COMMENT

The Reinstatement Rights of Striking Public Employees

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In the private sector, employers are prohibited from discharging economic strikers but may nevertheless permanently replace them. However, few jurisdictions have resolved the question of how to respond to economic strikes by public employees. This Comment proposes a public sector model for the reinstatement rights of striking public employees, based on statutory and constitutional protections extended to public workers but unavailable to their counterparts in the private sector.

INTRODUCTION

Public employees who strike to enforce economic demands may be at a disadvantage compared to economic strikers in the private sector.¹ While private sector employees who strike do not lose their employee status,² and retain certain limited rights to reinstatement,³ some courts have held that striking public employees effectively abandon their employment and may be summarily discharged.⁴

However, two recent developments in the law of public employment

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¹ This Comment addresses only the question of the right to reinstatement of public employees who strike to enforce economic demands. In the private sector, employees who strike in response to an employer's unfair labor practices (as well as economic strikers who are victimized by an employer's unfair labor practices which prolong their strike) are, in general, guaranteed reinstatement upon their unconditional offer to return to work. Backpay is due for any delay in reinstatement. See generally C. Morris, The Developing Labor Law 1007-11 (2d ed. 1983). The question whether the private employment scheme for resolving unfair labor practice strikes is a worthy model for public employee unfair labor practice strikes is beyond the scope of this Comment. For a discussion of some states' attempts to address this problem, see Public Unfair Labor Practice Strikers' Reinstatement Rights, 3 Pub. Employee Bargaining Rep. (CCH) ¶ 50,019 (1980).

² NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 347 (1938) (“The plain meaning of [§ 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) (1982)] is that if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employ[ees for the remedial purposes specified in the Act.”).

³ C. Morris, supra note 1, at 1011-15.

⁴ See infra notes 107-10 and accompanying text.

cast doubt on the ability of public employers either to discharge or to refuse to reinstate public sector strikers. First, a growing number of jurisdictions have legalized strikes by certain public employees. Second, the United States Supreme Court has recently made clear that public employees who have a property interest in their continued employment may only be discharged pursuant to specific, constitutionally mandated, pre- and post-discharge procedures. This Comment will address the extent to which these changes in the law prohibit public employees from being discharged for their participation in strikes and, of equal importance to strikers, the extent to which the law should be interpreted to require the reinstatement of public strikers at the conclusion of their strike.

The Comment will first analyze the evolution of the right of public employees to strike. It will then discuss the private sector distinction between discharging and refusing to reinstate strikers, and will reject on doctrinal and policy grounds the application of that distinction to the public sector. Next, the Comment will propose a model for the reinstatement rights of striking public employees. It will contend that public employees should neither be discharged nor permanently replaced when they engage in a legal strike. Moreover, it will posit the existence of just cause discharge protection as an additional basis for the right of public employees, engaged in legal strikes, to continued employment or reinstatement. Finally, the Comment will analyze the evolution of the procedural due process rights of public employees. It will propose the existence of a right to pre- and post-discharge procedures as a potential, if somewhat tenuous, means for illegally striking public employees to seek reinstatement.

I
A Developing Right to Strike in the Public Sector

This nation's movement toward a rule allowing its workers to withhold their labor in concert to obtain better working conditions has been a slow crawl indeed. In the early years of United States history, workers who engaged in strikes were treated as conspirators and subjected to civil and criminal penalties. This should not be surprising, considering that many workers at the time were enslaved, and thus denied the basic right

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5. See infra Part I, §§ C, D. By "legal" strikes, this Comment means strikes that have been specifically authorized by a jurisdiction's statutory or common law. All jurisdictions that recognize the right of public employees to strike limit that right in various ways. Thus, a public employee strike occurring within a "legalized" jurisdiction may nevertheless be illegal if the strikers fail to comply with the jurisdiction's public strike limitations.


to withhold their labor individually, let alone in concert with others. The United States did not recognize the constitutional right of individuals to control their own labor until 1865, and has never recognized a constitutional right to engage in a concerted refusal to work, that is, to strike.

Yet, the recognition of a right to strike has gained momentum in recent years. While eighty years ago the right of private employees to organize or to strike was severely hampered, today virtually all private employees, and various public employees in twelve states, have been granted the right to strike.

A. Traditional Prohibitions Against Public Employee Strikes

At common law, public employees have traditionally been denied the right to strike in the absence of specific statutory authorization. Courts and commentators have advanced a number of arguments for denying public employees the right to strike. A principal argument is that public employees should not have the right to interfere with the operations of the sovereign. Another common argument is that public
employers are virtually powerless to respond to strike pressure because the terms of public employment are dictated by state and federal legislatures. A third justification is that the lack of "market restraints" in the public sector economy provides public employees with a disproportionate share of bargaining power. Finally, both courts and commentators frequently argue against the right to strike in the public sector on the ground that public strikes disrupt essential government services.

The United States Supreme Court has never expressly declared that all public employee strikes are illegal. It has, however, affirmed the practice of enjoining federal public employee strikes. In United States v. United Mine Workers, the federal government had seized various private coal mines, under authority of the War Labor Disputes Act, and then obtained an order restraining the employees from engaging in a strike. The coal miners walked off the job anyway and were ultimately held in contempt of court.

The Supreme Court rejected the miners' argument that both the Clayton and Norris-La Guardia Acts precluded the lower court from enjoining their strike. The Court acknowledged that, had the government not seized the mines, the strike would have been private and the Norris-La Guardia Act would have precluded the issuance of an injunction. The Court also acknowledged that the government's seizure of the mines changed nothing, except that it placed ultimate control over the mines in the government's hands. Nevertheless, the Court held that the government's "actual possession of the mines" was sufficient to make the miners' concerted activity a public strike, subject to injunction under federal law.

Distinctions between public and private strikes have not been limited to the observations of courts. A number of United States presidents have viewed public employee strikes as impermissible. Woodrow Wilson stated that, although "[t]he right of individuals to strike is inviolate and agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private 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.

16. See supra note 13 and accompanying text.
20. 330 U.S. at 266-69.
21. See supra note 11.
23. See id. at 288.
24. Id. at 289.
ought not to be interfered with by any process of government," the government exercises a "predominant right . . . to protect all of its people and to assert its power and majesty against the challenge of any class."25 Apparently, President Wilson meant that public employees are members of one of the classes against whom the government may assert its power and majesty. He indicated his sympathies with regard to public employee strikes when he characterized the Boston Police Strike as "an intolerable crime against civilization."26 Franklin Delano Roosevelt, a long-time friend of labor, declared that 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."27

The executive branch's intolerance of public sector strikes continues to the present. Witness the Reagan administration's summary discharge of approximately 12,000 air traffic controllers who participated in the first nationwide open strike against the federal government, in August 1981.28

B. Modern Prohibitions Against Public Employee Strikes

The federal government was one of the first jurisdictions in the United States to expressly prohibit strikes by public employees. As part of its overhaul of the National Labor Relations Act ("NLRA") in 1947, Congress enacted section 305 of the Taft-Hartley Act.29 Section 305 makes a federal worker's participation in a strike a crime, subjecting the federal striker to immediate discharge and loss of civil service status. In addition, federal strikers may be fined and imprisoned.30 The United States District Court for the District of Columbia has upheld the constitutionality of the strike prohibition.31

27. Letter from President Franklin D. Roosevelt to the president of the National Federation of Federal Employees (Aug. 16, 1937) (quoted in Vogel, supra note 26, at 612). See also Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 273-74, 83 A.2d 482, 484 (1951).
31. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), aff'd, 404 U.S. 802 (1971). However, the district court specifically held unconstitutional the part of the federal anti-strike law that made it unlawful for a federal employee to assert the right to strike against the federal government. Id. at 881.
A few states have followed the federal approach of making public employee strikes a crime. A number of other states expressly prohibit strikes by public employees, but often without explaining whether public employee strikes are considered to be criminal or simply to violate public policy. Most of the states that prohibit strikes, as well as a few states that permit strikes, enforce their laws by penalizing those who violate statutory prohibitions or limitations. While a number of states


provide that public employers may discharge striking public employees, many jurisdictions have enacted laws that are even more punitive. Not all of the states that prohibit or limit public employee strikes do so by discharging or otherwise penalizing strikers. A number of states simply allow public employers to enjoin public employee strikes.

C. Development of the Right to Strike Statutes

The presumption at common law has long been that, unless a statute expressly authorizes strikes by public employees, such strikes are unlawful. Although many states have enacted public strike prohibitions, until recently no state expressly authorized public employee strikes. Then, in 1970, both Hawaii and Pennsylvania enacted complex statutory schemes which, among other things, authorized strikes by certain public


36. For example, Minnesota public strikers may be discharged under certain circumstances. However, if they are subsequently rehired, they must submit to two years' probation. Minn. Stat. Ann. § 179A.19 (West Supp. 1986). In Iowa and Virginia, public strikers are subject to immediate discharge and are ineligible for reemployment for 12 months. Iowa Code Ann. § 20.12 (West 1978); Va. Code § 40.1-55 (1980). Public strikers in Florida are also subject to discharge. Their employer may only rehire them if they agree to a six-month probation, receive compensation no higher than they received before the strike, and forego salary increases for one year beyond their post-strike reemployment. Fla. Stat. § 447.507(5) (West 1981).

However, Georgia, Texas and Wisconsin have the most severe strike penalties of all. In Georgia, all public employee strikers are deemed to have automatically terminated their employment. They forfeit all employment rights, status and seniority and they may not be rehired for three years. Ga. Code Ann. § 45-19-4 (1982). In addition to allowing public employers to discharge strikers, Texas law provides that public strikers forfeit their civil service rights and all rights to reinstatement. Tex. Rev. Civ. Stat. Ann. art. 5154c(3) (Vernon 1971). In Wisconsin, where strikes by some public employees are legal, the employer may discipline or discharge illegally striking state employees, permanently cancel their reinstatement rights and request the administrative agency to fine them. Wis. Stat. Ann. § 111.89(2) (West 1974).


38. See supra note 12 and accompanying text.
employees. Ten other states subsequently joined Hawaii and Pennsylvania in authorizing public strikes, seven by statute and three at common law. The seven other states that currently authorize public employee strikes by statute are Alaska, Illinois, Minnesota, Ohio, Oregon, Vermont and Wisconsin. The three that authorize public strikes at common law are California, Idaho and Montana.

Although each of the nine jurisdictions to authorize public employee strikes has approached the question in a different manner, a number of unifying themes are expressed in the statutes. First, virtually all address the legitimate concern that public employee strikes might endanger the public. The statutes respond to this concern by authorizing the injunction of strikes that threaten the public health, safety or welfare. Second, most of the statutes are designed to decrease the likelihood of public employee strikes by requiring bargaining to impasse before striking or by establishing pre-strike mediation or dispute resolution procedures. Third, most statutes additionally decrease the potential for strikes by setting various time limitations, including a “cooling off” period after the factfinder has submitted a report, and/or a notice period, during which strikes are prohibited. Furthermore, none of the statutes authorize strikes by all public employees.

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In addition, although Michigan law expressly prohibits public employee strikes, see supra note 33, common law developments there have granted public employees a de facto right to strike. The Supreme Court of Michigan has refused to enjoin public strikes “absent a showing of violence, irreparable injury, or breach of the peace.” School Dist. v. Holland Educ. Ass'n, 380 Mich. 314, 326, 157 N.W.2d 206, 210 (1968).

42. ALASKA STAT. § 23.40.200(c) (1984); HAWAII REV. STAT. § 89-12(c)(1) (1976); ILL. ANN. STAT. ch. 48, § 1618 (Smith-Hurd 1986); OHIO REV. CODE ANN. § 4117.16 (Page 1984); OR. REV. STAT. § 243.726(3)(a) (1986); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon 1986); VT. STAT. ANN. tit. 21, § 1730(3) (1978).
43. ALASKA STAT. § 23.40.200(c) (1984); HAWAII REV. STAT. § 89-12(b)(1), (2) (1976); ILL. ANN. STAT. ch. 48, § 1617(a)(1), (2) (Smith-Hurd 1986); MINN. STAT. ANN. § 179A.18 (1)(1)(a), (b) (West Supp. 1986-1987); OHIO REV. CODE ANN. § 4117.14 (Page 1984); OR. REV. STAT. § 243.726(1), (2)(a), (b) (1986); PA. STAT. ANN. tit. 43, §§ 1101.1002, 1101.1003 (Purdon 1986).
45. Alaska's system classifies public employees into three groups, completely prohibiting strikes by the first group (police, fire, jail, prison and correctional institution, and hospital employees), placing limitations on the strike right of the second group (public utility, snow removal and
Most importantly, however, the statutes represent a trend toward the rejection of the long-standing common law doctrine forbidding public employees the opportunity to engage in strikes. Before 1970, no state had authorized public employee strikes. Now, twelve states permit them, half of them—California (1985), Idaho (1978), Illinois (1984), Ohio (1984), Oregon (1979) and Wisconsin (1977)—having joined the ranks in the past nine years. At least one state that had previously prohibited public employee strikes by statute and at common law, Minnesota, recently reversed its position, and now authorizes public strikes under its Public Employment Labor Relations Act (“PELRA”).

D. Emergence of the Right to Strike at Common Law

Common law decisions in three states, Montana, Idaho and California, have granted public employees the right to strike. These decisions are bound together by the underlying assumption that, by not acting to expressly prohibit public employee strikes, the legislatures of the three states implicitly intended to permit public employee strikes.

1. Montana

The Supreme Court of Montana took the first stride toward declaring the right of public employees to strike in a 1974 decision, State ex rel. Department of Highways v. Public Employees Craft Council. In Department of Highways, over 285 Teamsters employees of the Montana Department of Highways went on strike to enforce their economic demands. The trial court issued a temporary restraining order prohibiting the strike the same day. However, in a subsequent show cause hearing regarding the Department’s request for a permanent injunction, the trial court dismissed the temporary restraining order, ruling that the em-


47. 165 Mont. 349, 529 P.2d 785 (1974).

48. Id.
ployees had the right to strike.49

The Montana Supreme Court affirmed the trial court's decision, focusing its discussion on Montana's Public Employees Collective Bargaining Act ("PECBA").50 First, the supreme court noted that the PECBA allows public employees to engage in "other concerted activities for the purpose of collective bargaining."51 The court explained that "other concerted activity" has become a technical phrase, interpreted by many jurisdictions as an authorization of the right of employees to strike.52 Second, the court reasoned that the Montana legislature's specific prohibition of nurse and teacher strikes, coupled with its failure to prohibit any other public employee strikes in the PECBA, indicated its acceptance of public employee strikes. Therefore, the court held that public employees, in the absence of a statutory prohibition, have the right to strike.53 By focusing on the legislature's failure to prohibit public employee strikes, the court turned on its head the common law view that a legislative failure to authorize public employee strikes indicates an intent to disallow such strikes.

2. Idaho

In 1978 the Supreme Court of Idaho joined Montana in recognizing at common law the right of public employees to strike. In Local 1494 of the International Association of Firefighters v. City of Coeur d'Alene,54 the city discharged seventeen firefighters who went on strike when negotiations for a new contract reached impasse, after the old contract had expired.55 Like the Montana court, the Idaho court analyzed the statutory language pertaining to strikes by firefighters to discern legislative intent regarding the existence or lack of a strike right. Because the Idaho statute merely prohibited firefighters from striking during the term of their contract, the court held that the legislature intended to permit firefighter strikes after expiration of the contract.56

49. Id. at 351, 529 P.2d at 786.
53. Dep't of Highways, 165 Mont. at 354-55, 529 P.2d at 788.
55. Id. at 631-32, 586 P.2d at 1347-48.
56. Id. at 639-40, 586 P.2d at 1355-56.
The court in *Coeur d'Alene* buttressed its decision by analyzing public strike prohibitions enacted in other states. The court noted that, while states that prohibit public employee strikes make that position unarguably clear, Idaho lacked any such express prohibition. The court concluded that "[b]y refusing to enact an absolute no-strike statute, with its correlative provision for conflict resolution by way of compulsory arbitration, Idaho might be said to have thus cast its lot with those states which are said to have recognized or granted their public employees a 'limited strike right.'"\(^\text{57}\)

3. **California**

The California Supreme Court recognized a public employee strike right at common law in *County Sanitation District No. 2 v. Los Angeles County Employees' Association*.\(^\text{58}\) There, seventy-five percent of the five hundred employees of a Los Angeles County sanitation district went on strike when post-expiration contract negotiations reached impasse. The strike terminated after eleven days when the strikers voted to accept the offer the district had made prior to the strike.\(^\text{59}\)

Like the courts in Montana and Idaho, the California Supreme Court began its analysis by emphasizing the failure of the legislature to specifically prohibit public employee strikes other than strikes by firefighters.\(^\text{60}\) The court concluded that, by failing to act, the legislature left to the courts the question of the legality of public employee strikes.\(^\text{61}\) Unlike the Montana and Idaho courts, however, the California Supreme Court did not end its analysis there. Instead, in a long and thoughtful opinion, it went on to consider and reject the principal arguments in support of public strike prohibitions.\(^\text{62}\)

The court rejected the argument that public strikes interfere with the sovereign\(^\text{63}\) by characterizing and rejecting the sovereignty concept as an anachronism rapidly losing support. The court's analysis focused particularly on the area of government immunity from tort liability.\(^\text{64}\) Next, the court addressed the argument that public employers are virtually powerless to respond to strike pressure because the terms of public em-

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\(^{57}\) *Id.* at 640, 586 P.2d at 1356. The court ordered the reinstatement of the 17 strikers, affirming the lower court's opinion that the city discharged the strikers while engaged in bad faith bargaining. *Id.* at 643, 586 P.2d at 1359.


\(^{59}\) *Id.* at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

\(^{60}\) California law specifically forbids all strikes by firefighters. **CAL. LAB. CODE** § 1962 (West 1971).

\(^{61}\) *County Sanitation*, 38 Cal. 3d at 571-73, 699 P.2d at 838-40, 214 Cal. Rptr. at 427-29.

\(^{62}\) *Id.* at 574-85, 699 P.2d at 840-49, 214 Cal. Rptr. at 429-38.

\(^{63}\) See supra note 14 and accompanying text.

\(^{64}\) *County Sanitation*, 38 Cal. 3d at 575-76, 699 P.2d at 842-43, 214 Cal. Rptr. at 431-32.
employment are dictated by the legislature. The court explained that the California legislature specifically placed control of wages, hours and working conditions of public employees in the hands of their employers by enacting detailed collective bargaining statutes. Thus, the court found, the argument that public employers would be powerless to respond to strike pressure simply carries no weight in California.

Third, the court rejected the argument that the lack of "market restraints" in the public sector economy provides public employees with disproportionate bargaining power. The court found no factual basis for the claim that government services are essential, the premise underlying the "no market restraints" argument. The court noted that "[m]odern governments engage in an enormous number and variety of functions, which clearly vary as to their degree of essentiality."

Finally, the court rejected the common law argument that public strikes must be prohibited because they disrupt essential government services. The court expanded its rebuttal of the "no market restraints" argument, pointing out that the United States Supreme Court had recently retreated from its former view that the fact of government ownership or operation makes a service essential. However, the court recognized that certain government functions truly are essential in that they ensure the public health or safety. Thus, the court held that trial courts must balance on a case-by-case basis the "basic right to strike" against the government's clear showing that a strike "creates a substantial and imminent threat to the health or safety of the public."

65. See supra note 15 and accompanying text.
66. County Sanitation, 38 Cal. 3d at 576-77, 699 P.2d at 843, 214 Cal. Rptr. at 432.
67. See supra note 16 and accompanying text.
68. County Sanitation, 38 Cal. 3d at 577, 699 P.2d at 844, 214 Cal. Rptr. at 433. The court also pointed out that four components of the public sector economy contradict the claim of a lack of market restraints: (1) public employees are just as reluctant to lose wages as are private employees; (2) public concern over rising taxes will serve as an economic factor which balances bargaining power; (3) where the public agency charges fees, as utilities do, for example, the employees will be very aware of the potential for backlash which would result from too high demands; and (4) perhaps most importantly, the potential for subcontracting always exists as a constraint on employees' demands. Id. See also Burton & Krider, The Role and Consequences of Strikes by Public Employees, 79 Yale L.J. 418, 425-27 (1970).
69. See supra note 17 and accompanying text.
71. 38 Cal. 3d at 580-81, 699 P.2d at 845, 214 Cal. Rptr. at 434-35.
72. Id. at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439. Other language in the opinion implies a presumption that police and firefighter strikes do pose a substantial and imminent threat to the public health or safety. See id. The court also argued that the lack of a right to strike exacerbates management-labor relations and that the "perception" that the right to strike is a basic civil liberty supports the court's conclusion. Id. at 582-84, 699 P.2d at 846-48, 214 Cal. Rptr. at 435-37. Finally, the court rejected the claim that only the legislature can recognize the right of public employees to strike. Id. at 584, 699 P.2d at 848, 214 Cal. Rptr. at 437.
While California is the most recent jurisdiction to "cast its lot"\textsuperscript{73} with the states recognizing a limited strike right, it goes further than any of the other states in doing so. Like Minnesota's PELRA,\textsuperscript{74} the \textit{County Sanitation} decision represents a reversal of the jurisdiction's earlier position that public employee strikes were illegal.\textsuperscript{75} This further evidences the existence of a trend toward the recognition of the right of public employees throughout the nation to engage in concerted refusals to work.

\section*{II}
\textbf{The Private Sector Model for the Limited Reinstatement Rights of Strikers}

As more jurisdictions recognize the basic right to strike, more employees will be protected from discharge and replacement when they exercise that right. The discussion in Part IV will contend that public employees who engage in legal strikes should not be subject to discharge or replacement because they are exercising a right specifically guaranteed them at law. Moreover, a legally striking worker who may only be discharged for "just cause" should be viewed as possessing an unassailable right to reinstatement.

In the private sector courts have distinguished between a striker's right not to be discharged and her right not to be permanently replaced. While nothing compels courts to apply the private sector distinction between discharge and replacement to the context of public sector strikes, a few courts have done so already and there is the possibility that still others will follow suit.\textsuperscript{76} Hence, it is necessary to consider the wisdom of applying the private sector distinction between discharge and replacement to the public sector.

The courts have long recognized that private sector employees, protected by the NLRA, may not be summarily discharged for engaging in strikes.\textsuperscript{77} This protection is however quite limited, since private sector employers may refuse to reinstate strikers, hiring permanent replacements in their stead. The United States Supreme Court created the distinction between discharge and reinstatement in an almost off-hand

\begin{footnotesize}
\begin{enumerate}
\item See \textit{supra} note 57 and accompanying text.
\item See \textit{supra} note 46 and accompanying text.
\item Although the California Supreme Court had earlier expressly reserved the question whether public strikes were illegal, see \textit{County Sanitation}, 38 Cal. 3d at 570-71, 699 P.2d at 438-39, 214 Cal. Rptr. at 427-28, a number of California courts of appeal had determined that public employees in California did not have the right to strike. See, e.g., \textit{Stationary Eng'rs v. San Juan Water Dist.}, 90 Cal. App. 3d 796, 153 Cal. Rptr. 666 (1979); \textit{Almond v. County of Sacramento}, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969).
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manner in its 1938 landmark decision, NLRB v. Mackay Radio and Telegraph Co.\textsuperscript{78} Although Mackay Radio was decided nearly fifty years ago, and has been subjected to extensive criticism,\textsuperscript{79} its discharge-reinstatement distinction continues to serve as a basic principle of private sector labor law.

Both doctrinal and policy reasons exist for questioning the desirability of expanding the Mackay Radio distinction to strikes by public employees, especially where the strike is authorized by law. Moreover, two fundamental differences between public and private sector employment provide further reason to question the applicability of the Mackay Radio distinction to the public sector.

\textbf{A. The Mackay Radio Distinction}

The United States Supreme Court first considered how to respond to private sector strikers in NLRB v. Mackay Radio & Telegraph Co.\textsuperscript{80} In Mackay Radio, striking telegraph operators in San Francisco sought to return to work when they determined that their economic strike would be unsuccessful.\textsuperscript{81} During the strike their employer had transferred employees from other areas to San Francisco to act as strike replacements, promising eleven of them that they could remain permanently in San Francisco if they so desired. When five of the eleven chose to remain, the employer refused to reinstate the five employees most active in initiating the strike.\textsuperscript{82}

The five employees who were not reinstated eventually brought their case to the United States Supreme Court by writ of certiorari. The Court had first to determine whether the employees who went on strike renounced or abandoned their employment, as the employer claimed. The Court explained that section 2(3) of the NLRA provides that the term “employee” includes “any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute... and who has not obtained any other regular and substantially equivalent employment.”\textsuperscript{83} Because the five strikers ceased work as the result of a strike,

\footnotesize{78. 304 U.S. 333 (1938).}
\footnotesize{79. The principal criticism of Mackay Radio maintains that while an employer may need to hire replacements during a strike, there is rarely, if ever, a need to promise the replacements permanent status in order to obtain a sufficient replacement labor force. Thus, the permanent replacement rule is perceived as a mechanism for employers to defeat unions, rather than as a legitimate tool to maintain business operations. See, e.g., J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19-34 (1983); Weiler, Striking a New Balance: Freedom of Contract and the Prospects for Union Representation, 98 HARV. L. REV. 351, 387-94 (1984); Gillespie, The Mackay Doctrine and the Myth of Business Necessity, 50 TEX. L. REV. 782 (1972).}
\footnotesize{80. 304 U.S. 333 (1938).}
\footnotesize{81. Id. at 337.}
\footnotesize{82. Id. at 338-39.}
\footnotesize{83. 29 U.S.C. § 152(3) (1982).}
and had not obtained other employment, the Court found that they continued to be employees.

The Court could have then chosen a broad interpretation of the Act by holding that, because the strikers were still employees under the Act, Mackay Radio was obligated to reinstate them when their strike ended. Instead the Court chose to interpret the Act narrowly, holding only that the strikers continued their status as employees "for the remedial purposes specified in the Act." Thus, Mackay Radio does not hold that employees maintain their full employment status when they go on strike, but only that they continue to have the protections provided by the Act, e.g., against coercion and discrimination.

Finally, having determined that the employees did not renounce their employment by striking, the Supreme Court held that Mackay Radio discriminated against the employees most active in instigating the strike by refusing to reinstate them while reinstating all of the other employees. The Court went on to reject the various constitutional challenges raised against the Act.

The Supreme Court might have ended its analysis there. However, in dicta, the Court created the distinction between discharging and refusing to reinstate strikers that persists to this day. The Court noted that although an employer is not allowed to discharge strikers, "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers." That an employer may hire replacements to continue operations during a strike is not a particularly controversial proposition. But the Court further stated that employers who hire strike replacements are "not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."

This distinction between discharge and reinstatement follows naturally from the underlying theory of Mackay Radio. Mackay Radio

84. Mackay Radio, 304 U.S. at 347. See also id. at 345, where the Court explained that "[w]ithin this definition the strikers remained employe[e]s for the purpose of the Act and were protected by the unfair labor practices denounced by it."

85. Subsequent court opinions have interpreted the Act as prohibiting employers from discharging private strikers. But these opinions follow Mackay Radio's narrow interpretation of the Act. That is, first the opinions recognize that strikers remain employees for the remedial purposes of the Act. Next, the opinions state that, therefore, strikers continue to have the right to be free from retaliation for engaging in concerted activities. Thus, they conclude that employers may not violate that right by discharging the employees because they engaged in a strike. See, e.g., Hamilton v. NLRB, 160 F.2d 465, 468-69 (6th Cir. 1947). See also NLRB v. United States Cold Storage Corp., 203 F.2d 924, 927 (5th Cir.), cert. denied, 346 U.S. 818 (1953), and cases cited therein.

86. Mackay Radio, 304 U.S. at 347.

87. Id. at 345.

88. But see infra note 99 and accompanying text.

89. Mackay Radio, 304 U.S. at 345-46.
merely holds that strikers are "employees" in the sense that they receive the protections of the NLRA. Thus the Court was able to conclude that the permanent replacement of strikers is not prohibited by any of the Act's protections. Had the Court determined that strikers continue to be employees to the same extent that they were employees before they struck, the Court would have had to conclude that the strikers' employer could not permanently replace them.

B. Doctrinal and Policy Implications of Mackay Radio

The Mackay Radio distinction, that employers may not discharge strikers but may permanently replace them, remained intact for nearly thirty years. Then, in 1967, the United States Supreme Court decided two cases that changed the rule. Those cases reveal serious flaws in the doctrine and policy underlying Mackay Radio.

In NLRB v. Great Dane Trailers, Inc., the Court considered whether an employer committed an unfair labor practice by granting vacation benefits provided for under the expired collective bargaining agreement to strikers who returned to work while denying those benefits to employees who remained on the picket line. The Supreme Court affirmed the National Labor Relations Board's ("NLRB") conclusion that this conduct violated section 8(a)(3) of the NLRA. The Court's opinion pointed out that certain employer conduct is "inherently destructive" of employee rights under the Act. The Court relied for its conclusion in part on its decision in NLRB v. Erie Resistor Corp. In Erie Resistor, the Court had concluded that an employer's grant of "superseniority" to strike replacements, guaranteeing them protection from future layoffs and recalls, was inherently destructive of rights guaranteed to employees under the Act.

The Court did not have to decide whether the employer's conduct was inherently destructive because the employer failed to meet its burden under the evidentiary test set out in Great Dane. According to that test, the union or employee charging a violation of § 8(a)(3) has the initial burden of producing evidence of the employer's discriminatory conduct. If the union demonstrates that the employer's behavior was inherently destructive to the exercise of rights afforded by the Act, the burden shifts to the employer to prove that it acted solely out of "legitimate and substantial business justifications." If the union demonstrates that the employer's conduct had only a "comparatively slight" adverse effect on the exercise of rights guaranteed by the Act, and the employer meets its burden of demonstrating a legitimate and substantial business justification, then the burden shifts back to the union to prove that the employer was motivated by antiunion animus.

In Great Dane, because the employer presented no evidence of business justification, the Court did not have to decide whether denying vacation benefits to the strikers was "inherently destructive" to, or simply had a "comparatively slight" effect on, rights guaranteed by the Act.

91. Id. at 33. The Court did not conclude that the employer's denial of vacation benefits to strikers, coupled with its grant of benefits to strikebreakers, was "inherently destructive," but only that it had a "discouraging effect on either present or future concerted activity." Id. at 32.
93. Id. at 230-32.
The premise underlying both *Great Dane* and *Erie Resistor* is that strikers retain their employment status with regard to the remedial protections guaranteed by the NLRA. In both cases, the Court reasoned that certain employer conduct is unacceptable because it is inherently destructive to the remedial rights guaranteed by the Act. In neither case did the Court explain how granting superseniority to strike replacements or discriminatorily denying vacation benefits to strikers is in any way more destructive to rights guaranteed by the Act than is granting permanent status to strike replacements. Certainly the knowledge that an employee may be permanently replaced if she strikes has a greater chilling effect on her desire to engage in concerted activity than does the knowledge that she might be denied vacation benefits or that her replacement might be granted superseniority in case of layoffs. The Supreme Court adopted the NLRB's "inherently destructive" analysis without reconciling that analysis with its earlier holding in *Mackay Radio*.

In the second decision altering the *Mackay Radio* distinction, *NLRB v. Fleetwood Trailer Co.*, the Court had the opportunity to reconcile *Mackay Radio* with the "inherently destructive" analysis, but failed to do so. In *Fleetwood*, the employer refused to rehire strikers when job vacancies occurred due to the employer's resumption of full production, even though the strikers had applied for reinstatement two months earlier. The Court held that, "[i]f and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show 'legitimate and substantial business justifications.'" Again the Court's analysis was based on the view that refusing to reinstate strikers when vacancies occur is inherently destructive to rights granted by the Act. But the Court failed to recognize that awarding permanent status to strike replacements under *Mackay Radio* is more destructive to employee rights under the Act than is the later refusal to reinstate strikers when vacancies occur.

In *Laidlaw Corp.* the Board essentially institutionalized *Fleetwood* by holding that replaced strikers who apply for reinstatement "are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." *Laidlaw* describes this conditional right to reinstatement as an entitlement. In fact, it is simply the statutory right of individual employ-

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95. *Id.* at 381.
97. *Id.* at 1369-70.
ees to demand that their employers not interfere with the remedial protections guaranteed by the NLRA. By not recognizing that the permanent replacement rule of Mackay Radio is at least as destructive as, if not more destructive than, the employer behavior singled out in Erie Resistor, Great Dane, Fleetwood and Laidlaw, the Supreme Court has perpetuated a serious problem of labor law doctrine.

A number of commentators have argued that Mackay Radio suffers from serious policy limitations. These critics contend that Mackay Radio's rule allowing employers to hire permanent strike replacements results in an uneven balance of economic power in the employer's favor. The employer can effectively destroy the union by replacing strikers with persons who are not loyal to the union and are likely to vote to decertify it. One commentator argues that overturning the permanent replacement rule in Mackay Radio "would merely scratch the surface of the problem of inequality of bargaining power—especially as experienced by the newly certified unit struggling to win a first collective agreement—because the employer would still be entitled to operate its plant during the strike."  

C. Rejection of the Private Sector Model

The Mackay Radio private sector model for the reinstatement of strikers must be rejected as a method of responding to public sector strikes for a number of reasons, not the least of which are the intractable doctrinal and policy problems created by Mackay Radio and its progeny. More significantly, the Mackay Radio doctrine fails to take into account just cause and property interests, the two fundamental differences between public and private employment.

The logic of Mackay Radio depends on the Supreme Court's refusal to construe the NLRA as providing that employees retain their full employment status when they go on strike. The Court could not ascribe full employment status to strikers while allowing employers to permanently replace them, since the retention of full employment status would mandate reinstatement of striking employees upon completion of their strike. Instead, Mackay Radio holds that striking private employees retain their employment status only for purposes of the protections afforded by the Act, such as the right not to be discriminated against for participating in concerted union activities.

On the other hand, just cause discharge provisions, by design, provide that public employees retain their full employment status unless and

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98. See supra note 79.
99. Weiler, supra note 79, at 393.
100. See supra notes 84-85 and accompanying text. See also § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1982).
until they commit an act which is cause for revoking their employment status. As explained below, public employees who engage in legal strikes commit no act that constitutes cause for revoking their employment status. Thus courts should recognize that legally striking public employees may not be discharged, and should further recognize those employees’ right to return to their jobs when their strike ends.

The situation is different when public employees participate in an illegal strike. Where that is the case courts have held that the employees do commit an act that constitutes cause for their discharge. Even where public employees are subject to discharge, however, they—unlike private employees—are usually constitutionally entitled to pre- and post-discharge procedural protections, including a full evidentiary hearing, before they can be discharged. Thus even illegally striking public employees should be recognized as having the opportunity to argue for their reinstatement before a neutral arbiter.

Because the Mackay Radio doctrine is inherently suspect, and because it does not take into account the just cause and due process procedural protections afforded public employees, the courts must fashion a new approach to resolving the conflict of interests when public employees strike.

III
A PROPOSED PUBLIC SECTOR MODEL FOR THE REINSTATEMENT RIGHTS OF STRIKERS

The courts have only recently begun to address the question of how to respond to strikes by employees in the public sector. For a number of reasons it would be difficult, if not impossible, to fashion a consistent rule for responding to all strikes by public employees. Each of the many jurisdictions in the United States follows its own individual approach to public labor relations. In addition, the differences between legal and illegal strikes inhibit a consistent approach. Moreover, each jurisdiction’s perception of the effect of strikes on the balance of economic power between employers and employees will influence the rule for responding to public sector strikes in that jurisdiction.

Nevertheless, two characteristics of public employment suggest that public employers in every jurisdiction should be prohibited from immediately discharging public strikers and should be required to reinstate certain public strikers. First, a great many public sector employees may only be discharged for just cause. Second, even where public employees engage in an illegal strike or are not protected by a just cause discharge

101. See infra notes 111-12 and accompanying text.
102. See infra notes 107-10 and accompanying text.
103. See infra notes 138-48 and accompanying text.
provision, they may still be protected by virtue of their possession of property interests in employment.

A. Public Employees Who Engage in Legal Strikes Should Not Be Discharged and Should Be Immediately Reinstated

It would be irrational for a jurisdiction to grant public employees a protected right to strike only to permit the employees' subsequent discharge should they exercise that right. At present, no jurisdiction appears to have taken such a position. Indeed, public employees discharged for their participation in a lawful strike should have a strong case for wrongful discharge. Many courts have held that it is illegal for an employer to discharge an employee in contravention of public policy established by statute. Statutes and court decisions granting a public employee strike right would seem indicative of the existence of a corresponding public policy.

Most public employees have an additional argument against their discharge for participation in a legally sanctioned strike. A great many public employees in the United States are protected by just cause discharge statutes. These statutes provide that employees retain their full employment status until they commit an act that constitutes cause for their dismissal. In general, just cause statutes are part of the protection afforded employees who attain civil service status.

Courts seem to be in general agreement that public employers may discharge employees who are protected by just cause discharge provisions but who engage in illegal strikes. However, the courts do not always agree on why this should be so. Occasionally a court will suggest that employees who strike in violation of the law abandon their employment. For example, in Bell v. Board of Trustees, an appellate court in Ohio affirmed the discharge of over one hundred striking employees of a general hospital because an Ohio statute provided that striking employ-

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106. However, many statutes provide just cause protection to non-civil service employees. For example, California State University employees are specifically excluded from civil service but are nevertheless given just cause discharge protection. CAL. CONST. art. 7, § 4(h) (West 1986); CAL. EDUC. CODE § 89535 (West 1986).
ees are deemed to have abandoned their jobs. Other courts reason that illegal strikers are subject to discharge merely because their conduct is illegal, or because engaging in unlawful action constitutes just cause for discharge. Still others state the more plausible view that employees who strike without legal authorization are absent without leave, which itself constitutes just cause for discharge.

However, public employees who engage in legal strikes commit no act that would constitute just cause for their discharge. The various rationales for discharging employees who engage in illegal strikes do not apply to employees engaged in legal strikes. Obviously, just cause based on the commission of an illegal act is inapplicable. Equally obvious is that public employees who engage in a strike do not intend to abandon their jobs. In fact, the primary reason for engaging in economic strikes is to gain better wages, hours and working conditions. Finally, because they walk off the job with specific statutory (or common law) authorization, it cannot be said that public employees who participate in a legal strike are absent without leave. Thus, it seems beyond refute that legally striking public employees may not be discharged.

The question remains whether legal public strikers may nevertheless be permanently replaced, like their counterparts in the private sector. Courts should answer this question in the negative, holding that the discharge-replacement distinction of Mackay Radio is simply inapplicable to the public sector. The Supreme Court’s decision in that case merely construes federal law regarding private, not public, employees, and so cannot be viewed as binding precedent as to the public sector. Nor is it

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108. 21 Ohio App. 2d 49, 50, 54-55, 254 N.E.2d 714-15 (1969). To give the court credit, it should be noted that the court merely intended to give effect to the legislature’s wishes, stating, “We have no doubt that most public employees who strike do not actually intend to abandon their employment.” Id. at 55, 254 N.E.2d at 715. Cf. IBEW v. City of Gridley, 34 Cal. 3d 191, 666 P.2d 960, 193 Cal. Rptr. 518 (1983) (rejected the city’s argument that striking public employees had abandoned their jobs). However, the Gridley court based its decision on the very narrow ground that the city could not have reasonably believed that the employees intended to abandon their jobs because they were only on strike one day. Id. at 209, 666 P.2d at 971, 193 Cal. Rptr. at 529. Implicit in the court’s reasoning is that the court might have accepted the abandonment rationale had the strike continued much longer.

109. Rockwell, 393 Mich. at 635-38, 227 N.W.2d at 744-46; Stationary Engineers, 90 Cal. App. 3d at 801, 153 Cal. Rptr. at 668; Battle, 78 Ill. App. 3d at 832, 396 N.E.2d at 1325.

110. See, e.g., Almond, 276 Cal. App. 2d at 34-35, 80 Cal. Rptr. at 520.


112. See supra Part I, §§ C, D.
persuasive. The Court’s reasoning is subject to a number of criticisms, both on policy and doctrinal grounds.

The premise underlying *Mackay Radio* is that private strikers remain employees only for the remedial purposes of the NLRA. Public strikers who have just cause protection, on the other hand, maintain their full status as employees until they commit an act that constitutes cause for their removal. If engaging in a legal strike is not cause for the employees’ removal, then courts should recognize that the employees have the right to demand their jobs back when their strike ends. Public employers should not be able to deny reinstatement to strikers by hiding behind a distinction between discharge and reinstatement that becomes particularly artificial when applied to the public sector.

B. Public Employees Who Engage in Illegal Strikes Should Receive Adequate Procedural Protections

The existence of just cause discharge provisions may be a boon to employees engaged in legal strikes, but such provisions are of no help to the vast majority of employees who engage in public employment strikes which are not legal. However, illegally striking public employees have an additional protection unavailable to workers in the private sector. Most public employees possess a property interest in their continued employment, protected by the due process clause of the fourteenth amendment, which shields them from immediate discharge. In order to revoke a public employee’s property interest, the government must provide the employee with comprehensive pre- and post-termination procedural protections. While it is clear that these procedures should be taken into account by courts considering the correct response to illegal public strikes, it is unclear whether, or under what circumstances, the procedures will protect illegal public strikers from discharge.

113. See supra Part II, § A.
114. A counterargument is that many private sector employees are protected from discharge without cause by their collective bargaining agreements, but are nevertheless subject to replacement under the rule of *Mackay Radio*. The answer to this counterargument is that *Mackay Radio* is wrongly decided and that, particularly where private employees have contractual just cause discharge protection, arbitrators should hold that they may not be permanently replaced during a lawful economic strike.
115. Recall that only 12 states so far recognize a limited strike right, although the number appears certain to keep growing. However, even in those 12 states, a strike can be found to be illegal if, for example, the employees do not comply with the appropriate procedures before engaging in their strike. See supra Part I, § C. Even in California, which has gone the furthest in recognizing a public employee strike right, strikes are illegal if they pose a substantial and imminent threat to public health or safety. See supra note 72 and accompanying text.
116. See infra Part III, § B.1. It should be evident that a class of public employees exists composed of individuals who do not have a property interest in employment and are not protected by a just cause discharge provision. These employees strike at their own risk unless and until their jurisdictions pass legislation guaranteeing them reinstatement after engaging in a peaceful strike.
1. **The Nature of Procedural Protections Required by the Due Process Clause**

Until well into this century, American jurisprudence distinguished between "rights" and "privileges," requiring the government to give adequate reasons for denying someone a right, but allowing the government to deny a privilege without reason or procedural protections. Under that view, a public employee's interest in employment was considered a privilege which could be revoked by the government at will. Gradually, the "rights-privileges" doctrine gave way to the "entitlement" or "interest" doctrine, which holds that when the government grants an individual a benefit such as public employment, it can deny that benefit only through procedures that are adequate under the due process clause of the fourteenth amendment. Essentially, the entitlement doctrine sets up a two-part legal analysis: first, it must be established that the benefit involves the individual's "liberty" or "property" sufficiently to invoke the protection of the due process clause, and then "the question remains what process is due."

The United States Supreme Court first extended the entitlement doctrine to public employment in 1972, in the companion cases of *Board of Regents v. Roth* and *Perry v. Sindermann*. In those cases, the Court laid the groundwork for determining whether the due process clause applies, i.e., whether the employee has a property or liberty interest in employment. In *Regents v. Roth*, the Court stated that to have a property interest in employment, the employee must have more than an abstract need or desire for, or a unilateral expectation of, employment; the employee must "have a legitimate claim of entitlement to it":

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. In *Perry v. Sindermann*, the Court explained that an employee's interest...
in employment is a property interest "if there are such rules or mutually
explicit understandings that support his claim of entitlement to the
benefit." 124

Since 1972 a wide variety of provisions have been tested in the
courts to determine whether or not they create a property interest, i.e., a
"claim of entitlement" to employment "legitimate" enough to warrant
due process procedural protections. Property interests have been found
in the form of statutes, 125 ordinances, 126 merit system provisions, 127
employment contracts, 128 personnel policies, 129 personnel manuals, 130
and even under the "common law" of an institution, e.g., in a de facto tenure
policy which supplemented a university's personnel policy. 131

Of course, just cause discharge provisions are the most obvious
sources of property interests in employment because they so clearly indi-
cate an intention to continue the employee's status indefinitely, in the
absence of some wrongdoing. 132 Even so, this conclusion has not always
been accepted by the United States Supreme Court. In Bishop v.
Wood, 133 the Court deferred to the district court judge's opinion that
even though a city ordinance detailed the types of "cause" for which a
police officer could be discharged, the officer held his position at the will
of the city. 134 Insofar as Bishop v. Wood suggests that a just cause provi-
sion does not give rise to a property interest, it should probably be read
as an anomaly and, indeed, has been criticized as such. 135

As Bishop v. Wood correctly suggests, employees who hold their po-
sitions in a temporary status or civil service-exempt position or in a simi-
lar designation generally are held not to have a property interest in their
employment because they have no legitimate expectation of continued

more than simply discharge him. See generally Foley, Individual Liberty and the Rule of Law, 7
WILLAMETTE L.J. 396 (1971); Monaghan, supra note 119; Comment, supra note 117, at 420-22.
course, be created by . . . an implied contract.").
131. Perry v. Sindermann, 408 U.S. at 600-03.
132. See Arnett v. Kennedy, 416 U.S. 134, 166 (1974) (Powell, J., concurring). See also Clev-
land Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1491 (1985); Hearn v. City of Gainesville, 688 F.2d
1328, 1332 (11th Cir. 1983); Thompson v. Bass, 616 F.2d 1259, 1265 (5th Cir.), cert. denied, 449
134. Id. at 344-47. See also Sumler v. City of Winston-Salem, 448 F. Supp. 519, 530 (N.D.N.C.
1978).
135. McMaster, Defending Civil Service Employees from Discharge, 24 AM. JUR. TRIALS 421,
employment. However it is possible to find that such employees have property interests in employment if some other provision exists which would give them a legitimate claim to continued employment.

Once a property interest in employment is discovered, the question remains as to the minimal procedures to which employees are entitled to protect their property interests. In Arnett v. Kennedy, a majority of the justices of the United States Supreme Court recognized that due process requires a full evidentiary hearing at some point before employees may be deprived of their property interests. However, a majority of justices in the case also indicated that the full evidentiary hearing does not have to take place until after the employee's discharge.

Until very recently the difficult question was what procedures employees were entitled to before discharge. The Court had previously explained that the procedures required to protect any particular property interest were flexible and depended on a balance of the importance of the individual interests involved, the risk that the procedures would result in error, and the importance of the government's interest. In Arnett v. Kennedy, a majority of the Court could not agree on the procedures required before employees may be initially deprived of their property interests. In fact, the plurality opinion suggested that the federal statute which granted the employee a property interest in employment could also limit the procedures required to protect that property interest, i.e., the employee would have to take “the bitter with the sweet.” That position was, however, expressly rejected by six other members of the Arnett v. Kennedy Court and by subsequent decisions of the Court.

The United States Supreme Court recently clarified the pre-termination procedures required to protect employees' property interests. In

137. See supra notes 125-31 and accompanying text.
139. Id. at 170 (Powell, J., concurring; joined by Blackmun, J.); id. at 185-86, 200 (White, J., concurring and dissenting); id. at 226-27 (Marshall, J., dissenting; joined by Douglas and Brennan, JJ.).
140. Id. at 163 (Rehnquist, J., plurality; joined by Burger, C.J., and Stewart, J.); id. at 170-71 (Powell, J., concurring; joined by Blackmun, J.); id. at 200 (White, J., concurring and dissenting).
142. 416 U.S. at 150-55.
143. Id. at 166-67 (Powell, J.; joined by Blackmun, J.); id. at 177-78 (White, J.); id. at 211 (Marshall, J.; joined by Douglas and Brennan, JJ.).
[If] it is settled that the “bitter with the sweet” approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty and property—cannot be deprived except pursuant to constitutionally adequate procedures.
See also Vitek v. Jones, 445 U.S. 480, 491 (1980).
Cleveland Board of Education v. Loudermill, the Court recognized that, even though public employers have a legitimate interest in immediately replacing inadequate employees, that interest does not outweigh the employees' interest in retaining employment. The Court stated, "We have frequently recognized the severity of depriving a person of the means of livelihood." Finally, the Court emphasized the importance for the employees to be able to present their side of the story, stating that "[e]ven when the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." For these reasons the Court held that, in addition to the full evidentiary post-termination hearing, due process requires at a minimum that public employees receive oral or written notice of the charges against them, an explanation of the employer’s evidence, and an opportunity to present their side of the story before termination.

2. An Illegal Strike Does Not Constitute Abandonment of the Striking Employees' Property Interests in Employment

During the past decade, a few courts have considered the question whether striking public employees must receive pre- and post-termination procedures before their employers may deprive them of their property interests in continued employment. Although certain of these courts concluded that strikers were entitled to procedural hearings, others held that employees abandoned their property interests by engaging in illegal strikes.

146. Id. at 1494.
147. Id.
148. Id. (emphasis added).
149. Id.
151. See, e.g., Ash v. Board of Educ., 699 F.2d 822, 827 n.3 (6th Cir. 1983) (property interest created by collective bargaining agreement abandoned by breaching the agreement’s no-strike clause); Kirker v. Moore, 308 F. Supp. 615, 623 (S.D. W. Va. 1970), aff’d, 436 F.2d 423 (4th Cir. 1971) (dictum that employees forfeited their due process rights “through their own misconduct” of engaging in an illegal strike).

In a similar analytical approach, another pre-Loudermill case attempted to limit the procedural protections of public strikers. In Burgess v. Miller, 492 F. Supp. 1284 (N.D. Fla. 1980), garbage collectors struck after their public employer told them that a strike would be cause for discharge. The employer then fired the employees, giving them neither written notice of the reasons for their discharge, nor notice of their right to respond. None of the employees asked for or received a post-termination hearing. Id. at 1286-87. The Burgess court first held that a personnel manual, which set out the right to be discharged only for cause, gave the strikers a property interest in their continued employment. Id. at 1288-89. However, the court then held that the employer’s oral warning that employees would be discharged if they struck constituted “all the process they were due.” Id. at
The abandonment argument was persuasively rejected by the Wisconsin Supreme Court in *Hortonville Education Association v. Hortonville Joint School District*.152 There, school teachers went on strike after negotiations for a new contract proved unsuccessful. The school board responded by sending notices of individual disciplinary hearings before the board to the strikers. The school board subsequently discharged all of the strikers except one.153 The Wisconsin Supreme Court reversed the school board’s action on the ground that the teachers were entitled to review by an independent arbiter, someone other than the board.154 In the course of its opinion, the court considered the school board’s argument that the employees abandoned their property interests by participating in the strike. The board argued that striking is “the equivalent of quitting, a unilateral breach of the employment contract which dissolves any property interests for due process purposes.”155 The court rejected the board’s argument, pointing out that it begs the question:

One of the purposes of due process in this context is to determine whether the alleged conduct did in fact take place. To say that the performance of certain acts forecloses the requirement of a hearing to determine whether the acts were in fact performed is to engage in circular reasoning.156

The United States Supreme Court reversed the Wisconsin court on the merits, holding that the school board was not biased and, therefore, that due process was satisfied by a hearing before the board.157 However, the Supreme Court affirmed the Wisconsin court’s opinion that the employees, in engaging in the illegal strike, had not abandoned their property interests in their jobs.158

In *Loudermill*,159 the Supreme Court provided further reason to reject the abandonment argument. There, the Court explained that employees’ interests in retaining their employment are superior to the

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1293 (“True the [strikers] were not given something formally titled a hearing. But the absence of lawyerly labels cannot be used to deny the existence of due process anymore than a pretext of a hearing can be used to conceal a denial of due process.”). Certainly, the reasoning in *Burgess* does not survive *Loudermill*’s insistence on “constitutionally adequate procedures,” including oral or written notice of charges, an explanation of the employer’s evidence and an opportunity to respond. *Loudermill*, 105 S. Ct. at 1493, 1495.

152. 66 Wis. 2d 469, 225 N.W.2d 658 (1975), rev’d, 426 U.S. 482 (1976).
153. 426 U.S. at 484-85.
154. 66 Wis. 2d at 496, 225 N.W.2d at 672.
155. Id. at 489, 225 N.W.2d at 669.
156. Id.
157. 426 U.S. at 496-97.
158. Id. at 495. For other cases recognizing the right of striking public employees to procedural hearings when their employers attempt to discharge them, see Fletcher v. Civil Serv. Comm’n, 6 Ill. App. 3d 593, 286 N.E.2d 130 (1972); Sanford v. Rockefeller, 70 Misc. 2d 833, 335 N.Y.S.2d 502 (N.Y. Sup. Ct. 1972), modified on other grounds, 40 A.D.2d 82, 337 N.Y.S.2d 688, aff’d, 32 N.Y.2d 788, 298 N.E.2d 681, 345 N.Y.S.2d 543 (1973).
interest of their employer in immediately terminating them, and that, even if it is clear that employees committed a wrongful act, it may not be clear that they should be discharged. Procedural protections, the Court explained, protect against the mistaken or unwarranted deprivation of employees' property interests. Under the reasoning in Loudermill, even if it is clear that employees engaged in an illegal strike, they must receive adequate procedures before they may be discharged for striking if they possess property interests in employment.

Thus the United States Supreme Court, even though it has not directly addressed the question, has rejected the arguments proposed for denying or limiting the procedural rights of striking employees. Public employees who engage in illegal strikes should not be discharged unless they receive pre- and post-termination procedural protections.

3. The Effect of Due Process Hearings on the Reinstatement Rights of Illegally Striking Public Employees

It is probably true that in most instances due process procedural protections will be of little or no avail to public strikers discharged for participating in an illegal strike. Although the strikers will be entitled to a post-discharge evidentiary hearing, often the reviewing agency will simply affirm the decision of the government employer without analyzing the appropriateness of that decision. For example, in Fletcher v. Civil Service Commission, the Supreme Court of Illinois affirmed the civil service commission's order discharging striking police officers on the basis that the procedures afforded by the commission complied with the due process clause. Nevertheless, due process procedural requirements serve striking public employees in two ways. First, they protect against the mistaken termination of nonstrikers. Second, they place the ultimate determination of whether or not to reinstate strikers in the hands of an independent agency, which may determine that discharge is too harsh a discipline or that discharge would adversely affect management-labor relations.

It is the second function of due process procedural protections which offers the most promise for discharged public sector strikers. Most public employees effect their appeals to special state agencies particularly established to deal with public sector labor issues.

160. Id. at 1494. The Court also explained that "the right to a hearing does not depend on a demonstration of certain success." Id.
161. Id.
162. See supra notes 138-40 and accompanying text.
163. 6 Ill. App. 3d 593, 286 N.E.2d 130 (1972).
164. Id. at 596, 286 N.E.2d at 133.
166. See generally 2 PUB. EMPLOYEE BARGAINING REP. (CCH) (1986).
cies are often given authority to review the appropriateness of disciplinary action taken. For example, in IBEW v. City of Gridley, the California Supreme Court rejected a public employer's argument that, because it was undisputed that the employees in question had participated in an illegal strike, a post-discharge due process hearing was unnecessary. The court held that because the agency was authorized to determine the extent of punishment, "at the very least, a hearing was required to determine the nature and extent of the appropriate disciplinary action."168

The concern expressed in City of Gridley was echoed in the United States Supreme Court's opinion in Cleveland Board of Education v. Loudermill. There again the Court explained that even when it is clear that an employee committed a wrongful act, the due process procedures serve as a check against unreasonable discipline.170

CONCLUSION

It is difficult, if not impossible, to establish standards for the reinstatement rights of all public employees. Too many differences and too few similarities exist in public employment across the nation. Public employees have earned a legal right to strike in twelve states, yet each state addresses the strike right in an entirely different manner. Wisconsin grants its municipal employees a very limited strike right, while California, the newcomer, provides a sweeping right to strike for nearly all of its public employees. On the other hand, most jurisdictions continue to deny their public employees the right to strike. But even among those jurisdictions, a variety of approaches exists. While the federal government can actually imprison federal employees who strike, Michigan, although outwardly prohibitive, in reality permits most public strikes.

Overall a growing number of jurisdictions are granting public employees the right to strike. As employees exercise that right, courts and administrative tribunals will more and more be called on to reconcile the strikers' interests with those of the public employer.

Two important factors in public employment remain constant and should serve as the foundation for any jurisdiction's approach to dealing with striking public employees. First, most public employees may only be discharged for just cause. Thus employees under the protection of a just cause discharge statute may not be discharged for engaging in a legal strike, and should also be entitled to reinstatement. Second, most public employees retain a property interest in their employment. Thus even if

168. Id. at 208, 666 P.2d at 971, 193 Cal. Rptr. at 529.
170. Id. at 1493-94.
they participate in an illegal strike, they must receive notice and an opportunity to respond before any disciplinary action can be taken against them if a property interest in their employment exists. Such employees are additionally entitled to a full evidentiary hearing promptly after the discipline has been imposed. Although these procedures may be of little help to most illegally striking public employees, they nevertheless provide a safeguard against mistaken terminations and may actually result in the reinstatement of strikers where reinstatement is in the best interests of labor-management relations.

Certainly policy arguments exist on both sides of the question of whether or not striking public employees should be reinstated. On one hand, employers claim a need for flexibility in responding to strikes, especially when they are responsible for providing essential public services. On the other hand, employees and unions claim that temporary replacements can, in almost every case, satisfy the employer's need to continue business without the serious harm to labor-management relations that permanent replacements can cause.

Just as each jurisdiction has answered differently the question of the right of public employees to strike, so will each likely answer differently the question of reinstatement. At present, however, the private sector model seems hopelessly inadequate as a means of responding to public sector strikes.

Public employees engaged in legal strikes and protected by just cause discharge provisions should have the right to return to their jobs upon the termination of their strike. It is not an answer to tell these strikers, as the Supreme Court told private strikers in *Mackay Radio*, that they cannot be discharged but can be permanently replaced. *Mackay Radio* was based on a fine distinction between employees who fully retain their employee status and employees who retain that status, only for the purpose of protections provided by federal labor law. Because public employees engaged in a legal strike do nothing to relinquish their full employment status, they should not be barred from returning to their jobs by the hiring of permanent replacements.

Moreover, because the private sector model allows employers to take action against strikers without third party intervention, it is inadequate as a method of responding to illegal public strikes. Even public employees who violate state or federal law by striking are entitled to pre- and post-discipline procedural protections. Often the final decision on whether or not to discharge public strikers will come from an expert administrative agency, rather than the governmental employer. These agencies should have the discretion to reinstate illegally striking public employees where discharge would be too harsh a remedy or would adversely affect labor-management relations in the long run.