion of public school employees from the right to strike, it would be necessary to show that (1) the classification is not related to a legitimate state purpose, or (2) that the classification infringes upon a fundamental right, or involves a suspect classification.⁷¹ In the latter case the statute would be subject to strict scrutiny.⁷²

while attempting to board moving railway car does not violate state privileges and immunities and equal protection provisions); *Gray v. Whitmore*, 17 Cal. App. 3d 1, 20, 94 Cal. Rptr. 904, 914 (1st Dist. 1971) (statute providing for the sale of a tenant's property to satisfy an unlawful detainer judgment violates state due process and equal protection rights).

⁶⁹ The California Supreme Court has increasingly relied upon state constitutional rights in the area of criminal procedure. *See, e.g.*, *Cardenas v. Superior Court*, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1971) (double jeopardy, explicit rejection of *Gori v. United States*, 367 U.S. 364 (1961), which held to the contrary); *Curry v. Superior Court*, 2 Cal. 3d 707, 470 P.2d 345, 87 Cal. Rptr. 361 (1970) (double jeopardy); *In re Smiley*, 66 Cal. 2d 606, 614-26, 627 n. 15, 427 P. 2d 179, 189-92 n.15, 58 Cal. Rptr. 579, 584-85 n. 15 (1967) (right to counsel, right to speedy trial).

⁷⁰ *Gray v. Whitmore*, 17 Cal. App. 3d 1, 20, 94 Cal. Rptr. 904, 914 (1st Dist. 1971). In *Whitmore*, the court stated that the standards of review under the California "equal protection" provisions are essentially the same as those prescribed by the federal constitution. The *Whitmore* court therefore relied on federal and California precedents in invalidating a state statute providing for application of proceeds from the sale of tenant's property to satisfy a judgment in an unlawful detainer action. *Id.* at 20-29.

⁷¹ *See Serrano v. Priest*, 5 Cal. 3d. 584, 597, 487 P.2d 1241, 1251, 96 Cal. Rptr. 601, 609 (1971). For further discussion of *Serrano*, see note 76 *infra*.

⁷² This test supplies two entirely different standards for review of legislative classifications. Classifications that are "suspect" or infringe upon a fundamental right are subject to the "strict" scrutiny test. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1962) (right to travel is a fundamental right); *Korematsu v. United States*, 333 U.S. 216, 220 (1944) (race based classifications are suspect). Under this test the classification is presumed invalid and will survive the constitutional challenge only if a "compelling state interest" justifies making the classification, and there is proof that there is no reasonable alternative means of achieving the same purpose. *Id.* The application of this standard will usually result in the invalidation of the challenged classification. If, however, the classification is not suspect, and no fundamental interest is at stake, the court will presume the classification valid unless there is no set of facts which may be 'reasonably conceived' to justify it. *See, e.g.*, *McGowan v. Maryland*,

The exclusion of public school employees from the right to strike is probably not subject to the "strict scrutiny" standard of review. Because public school employee legislation is primarily economic regulation it is unlikely that the California courts would treat either the right to strike or the right to bargain collectively as a "fundamental right."⁷³ Moreover, a California appellate court has held that distinguishing public school employees from other employees does not involve a suspect classification or a fundamental right.⁷⁴ Thus, although the California constitution does protect certain fundamental rights not recognized under the federal constitution,⁷⁵ it is unlikely that the right to strike or bargain collectively is one of them.

Nonetheless, it may be possible to persuade the courts to legalize public sector employee strikes without invoking the strict scrutiny test. The California Supreme Court has applied the tests for validity under the state constitution in a way which increases the scope of judicial review and gives broader protection of individual rights than the application of the tests used by the

366 U.S. 240, 246 (1961) (Sunday closing laws are rationally related to state purpose of providing a uniform day of rest). This is an extremely low standard of review, usually resulting in the failure of an equal protection challenge. For a summary of equal protection analysis, see, Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

⁷³ Interests which the United States Supreme Court has recognized as 'fundamental' include the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), the right to vote, *Reynolds v. Sims*, 377 U.S. 533 (1964); and a group of interests including the marriage relationship and procreation, *Loving v. Virginia*, 388 U.S. 1010 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The California Supreme Court has expanded this group to include the right to education which, the court held, is protected under the federal and California constitution. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

⁷⁴ *Grasko v. Los Angeles City Bd. of Educ.*, 31 Cal. App. 3d 290, 306, 107 Cal. Rptr. 334, 345 (2d Dist. 1973). In *Grasko*, the court upheld an injunction preventing the board of education from entering into an agreement as part of a settlement of an illegal strike. The court based its decision on an interpretation of the "meet and confer" requirements of the Winton Act, now replaced by CAL. GOV'T CODE §§ 3540-3549.3. The court, however, did not analyze or support its statement that there is no fundamental right to bargain collectively under the state constitution, and that the exclusionary classification of public employees was not suspect. The *Grasko* decision also has been criticized on other grounds. See *County of Los Angeles v. Superior Court*, 13 Cal. 3d 721, 728-29, 532 P.2d 495, 501, 119 Cal. Rptr. 631, 636 (1975).

⁷⁵ See note 73 *supra*.

United States Supreme Court under the federal constitution.⁷⁶ One way in which the court has afforded greater protection to individual rights is through the application of a more activist construction of the equal protection provisions than the traditional federal two-tier equal protection test, through the "substantial relationship test."⁷⁷ In order to apply the "substantial relationship test" it is necessary to (1) identify the classifications made, (2) enumerate the legislative purposes for which the classifications are made, and (3) determine whether there is a "substantial relation in fact," between the classifications and the leg-

⁷⁶ See notes 69 and 73 *supra*, and note 77 *infra*. Compare *Serrano v. Priest*, 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971), with *San Antonio Independent School Dist. v. Rodriguez* 411 U.S. 1, *rehearing denied*, 411 U.S. 959 (1973). In *Serrano*, the California Supreme Court treated wealth as a suspect classification and held that education is a fundamental right. The court invalidated a state system of financing public schools through local property taxes. Yet, in *Rodriguez*, the United States Supreme Court held that a similar system of financing was valid under the federal constitution, and refused to apply the strict scrutiny standard of review.

⁷⁷ See *Brown v. Merlo*, 8 Cal. 3d 855, 865 n.7, 506 P.2d 212, 222 n.7, 106 Cal. Rptr. 388, 395 n.7 (1973). In *Merlo*, the court held that a California automobile guest statute that barred recovery by non-paying passengers violated the California Constitution's "equal protection" provisions. The Court applied the "substantial relationship" test as the standard of review.

The *Merlo* court noted that the United States Supreme Court has recently moved away from its deferential posture when reviewing statutory classifications. The Court has, in several cases, required that the classification have a fair and substantial relationship to an actual, rather than a constructive governmental purpose. *Id.*

Regardless of the status of the two-tier equal protection test in United States Supreme Court decisions, the state courts may, and perhaps should, apply a more activist test under analogous state constitutional provisions. It is important to recognize that underlying the federal two-tier equal protection test are fundamental institutional concerns regarding the role of judicial review. The test severely limits the scope of judicial review unless a fundamental right or presumptively discriminatory classification is involved. This judicial restraint in part reflects judicial deference to the fact-finding and policy decisions of the legislature. It also, however, reflects a concern that, in many areas, the federal courts are incompetent to set standards which should vary according to the history and social needs of each state. See *Tussman & tenBroek*, *supra* note 72. The state courts, by contrast, are far better situated to set such standards for the state, and it is the unique function of the state courts to do so. A broader scope of judicial review may therefore be appropriate when a state court is reviewing a state statute. *Brown v. Merlo*, 8 Cal. 3d 855, 865 n. 7, 506 P.2d 212, 227, n. 7, 106 Cal. Rptr. 388, 395 n. 7 (1973).

islative purpose.⁷⁸ Although the status of this “substantial relationship test” is as yet unclear,⁷⁹ the application of this intermediate standard of review might result in the invalidation of the statutory exclusion of public school employees from the right to strike.

The classification system of Government Code section 3549 excludes public school employees from the right to strike conferred upon private employees by section 923 of the Labor Code.⁸⁰ It therefore treats public school employees differently than it does private sector workers. The statute also differentiates between public school employees and other public employees because at least one class of public employees, Los Angeles public transit workers, has a statutory right to strike.⁸¹ The courts offer two main justifications for this public-private distinction. First, denial of the right to strike to public school employees is necessary to protect public sovereignty over the provision of a public service.⁸² Second, since public school employee strikes would interfere with the provision of a public service, the right to strike must be denied.⁸³

Under the traditional rational relationship test, in the absence of a showing that the classification is grossly overinclusive or underinclusive, the task of judicial review would be complete upon the showing of some “conceivable” relation between the classification and the legislative purpose.⁸⁴ The rationale cited above would be sufficient to satisfy the “reasonable relationship” standard. However, under the “substantial relationship” test, the

⁷⁸ *Brown v. Merlo*, 8 Cal. 3d 855, 868, 506 P.2d 212, 223, 106 Cal. Rptr. 388, 399 (1973).

⁷⁹ See note 77 *supra*. See also, Gunther, *In Search of an Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁸⁰ See CAL. GOV'T CODE § 3549 (West 1980) and CAL. LAB. CODE § 923 (West 1980), discussed in note 1 *supra*.

⁸¹ *Los Angeles Metropolitan Transit Auth. v. Bhd. of R.R. Trainmen*, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960); CAL. PUB. UTIL. CODE § 90300 (West 1971).

⁸² *City of San Diego v. A.F.S.C.M.E., Local 127*, 8 Cal. App. 308, 312, 87 Cal. Rptr. 258, 261 (4th Dist. 1970). This case involved a public utilities strike but the court's discussion of the justification to prohibiting public sector strikes included public school employees. *Id.*

⁸³ *Id.*

⁸⁴ *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (Sunday closing laws are related to state purpose of providing a uniform day of rest).

California court may look beyond the "four-corners of the statute" to historical developments which undermine the factual premise supporting a relation between the classification and the statutory purpose.⁸⁵ The court may also find the classification arbitrary if persons similarly situated with respect to the legitimate purpose of the law do not receive like treatment.⁸⁶

The public sovereignty argument has usually been raised as an objection to allowing public school employees to bargain collectively, and by extension to the right to strike.⁸⁷ The contention is that the public through its elected representatives should have the exclusive power to determine the allocation of tax revenues for education.⁸⁸ However, some courts⁸⁹ and the California legislature through the enactment of collective bargaining legislation have rejected the notion that public control over education and collective bargaining are incompatible. As in the private sector, the role of the strike is primarily to equalize bargaining power and provide an incentive for both parties to bargain in good faith.⁹⁰ The school board is not required to accede to any employee demands, and will not do so if it considers the demands unacceptable.⁹¹ The Board's only duty is to offer reasonable counter proposals. The legalization of strikes does not add to this duty to bargain already imposed on the school boards, it merely enforces that duty.⁹² Thus, once the principle of allowing the school boards to negotiate the terms of employment with public school employee unions is accepted, there is no reason to assert the concept of public sovereignty when faced with the strike issue.

The denial of the public school employees' right to strike also may not have a "substantial relation in fact" to the legislative

⁸⁵ *Brown v. Merlo*, 8 Cal. 3d 855, 863, 506 P.2d 212, 220, 106 Cal. Rptr. 388, 393 (1973).

⁸⁶ *Purdy and Fitzpatrick v. State of California*, 71 Cal. 3d 566, 578, 456 P.2d 645, 652, 79 Cal. Rptr. 77, 85 (1969) (statute prohibiting employment of aliens in public works violates equal protection provisions).

⁸⁷ Note, *Collective Bargaining and the California Public Teacher*, 21 STAN. L. REV. 340, 372 (1969).

⁸⁸ *Id.*

⁸⁹ See, e.g., *Norwalk Teacher Assoc. v. Bd. of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951).

⁹⁰ See notes 11-32 and accompanying text *supra*.

⁹¹ See notes 19-23 and accompanying text *supra*.

⁹² 21 STAN. L. REV., *supra* note 87, at 376.

purpose of protecting the public from strikes which would interrupt the provision of important public services. First, this rationale fails to explain why the statute authorizes strikes for some other public employees who are involved in the provision of services the interruption of which would be at least as disruptive as a school employee strike.⁹³ Second, strikes in the private sector may well be equally or more disruptive for the public than a public school employees' strike.⁹⁴ It would be arbitrary to exclude public employees from the right to strike when it is granted to similarly situated public and private sector workers. Moreover, studies of the California law demonstrate that the fact that strikes are illegal does not prevent strikes, and may in fact prolong them.⁹⁵ Thus, it appears that the illegality of public employees strikes does not "substantially further" the legislative purpose of preventing the interruption of public services and should be invalid under this test.⁹⁶

CONCLUSION

Despite widespread public opposition to public employee strikes, California public school employees should have the right to strike. The strike plays an essential role in collective bargaining because it forces the parties to rely on negotiation at the bargaining table for resolution of labor disputes. In the absence

⁹³ Wellington & Winter, *supra* note 16, at 1123.

⁹⁴ See notes 23-28 and accompanying text *supra*.

⁹⁵ See note 2 *supra*.

⁹⁶ Apart from the substantive issues discussed above, the invalidation of the denial of the right to strike for public school employees under the "substantial relation test" for equal protection reasons under the California Constitution may raise some institutional objections. Because the U.S. Supreme Court will not review a decision which rests on separate and adequate grounds, *see, e.g.*, *Murdock v. Memphis*, 87 U.S. 870 (1975), some critics view the disposition of constitutional claims under the state constitution as a rush to judgment, and a devious means of avoiding federal review. *See Falk, The State Constitution: A More Than Adequate Federal Ground*, 61 CALIF. L. REV. 273, 275 (1973). These critics overlook the fact that prior to the fairly recent application of the Bill of Rights to state and local government the state constitutions were the primary source for the protection of civil liberties. *Id.* at 274. This practice of relying on the state constitution as a separate guarantee of individual liberties is entirely in accord with the federalist principle of leaving to the states those powers which are not reserved to the federal government and the California courts may appropriately find that a state constitutional guarantee is violated by the exclusion of public school employees from the right to strike.

of an effective alternative to the strike, the right to strike should be legal in order to insure effective collective bargaining. Moreover, the legalization of strikes may result in a quicker resolution of labor disputes and more effective regulation of strike activity.

Although the federal courts have upheld public sector strike prohibitions, the issue of the legality of public school employee strikes is an open question in the state courts. The two possible bases for the judicial creation of a right to strike for California public school employees are a statutory inference of a right to strike, and protection of the right to strike under the California Constitution. A statutory inference of a right to strike would be the narrowest basis for legalizing public school employee strikes. However, because the relevant statutes may not be susceptible to such an interpretation, it may be necessary to rely instead on rights guaranteed under the state constitution. In view of the federal judicial deference to the states on issues of public employee labor relations, the state courts should step forward and resolve this issue on state grounds.

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