



8-1-1965

Economic Institutions and Value Survey: Political Activity, Unionization and Conflicts of Interests -- Problem Areas of Public Employment

Thomas J. Kenney

Paul V. Niemeyer

Michael F. Del Fra

Ross W. Peterson

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Thomas J. Kenney, Paul V. Niemeyer, Michael F. Del Fra & Ross W. Peterson, *Economic Institutions and Value Survey: Political Activity, Unionization and Conflicts of Interests -- Problem Areas of Public Employment*, 40 Notre Dame L. Rev. 606 (1965).

Available at: <http://scholarship.law.nd.edu/ndlr/vol40/iss6/3>

NOTE

ECONOMIC INSTITUTIONS AND VALUE SURVEY: POLITICAL ACTIVITY, UNIONIZATION AND CONFLICTS OF INTERESTS — PROBLEM AREAS OF PUBLIC EMPLOYMENT

I. Introduction	
II. Right of Public Employees to Participate in Political Activities.....	607
A. Introduction	607
B. Federal Legislation Affecting State Employees.....	608
C. State Legislation	614
1. Legislation Applicable to All State or All Classified Employees.....	615
a. Solicitation-Contribution Provisions	616
b. Participation in Party and Campaign Activities.....	617
i. The Most Common Prohibitions	618
ii. The Shorter Form	618
iii. The Enumerative Approach	619
iv. The Incompatibility Approach	620
v. Affirmative Provisions	621
vi. Prohibition of Office Holding	621
2. States Utilizing a "Piecemeal" Approach	621
3. Delegation to Political Subdivisions	623
D. Issues Raised by the State Cases	624
III. The Rights of Public Employees to Organize, Bargain Collectively and to Strike	628
A. Introduction	628
B. Federal Law of Public Labor Relations	630
C. The Concept of "Publicness"	632
D. The Right to Organize	636
E. Collective Bargaining	641
1. Existing Law	642
2. Trends and Conclusions	647
F. The Right to Strike	648
IV. Conflicts of Interest	
A. Interests in Public Contracts	654
1. Direct Interests	654
2. Corporate Interests	657
3. Indirect Interests	660
4. Federal Treatment	664
B. Nepotism	665
C. Dual Employment Limitations	666
D. Post Employment Limitations	667
E. Codes of Ethics	667

I. INTRODUCTION

Public employees have traditionally found themselves subject to greater regulation than is imposed upon their counterparts in private industry. The bulk of this regulation arises from the peculiar position of the public employee as the provider of basic and necessary services to his fellow citizens which must not be interrupted. This Survey Note seeks to examine the regulation of public employees in three areas in which limitations have been considered particularly necessary because of the peculiar position of the public employee as the servant of the citizenry: participation in political activities, labor relations including the rights to organize, bargain collectively and strike, and, conflicts of interest. While the discussion of these three topics is somewhat critical and evaluative, it is aimed principally at an exposition of the present law with indications of trends where possible.

This treatment is generally limited to the law as it affects state employees as opposed to those employed by the federal government or by municipalities. However, federal and municipal law is discussed where it sheds light upon state legislation and decisions.

The initial topic considered is the limitation upon the rights of state employees to participate in political activities. Regulation in this area is both traditional and widespread — traditional in that such regulation has long been imposed seemingly without a great deal of reflection and widespread in that almost every state has some kind or another of restriction on its employees' political activities. The initial section of the Survey examines the great mass of legislation dealing with the right of state employees to participate in politics as well as the judicial interpretations of this legislation. The analysis of the law in this area is quite exhaustive and features a classification of the statutory materials into a number of basic types, one of which is found in most states which impose political restrictions upon their employees.

The second major section of the Survey, dealing with organization, collective bargaining and strikes, concerns itself with an analysis of the problems facing state employees in their efforts to attain a more favorable relationship with their government-employer by means of which grievances and demands for better pay and working conditions may be met in an orderly fashion. Public employees have long been denied the same organizational freedom which is enjoyed by their counterparts in private industry. However, an examination of the legislation and judicial decisions in this area reveals a trend toward increased union activity on the part of public employees at every level. This section of the Survey probes the distinctions between public and private employees which formed the basis of the denial of organizational rights in the past and seeks to indicate how these distinctions have been discarded or modified in those instances which account for the trend toward increased organizational freedom.

As regards strikes, while the denial to public employees of the right to strike remains steadfast, the alternative methods of settling disputes, mediation and arbitration, are becoming more widely accepted, thus affording public employees the outlet which they seek for presenting demands and grievances to their employer. The once ironclad prohibition against bargaining with public employees has been gradually deteriorating so that it may now be said that collective bargaining is becoming the rule rather than the exception. The discussion of collective bargaining and the strike includes an analysis of the arguments for and against the use of these devices with regard to public employees as well as a presentation of selected examples illustrating the impact of collective bargaining in those localities which have made it a part of the government-employer-employee relation.

The final topic is conflicts of interest. These arise from the demand for complete loyalty to the public service as contrasted with the private interests of the individual employees. State legislation is replete with every manner of law proscribing various and sundry forms of beneficial interests in public dealings, and numerous, though often illusory, exemptions to the prohibitions. This legislation spans the range of effectiveness, from muddled and vague provisions, subject to a myriad of interpretations in an area, *e.g.*, such as public contracts, to the rigid and exacting restrictions aimed at nepotism. A bright spot may be emerging, however, in legislative attempts to accurately define standards of conduct in the form of codes of ethics. Such codes are admirable attempts to take a logical and reasoned approach to the problems.

II. RIGHT OF PUBLIC EMPLOYEES TO PARTICIPATE IN POLITICAL ACTIVITIES

A. Introduction:

This section seeks to examine the restrictions placed upon the political activities of public employees. Most states have imposed such restrictions, their purpose

being to maintain the integrity of the state service against possible political corruption. Because of the great wealth of material available on this topic, it has been necessary to limit the scope of the discussion in several ways. First, the emphasis is upon restrictions on *state* employees, and *state* action in the field in general. Hence municipal, county or federal employees are mentioned only when their activities are regulated by state action or when decisions and legislation concerning such employees are helpful in interpreting state decisions and legislation. Secondly, the type of restrictions considered here are principally those upon *voluntary* political activities of the kind in which the ordinary citizen might be expected to participate. Thus, prohibitions of forced contributions or services, enforced by superiors against their subordinates under threats of the latter's employment status being somehow affected, are somewhat beyond the scope of this section of the survey. Such prohibitions may almost be taken for granted as a necessary adjunct to a healthy state employment system. However, provisions regarding forced contributions or services will be mentioned in connection with states where there are no other political activity provisions or where helpful in treating matters properly within the scope of discussion.

B. Federal Legislation Affecting State Employees:

It may seem strange after an introduction emphasizing the focus of this survey upon state activity to plunge initially into federal legislation. However there are good reasons for this approach. The first is that the principal federal legislation, the Hatch Act,¹ is probably the best known enactment relating to political activity. A consideration of this Act, with which the reader is probably somewhat familiar, will serve as an effective orientation to the great mass of state legislation which follows. Moreover, viewed against the background of the Hatch Act and the decisions interpreting it, the disparate approaches taken in the legislation of the various states are more readily understood. Finally, and more importantly, the Hatch Act itself contains political prohibitions which apply to those state and local employees whose "principal employment is in connection with any activity which is financed in whole or in part" by federal funds.²

The passage just quoted is a part of section 12(a) of the Hatch Act. That section restricts the activities of certain state employees as follows:

(a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.³

Section 18 of the Act exempts from the prohibitions of the second sentence of section 12(a) activities in connection with elections which do not concern national or state issues or parties.⁴

1 53 Stat. 1148 (1939), 54 Stat. 767 (1940), as amended 5 U.S.C. § 118i-n (1958), as amended 5 U.S.C. §§ 118(i)(b), 118(k)(b) (Supp. V. 1964).

2 54 Stat. 767 (1940), as amended, 5 U.S.C. § 118k(a) (1958).

3 *Ibid.*

4 54 Stat. 767 (1940), 5 U.S.C. § 118n (1958).

Section 12(a) of the Hatch Act, like its section 9(a)⁵ counterpart which contains the prohibitions against federal employee political activity, is administered by the United States Civil Service Commission. Section 12(b) defines the basic procedures to be followed by the Commission in state employee political activity cases.⁶ The penalty imposed if it is found that the state has not removed a delinquent employee as requested by the Commission is the withholding from the federal grants to the state a sum equal to two years' compensation of the employee who has violated the Act.⁷ Although the substantive provisions of political activity are the real subject matter of this portion of the survey and the intricacies of procedure are beyond its scope, it might be noted at this point that many of the states employ a similar scheme in imposing and enforcing their political restrictions — *i.e.*, a civil service law containing the substantive prohibitions and a commission to determine violations and recommend dismissal, the most frequently utilized penalty for violations.⁸

Putting aside administrative procedure and returning to section 12(a), a number of questions concerning that section arise. It would seem initially that there could be constitutional problems in view of the limitations imposed upon free participation in the fullness of the democratic process of government. Are there considerations of policy which justify this interference with constitutional rights? Moreover, what does the jurisdictional standard "principal employment in connection with" mean? Finally, what are the actual activities proscribed by the language "active part in political management or in political campaigns"? Though the judicial interpretations of the Hatch Act are numerically not impressive, they do answer these important basic questions.

The constitutionality of the Act and its underlying policy and purposes were considered by the Supreme Court in the cases of *United Public Workers v. Mitchell*⁹ and *Oklahoma v. United States Civil Service Commission*.¹⁰ *United Public Workers* involved a section 9(a) violation by a federal employee but is applicable here for its consideration of the general question of the constitutionality of the substantive activity prohibitions. *Oklahoma* was concerned with section 12(a), specifically with the claim that the section was an unconstitutional invasion of the powers reserved to the states by the tenth amendment. The Court in *Oklahoma* deferred to the opinion in *United Public Workers* on the question of the constitutionality of the substantive prohibitions as limiting rights to free participation in government.

In considering the constitutional issue in *United Public Workers*, the Court found it necessary to enunciate the purposes of the Act, for it viewed the resolution of the constitutional question as the proper striking of a balance between the limitations imposed on political freedom and the reasons for such an imposition.

"Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."¹¹

The purposes of this kind of legislation were found to be worthy ones long before the passage of the Hatch Act. The Court relied substantially on the 1882 decision in *Ex parte Curtis*¹² for its statement of the policy underlying the Act. That case involved the validity of a federal statute prohibiting federal employees

5 53 Stat. 1148 (1939), as amended 5 U.S.C. § 118i(a) (1958).

6 54 Stat. 767 (1940), as amended, 5 U.S.C. § 118k(b) (Supp. V. 1964). For the Civil Service Commission's Rules of Practice in proceedings involving political activity violations by state employees, see 5 C.F.R. § 151.101-.124 (1964).

7 54 Stat. 767 (1940), as amended, 5 U.S.C. § 118(k)(b) (Supp. V. 1964).

8 See note 114 *infra*.

9 330 U.S. 75 (1947).

10 330 U.S. 127 (1947).

11 *United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947).

12 106 U.S. 371 (1882).

from giving, receiving or soliciting funds for political purposes from other employees. In *Curtis*, the Court said:

The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power. . . .¹³

If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. . . .¹⁴

The Court in *United Public Workers* adopted this rationale and struck the balance on the side of constitutionality.

Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.¹⁵

In *Oklahoma*, the state instituted an action to review a determination of the Civil Service Commission that a member of the state highway commission be removed from his position for violation of section 12(a). The official in question, while engaged in work financed by federal funds, had served as chairman of the State Democratic Central Committee. During his chairmanship there was no general election in the state. However, he did participate in such activities as advising the governor on fund raising and acting as toastmaster at a fund raising dinner. The Commission notified the state that such activities constituted a violation of the Hatch Act and warranted removal. Its determination was upheld by the Supreme Court. Specifically, the Court met the tenth amendment challenge with the argument that, while the federal government "has no power to regulate . . . local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to the states shall be disbursed."¹⁶ A number of lower federal court cases, before and after *Oklahoma*, have employed this same reasoning, emphasizing in addition that the Act does not force a state to do anything, since it could refuse to discharge an offending employee and thereby take a reduction in the amount of federal funds received.¹⁷

Enough said for now on the constitutional question. It will recur at greater length in the discussion of the state legislation.

Next arises the problem of defining the Civil Service Commission's jurisdiction in 12(a) cases. The terms "principal employment in connection with" projects supported "in whole or in part" by federal funds, leave something to be desired as regards specificity. Could it be said that a state employee who spends fifty-one percent of his working time on a project, ten percent of which is supported by

¹³ *Id.* at 373.

¹⁴ *Id.* at 374.

¹⁵ 330 U.S. 75, 103 (1947). Mr. Justice Reed wrote the opinion of the Court. Mr. Justice Frankfurter was of the opinion that jurisdiction was lacking due to an irregularity in appellate procedure but concurred on the merits since the Court had in fact assumed jurisdiction. Mr. Justice Rutledge and Mr. Justice Black dissented on the grounds that the Act unjustifiably deprived large numbers of employees of their constitutional right to participate in the democratic processes of government. Mr. Justice Douglas dissented in part, one ground being that there was no necessity of regulating the actions of an industrial worker as the appellant Poole. Thus the decision was an extremely close one, a fact seldom noted in the many cases which rely on *United Public Workers*.

¹⁶ 330 U.S. 127, 143 (1947).

¹⁷ *Palmer v. United States Civ. Serv. Comm'n*, 297 F.2d 450 (7th Cir. 1962); *Ohio v. United States Civ. Serv. Comm'n*, 65 F. Supp. 776 (S.D. Ohio 1946); *Neustein v. Mitchell*, 52 F. Supp. 531 (S.D.N.Y. 1943); *Stewart v. United States Civ. Serv. Comm'n*, 45 F. Supp. 697 (N.D. Ga. 1942).

federal funds, is covered by section 12(a)? The Civil Service Commission and the courts have provided guidelines to aid in the answering of such questions.

The Commission, for its part, has adopted "general" and "secondary" rules of jurisdiction in section 12(a) cases, as follows:

An officer or employee of a State or local agency is subject to the Act if, as a normal and foreseeable incident to his principal position or job, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not.¹⁸

An employee of a State or local agency is not within the "principal employment" requirement of Section 12(a) of the Hatch Act, if the only duties in respect to any activity financed in whole or in part by Federal loans or grants which he performs as a normal and intended incident of his principal job or position, are so inconsequential in comparison with other duties of his said job or position as to make applicable the maxim "de minimis non curat lex."¹⁹

A Commission proceeding involving an employee of the Illinois Highway Department conveniently illustrates the mode of application of both jurisdictional rules.²⁰ The principal duty of the employee was to supervise the maintenance of completed highways. Federal funds were not involved in such work since federal contributions for highways are for construction rather than maintenance. However, federal funds were allocated for "roadside improvement" and supervision of this work was also a part, though apparently a minor one, of the employee's duties. The Commission noted that, if judged solely on the basis of the general jurisdiction rule, the employee in question would have been within the coverage of the Act.²¹ However, upon a finding that ". . . only about 1/10 of 1 percent of his time was devoted to . . ." roadside improvement, it was held that the situation was an appropriate one for the application of the secondary rule.²² Therefore, the employer was not within the coverage of section 12(a).

A fairly recent decision, *Palmer v. United States Civil Service Commission*,²³ indicates a continuing broad sweep of 12(a) jurisdiction. The Commission had recommended dismissal of Mr. Palmer, Illinois State Director of Conservation, for activities including service as a precinct committeeman and chairman of the Kendall County Republican Committee. Its investigation had revealed that during Palmer's tenure as Director of Conservation, eight percent of the funds expended by his Department came from federal grants. Palmer claimed that he actually spent only one percent of his time working on federally supported projects since two of his subordinates supervised all federal aid projects. This contention was rejected on the ground that Palmer, as head of the Department, had the last word on major policy decisions, including approval of plans for undertakings supported with federal funds. Moreover, six of the Department's nine Divisions received federal aid. Palmer "plainly met the test" of jurisdiction.²⁴

The term "principal employment" has required definition, not only in the sense of principal with reference to the work performed by the employee in his state job, but also in the sense that the employee has two jobs; one public, the

18 In the Matter of Slaymaker & the State of Illinois, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-3 (U.S. Civ. Serv. Comm'n 1943). This is the "general" rule of jurisdiction. In explaining the rule, the Commission noted: ". . . we do not divide and weigh the things which an employee does. We merely analyze the position or job to determine, first—whether it is his 'principal' one, and second—whether it involves (as a normal and foreseeable incident thereof) performance of duties in connection with a Federally financed activity. . . ." In the Matter of Slaymaker, *supra* at 41b. 1-3.

19 In the Matter of Todd & the State of Illinois, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-5, 1-6 (U.S. Civ. Serv. Comm'n 1943).

20 *Id.* at 41b. 1-5.

21 *Id.* at 41b. 1-7.

22 *Ibid.*

23 297 F.2d 450 (7th Cir. 1962).

24 *Id.* at 454.

other private. In *Anderson v. United States Civil Service Commission*,²⁵ the employee, an attorney, spent seventy-five percent of his time in the private practice of law, while twenty-five percent was spent as an advisor to the Montana Department of Public Welfare. It was held that his "principal employment" was his private law practice. Congress had not intended to impose the prohibitions of the Act upon persons with two jobs, the more important of which had nothing to do with federal funds.²⁶

A number of miscellaneous jurisdictional problems have arisen. In *Neustein v. Mitchell*,²⁷ an employee claimed that his resignation prior to a determination of violation by the Commission ousted jurisdiction. The District Court for the Southern District of New York rejected this argument on the ground that the proceeding to determine whether there has been a violation is against the state as well as the individual employee.²⁸ This is so because if the employee has committed a violation and the state re-hires him within eighteen months, federal funds may be cut off.²⁹ Thus determination of violation is crucial to the determination of whether re-hiring would give cause to withhold federal aid.³⁰ Furthermore if this were not the rule, it would become a simple matter to avoid the prohibitions of the Act. In *re Higginbotham*³¹ involved an attempt to escape the Commission's jurisdiction by use of the office-holder exemption provided in the final sentence of section 12(a). The employee in question worked for the Washington, Pennsylvania, housing authority, an agency receiving federal grants. While so employed he ran for, and was elected to, the office of alderman. Upon the Commission's finding of a violation, the employee objected under the 12(a)(3) office holder exemption. The Third Circuit Court of Appeals held that the exemption was not applicable since it was not intended to mean office holding incidental to employment in connection with federal funds but rather referred to situations where an official is elected to a position in connection with a project financed with federal funds.³²

What are the actual activities prohibited by the words "active part in political management or in political campaigns"? These words can be understood only if viewed in the proper context. As the Court made clear in *United Public Workers*, that context is partisanship:

It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success.³³

Thus the initial inquiry can be rephrased — what are the actual *partisan* activities prohibited by section 12(a)? First, it is noteworthy that the prohibitive words of section 9(a) (federal employees) are identical with those of 12(a) (state and local employees).³⁴ The Congressional intent was apparently to prohibit the same

²⁵ 119 F. Supp. 567 (D. Mont. 1954).

²⁶ *Id.* at 572-73. *Accord*, *Matturri v. United States Civ. Serv. Comm'n*, 130 F. Supp. 15 (D.N.J. 1955), *aff'd per curiam*, 229 F.2d 435 (3d Cir. 1956) (attorney engaged in private practice while uncompensated member of Newark Housing Authority).

²⁷ 52 F. Supp. 531 (S.D.N.Y. 1943).

²⁸ *Id.* at 532.

²⁹ *Ibid.* This penalty is provided by section 12(b) of the Hatch Act.

³⁰ *Ibid.*

³¹ 340 F.2d 165 (3d Cir. 1965).

³² *Id.* at 167.

³³ 330 U.S. 75, 100 (1947).

³⁴ The words referred to, which are the same in each section, are ". . . shall take any active part in political management or in political campaigns." 53 Stat. 1148 (1949), as amended, 5 U.S.C. § 1181(a) (1958) and 54 Stat. 767 (1940), as amended 5 U.S.C. 118k(a) (1958).

activities on the part of both groups of employees.³⁵ Therefore it follows that whatever kinds of activities have been held to be proscribed for federal employees are likewise restricted for state employees. Some of the specific activities in which federal employees have been forbidden to participate include service as a delegate to a political convention, membership on a committee of a political party, holding positions of leadership in partisan political clubs, acting as a party worker on election day and running for elective office.³⁶ Note from what has been prohibited the effect given to the word "management" in section 12(a). While the employee can belong to a partisan political club, he cannot take part in its leadership by *e.g.*, being a member of a steering committee or addressing the club members in an effort to influence a partisan course of action.³⁷ By the latter activities the employee would be taking part in management.

Partisanship and leadership, or more accurately, an active attempt to influence partisan action by others, seem to be the key elements in any offense under the Act. These requirements are certainly met if the employee is a member of a committee of a political party. Partisanship would be present by virtue of the fact that a party is involved, while the leadership requirement would be met because a committee is presumably a guiding force in the party organization. The violation is even clearer in a case like *Oklahoma* where the employee was chairman of a state-wide committee.³⁸ As the court in *Oklahoma* emphasized by its statement that there was no general election in the state during the period of the alleged violation,³⁹ the activity of the transgressing employee need not have any connection with an actual election campaign. It may still fall under the heading of political management.

Other decisions typify the kinds of situations in which the twofold requirement of partisanship and active attempt to influence the activities of others are met. In *Utah v. United States*,⁴⁰ various state agencies were assigned quotas of tickets for a fifty-dollar a plate dinner planned by a political party. The Director of the State Road Commission received some of the tickets and passed them on to one Bridge, Chief of the Right of Way Division. Bridge and two of his associates "recommended" to the employees in the division that they contribute toward the price of the tickets. The quota was met after a meeting at which the employees were told that they might not get an expected pay increase unless they helped the party involved. Bridge and his two associates were dismissed for violations of section 12(a). However, the Road Commissioner who had initiated this chain of events within the Department was not dismissed upon a finding that he was not subject to the provisions of the Act. Thus the case stands for the added proposition that activities in violation of the Act are not justified because they are carried out under the orders of a superior, unless duress is present.⁴¹

35 UNITED STATES CIV. SERV. COMM'N PAMPHLET 20, p.18 (1964). [Hereinafter cited as Pamphlet 20.] Section 15 of the Hatch Act, 54 Stat. 767, as amended 5 U.S.C. § 1181 (1958), provides that all persons to whom the political restrictions of the Act apply are prohibited from participating in such activities as the Civil Service Commission had determined, before the passage of the Act, were prohibited on the part of U.S. Civil Service employees. Thus state and federal employees are subjected to the same restrictions. In *Oklahoma*, the Court stated: "By this section [§ 15] Congress made the test of political activities for state employees the same as the test then in effect for employees in the classified civil service." 330 U.S. 127, 144. For an excellent discussion of section 15, and also of sections 9(a) and 12(a) of the Hatch Act, see Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510 (1962).

36 PAMPHLET 20, pp.10-16. This pamphlet is in effect a summary of the Hatch Act restrictions on federal, state and local employees, as determined from the Commission's & the courts' applications of the Act.

37 PAMPHLET 20 at 11.

38 See text accompanying note 16 *supra*.

39 330 U.S. 127, 132 (1947).

40 286 F.2d 30 (10th Cir. 1961).

41 *Id.* at 34.

One final area of the substantive prohibitions which could conceivably give some trouble is the extent of an employee's right to express his opinion on a political subject or candidate. How far may an employee go in expressing his opinion without running afoul of the dual requirements of partisanship and direct attempt to influence others toward partisan action? The Civil Service Rules in effect prior to the passage of the Hatch Act allowed only "private" expressions of opinion.⁴² The present Act contains no such qualification of the right of expression.⁴³ In an opinion a few years after the Hatch Act was passed, the Attorney General of the United States stated that a public expression of opinion is not violative of the Act, "provided it is not such as to constitute taking an active part in political management or in political campaigns."⁴⁴ This basic position was adhered to in *Wilson v. United States Civil Service Commission*,⁴⁵ a case involving an employee of the Post Office Department who had written a letter, which appeared in the *Houston Post*, urging defeat of a partisan candidate. The court stated that section 9(a) of the Act gives employees the right to express their opinions and that the right endures even "when it might chance to parallel the positions of the organized parties so long as it is not part of organized political activity."⁴⁶ It was found that the letter, on its face, did not reveal active participation in partisan politics "although . . . an intent to influence the thoughts or actions of others can be assumed."⁴⁷

This concludes the discussion of the Hatch Act—its constitutionality and underlying policy, the criterion of jurisdiction for state employees, and its substantive prohibitions. The purpose in considering it has been twofold; first, to study the provisions which affect state employees and secondly, as a prelude to examination of similar state legislation. It might be noted in passing that the Hatch Act has been subjected to some rather heavy criticism.⁴⁸ A critique of it here would be inappropriate since the principal focus of this work is upon state activity. Moreover, a number of the objections to the Hatch Act can also be made against the state legislation. These will be discussed in greater detail below.

C. State Legislation

As stated in the introduction, almost every state has some kind of statutory provision concerned with political activities of its employees. There is such great variety in this legislation that it practically defies summary and generalization. However, an attempt will be made here to classify the political activity restrictions into basic patterns in order to gain a clearer understanding of their nature and scope. This systematic approach seems to be the only suitable manner in which to cover the subject.

It should be emphasized again that the principal focus of this section of the survey is upon the substantive provisions of the state legislation—*i.e.*, the specific activities which are proscribed. Therefore, before delving into the classification of such provisions, it would be well to dispense preliminarily with certain matters which are not substantive but which are nevertheless important to a thorough understanding of the topic under consideration.

The first of these matters is the breadth of coverage of the various state enactments. It is one thing to say that a state has political activity legislation but it is another question entirely as to which employees within the state are affected by the prohibitions. A majority of the states impose restrictions upon their em-

42 40 OPS. ATT'Y GEN. 15, 20 (1941).

43 *Id.* at 20-27.

44 *Id.* at 27.

45 136 F. Supp. 104 (D.D.C. 1955).

46 *Id.* at 106.

47 *Ibid.*

48 *E.g.*, Rose, *supra* note 35; Note, *The Hatch Act—Political Immaturity*, 45 Geo. L.J. 233 (1956-57).

ployees through a civil service, merit or personnel system.⁴⁹ This is of course the approach utilized in the Hatch Act as it affects federal employees.⁵⁰ Such states have enacted civil service laws which contain prohibitions of political activity applicable to all classified employees in the state civil service.⁵¹ This approach leaves unrestricted the unclassified employees. A few states apply political restrictions to all state employees, whether in the classified service or not.⁵² Some states have no restrictive provisions of general applicability to classified or unclassified employees but rather impose limitations on employees of specific state agencies.⁵³ Still other states impose direct restrictions upon all public employees, including those at the county and municipal levels.⁵⁴ Finally, a number of states impose no direct prohibitions on any employees but delegate to lower level governmental units the power to organize a system of employee classification with a direction that certain political restrictions be imposed on the employees so classified.⁵⁵ Of course, various combinations of these methods of coverage are used in a number of states.⁵⁶

The second preliminary consideration is the scope of the inquiry into the prohibitions of political activity. Again it must be noted that almost every state may be expected to have restrictions with respect to *forcing* contributions of money or services by public employees under threats of their employment status being somehow affected. The focus here is upon prohibitions of *voluntary* participation in political activities which are arguably not as necessary for the preservation of an efficient state service. Prohibitions of forced activities will be mentioned only if they are the sole type of restriction imposed by the state.

1. Legislation applicable to all state or all classified employees.

With the ground now cleared, the substance of the restrictions upon political activity can be examined. First to be considered are provisions of general or state-wide applicability. At the risk of over-simplification, it can be said that there are two general categories of prohibitions found in the state legislation: (1) those restricting solicitation and/or contribution of funds for political purposes, and (2) those proscribing active participation in party and campaign affairs. Many states have enacted both of these types of restrictions. They are found both in statutes and in state personnel or civil service rules.

49 An enumeration of these states would prove to be repetitious since all statutes imposing restrictions through civil service systems, etc., will be discussed in this section. For a brief discussion of political restrictions imposed through civil service laws, see KAPLAN, *LAW OF CIVIL SERVICE* 341-50 (1958).

50 This statement merits a slight qualification. Section 9(a) of the Act applies to persons "employed in the executive branch of the Federal Government, or any agency or department thereof. . . ." 53 Stat. 1148 (1939), as amended, 5 U.S.C. § 118i(a) (1958). However, the great bulk of such employees are in the classified service and the Civil Service Commission administers the political activity prohibitions as to them. For employees who are not classified under the Civil Service Act, the employing authority must see to it that the Act's restrictions are enforced. See PAMPELET 20, pp. 5-6.

51 *E.g.*, ALA. CODE tit. 55, § 317 (1958). In some states, almost all employees may be in the classified service. Connecticut, which also imposes its restrictions through a civil service law, CONN. GEN. STAT. REV. § 5-61 (1958), numbers 25,000 of the state's 27,000 employees in the classified service. Letter from George J. Walker, Personnel Director, State of Connecticut, to NOTRE DAME LAWYER, Feb. 9, 1965, on file in office of NOTRE DAME LAWYER.

52 *E.g.*, CAL. GOV'T CODE § 19730, prohibiting a "state officer or employee" from soliciting or receiving funds for political purposes.

53 *E.g.*, UTAH CODE ANN. § 27-11-21 (1953), prohibiting political activities by members of the Highway Patrol.

54 *E.g.*, FLA. STAT. ANN. § 104.31 (1960): "No officer or employee of the state, or any county or municipality thereof . . ." may participate in the restricted activities.

55 *E.g.*, MD. ANN. CODE art. 23B, § 70(a) (1957), prohibiting certain political activities on the part of town employees if the town creates a merit system for its employees.

56 *E.g.*, Florida, in addition to the restrictions upon all state, county and municipal employees, FLA. STAT. ANN. § 104.31 (1960), *supra* note 54, has prohibitions which apply only to classified employees. FLA. STAT. ANN. § 110.13 (1960).

a. *Solicitation-contribution provisions*

Considering first solicitation and/or contribution for political purposes, the provisions usually take one of three general forms: (1) prohibition of both solicitation and contribution; (2) prohibition of solicitation only; (3) prohibition of forced contributions only.

The Alabama statute and State Personnel Board rule are typical of the restrictions upon both solicitation and contribution. Both provide as follows:

No employee in the classified service, and no member of the board shall, directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take any part in soliciting any such assessment, subscription, or contribution. No person shall solicit any such assessment, subscription, or contribution of an employee in the classified service.⁵⁷

Nine other states have restrictions to the same effect⁵⁸ and in several of these the prohibition is in substantially the same language as the Alabama provision herein set out.⁵⁹

Typical of the provisions prohibiting only solicitation of funds for political purposes is the California statute:

A State officer or employee shall not, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, contribution, or political service, whether voluntary or involuntary, for any political purpose whatever, from any one on the employment lists or holding any position under this part or board rule.⁶⁰

Thirteen other states impose a similar restriction,⁶¹ again some of these being couched in substantially the same terms as the California statute.⁶²

Eight states prohibit only forced contributions for political purposes.⁶³ The language of these prohibitions is not nearly so uniform from state to state as the two types discussed previously, but the Alaska statute is typical at least in indicating the general tenor of this type of restriction:

"No person may require an assessment, subscription, contribution, or service for a political party from an employee in the classified service."⁶⁴

There are several miscellaneous types of solicitation — contribution prohibitions in addition to the three principal types outlined. The Montana and New Hamp-

57 ALA. CODE tit. 55, § 317 (1958). Rules of the State Personnel Board (rev., 1956) § 14(d), adopt the words of the statute verbatim. This is a not uncommon practice. 58 Conn., Regs. of the Civ. Serv. Comm'n, State Personnel Bd., §14-13 (1961); FLA. STAT. ANN. § 110.13(3) (1960); Ga., Georgia State Personnel Bd. Rules and Regs., Rule 3, par. 3.104; ILL. ANN. STAT. ch. 24½, § 38t (Smith-Hurd Supp. 1964); IOWA CODE ANN. § 365.29 (1946); KY. REV. STAT. ANN. § 18.310 (3) (1963); LA. CONST. art. XIV, § 15 (N)(3) and La. Civ. Serv. Rules, 14.1B (1963); ORE. REV. STAT. §§ 240.705, 260.230 (Supp. 1963); WEST VA. CODE § 2835(17)(d) (1961). See KAPLAN, *op. cit. supra* note 49, at 343.

59 *E.g.*, KY. REV. STAT. ANN. § 18.310(3) (1963).

60 CAL. GOV'T CODE § 19730.

61 HAWAII REV. LAWS § 3-70(d) (1955); IND. ANN. STAT. § 60-1341 (repl. vol. 1961); ME. REV. STAT. ANN. ch. 63, § 25 (1954); MASS. ANN. LAWS ch. 55, § 11 (1964); MINN. STAT. ANN. § 43.28 (1961); MO. ANN. STAT. § 36.150(4) (1949) and Rules and Regs. Personnel Div., Rule 15.4(b); OHIO REV. CODE ANN. § 143.41 (Page 1953); OKLA. STAT. ANN. tit. 74, § 818 (1965); PA. STAT. ANN. tit. 71, § 741.905 (1962); R. I. GEN. LAWS ANN. § 36-4-53 (1956) and Merit System Rule 36-4-53 (repetition of statute verbatim); TENN. CODE ANN. § 8-3121 (1956); Vt. Civ. Serv. Rules quoted in letter from Mr. Claude W. Magnant, to NOTRE DAME LAWYER, Feb. 16, 1965, on file in office of NOTRE DAME LAWYER; WIS. STAT. ANN. § 16.30 (1957).

62 *E.g.*, OKLA. STAT. ANN. tit. 74, § 818 (1965).

63 ALASKA STAT. § 39.25.160(c) (Supp. 1962); Idaho, S.B. No. 69 § 11(1)(b), 1965 Sess., Idaho Legislature; KAN. GEN. STAT. ANN. § 75-2953 (1964); Rules of the Civ. Serv. Comm'n, State of Michigan, Rule 7.2 (1964); N.M. STAT. ANN. § 5-4-42A (Supp. 1963); N.Y. CIV. SERV. LAW § 107(3); TEX. PEN. CODE art. 195.259 (1952); WASH. REV. CODE § 41.06.250(1) (Supp. 1964).

64 ALASKA STAT. § 39.25.160(c) (Supp. 1962).

shire statutes appear to prohibit only contributions.⁶⁵ Florida's restriction is borrowed from section 12(a) of the Hatch Act.⁶⁶ In some states where nothing is said specifically about solicitation or contribution, and even in some states where reference is made to these matters, it is possible that such activity is proscribed by the more general restrictions upon participation in political activities.

Judicial interpretations of the legislation and regulations thus far discussed are dealt with below at the completion of the treatment of all statutory and quasi-statutory materials. However, since there is little judicial treatment of many political restrictions, a few remarks with reference to such restrictions might be appropriate immediately after their terms are set out. As regards the solicitation-contribution form of restriction, there would seem to be some question of the necessity for prohibiting voluntary, unsolicited, private political contributions. Yet a fair reading of some of the provisions discussed indicates that their intent is to prohibit such contributions. There would seem to be little danger of political corruption in the state service, in the form of favoritism or discrimination, from such contributions except in the rare instances where the contribution would be on behalf of an official who could and *would* exercise influence upon the contributor's employment status. More often than not the contribution would be to a candidate at most remotely connected with the contributor's employee status, if indeed the candidate ever learned of the specific contribution. It is not necessary to prohibit all contributions in order to avoid a few potentially dangerous situations. On the other hand, prohibitions of merely forced contributions would not seem to go far enough. There are many subtle forms of pressure which could escape the proscriptions of this type of regulation. An acceptable middle ground as regards restriction upon contributions might be to prohibit contributions for candidates and purposes which can reasonably be expected to have an effect on the contributor's employment status. Prohibition of solicitation of contributions from and by public employees seems to be justified because of a greater danger of repercussions affecting employment status than is presented by voluntary contributions. A superior could much more easily learn who did and did not respond favorably to a solicitation, which indeed he himself may have initiated, than he could discover who has given voluntary, unsolicited contributions to a candidate of his choice.⁶⁷

b. *Participation in party and campaign activities*

The second general type of prohibition indicated above was that of active participation in party and campaign activities. The forms taken by statutes and rules imposing this general restriction are quite diverse. Most are more detailed than section 12(a) of the Hatch Act which says little more than the label here given to the general type of prohibition. However, in spite of the diversity, an attempt at classification does reveal a few basic approaches to the problem at which this kind of restriction is aimed. Again note that the classifications as drawn are not mutually exclusive so that some states combine two or more of the various available approaches.

65 MONT. REV. CODES ANN. § 94-1439 (1947); N.H. REV. STAT. ANN. § 70:2 IV (Supp. 1963). The Montana provision could be construed as prohibiting solicitation of contributions by employees also. However, the only prohibition directed specifically against employees deals with contributions.

66 FLA. STAT. ANN. § 104.31(1)(b) (1960). This is the Florida provision which applies to all state, county and municipal employees. For the other Florida provision, which applies only to classified service employees, see *supra* note 58.

67 The Hawaii statute, HAWAII REV. LAWS § 3-70(d) (1955), presents an interesting way to allow voluntary contributions but at the same time to prevent them from being linked to a particular candidate: "Any person in the civil service may make voluntary contributions to a political organization for its *general expenditures*." (Emphasis added.)

i. The most common prohibitions

By far the most common form of prohibition of active participation in party and campaign activities is the Alabama provision as follows:

No employee in the classified service shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.⁶⁸

It is evident that this provision prohibits specifically some of the activities which have been found to be in violation of section 12(a) of the Hatch Act.⁶⁹ This kind of restriction, in either statutory or rule form, is found in eleven states.⁷⁰ There are a few variations in some of these states from the text quoted above. For example, this provision proscribes candidacy for "nomination or election to *any public office*."⁷¹ In three states an exception to this particular prohibition is made by the addition of language to this effect: "This section does not prohibit appointment, nomination, or election to *nonpartisan* public office in a *local* government unit."⁷² The Hatch Act recognizes a similar exception.⁷³ Note also, in the quoted provision, the reference to expression of opinion "privately." As has been indicated this limitation of expression is not present, either expressly or by implication, in section 12(a) of the Hatch Act.⁷⁴ In eight states, not all of them having the specific type of prohibition being discussed here, the word "private" remains.⁷⁵ Perhaps the same considerations which prompted Congress to remove this limitation from the federal law will compel these states to do likewise if they have occasion to reconsider their legislation.

The Alabama provision quoted above and those like it in other states, seems by comparison with some of the other statutes to be considered, a rather effective imposition of political restrictions, prescinding from the question of whether its limitations go too far. It has the virtues of specificity and interpretability in view of the body of analogous federal law available to its administrators.

ii. The shorter form

Moving on, five states have what seems to be an abbreviated Hatch-like ver-

68 ALA. CODE tit. 55, § 317 (1960); Rules of the State Personnel Bd., § 4(e) (rev. 1956).

69 See text accompanying note 36 *supra*.

70 ALA. CODE tit. 55, § 317 (1960) and Rules of the State Personnel Board, § 4(e) (rev. 1956); ALASKA STAT. § 39.25.160(a) (1962); Conn., Regulations of the Civil Commission, State Personnel Dept., § 14-13 (1961); FLA. STAT. ANN. § 110.13(4) (1960); Ga. State Personnel Board Rules and Regulations, Rule 3, par. 3.104; KY. REV. STAT. ANN. § 18.310(4) (1963); LA. CONST. art. XIV, § 15 (N) (7) and La. Civ. Serv. Rules, Rule 14.1E (1963); MO. ANN. STAT. § 36.150(5) (1949) and, Rules and Regs. Personnel Div., Rule 15.4(b); OKLA. STAT. ANN. tit. 74, § 818 (1965); WASH. REV. CODE § 41.06.250(2) (Supp. 1964); WEST VA. CODE § 2835(17)(e) (1961).

71 ALA. CODE tit. 55, § 317 (1960). (Emphasis added.)

72 ALASKA STAT. § 39.25.160(a) (Supp. 1962). The other two states are Kentucky and Washington. (Emphasis added.)

73 However, the Hatch Act exception is considerably broader. Section 16 of the Act, 54 Stat. 767, as amended 5 U.S.C. § 118m (1958), authorizes the commission to remove political activity restrictions for federal employees living in communities where the majority of the voters are federal employees. Federal employees, who wish to run for public office in such communities must, according to PAMPHLET 20, p.17, run as independents, not associated with a political party. This corresponds with the "non-partisan" language in the state legislation. PAMPHLET 20, p.17, lists the municipalities to which section 16 has been applied. Most of them are in the Maryland and Virginia suburbs surrounding Washington.

74 40 OPS. ATT'Y GEN. 15 (1941). See text accompanying notes 42-44 *supra*.

75 ALA. CODE tit. 55, § 317 (1960); FLA. STAT. ANN. § 110.13(4) (1960); IOWA CODE ANN. § 365.29 (1946); KY. REV. STAT. ANN. § 18.310(4) (1963); LA. CONST. art. XIV, § 15(N)(7); Nebraska Merit System Rules, art. XVI; OKLA. STAT. ANN. tit. 74, § 818 (1965); WEST. VA. CODE § 2835(17)(e) (1961).

sion of the form of restriction discussed above, its essence being no active participation in political activity.⁷⁶ The Connecticut statute is illustrative:

No person employed in the classified service shall participate in any manner in any political activity on behalf of any political party or candidate for election other than to cast his vote in any election and express his opinion as a citizen with relation to any issue before the electorate. Any violation of this section by a person in the classified service shall be adequate reason for dismissal.⁷⁷

Such a statute seems to intend substantially the same restrictive effect as the more detailed provision. This conclusion is buttressed by the fact that the Connecticut Civil Service Rules expand upon the statute in using in part the language of the longer provision.⁷⁸ A noteworthy feature of the otherwise similar Iowa statute, which may set it apart from the rest, is that its activity prohibitions appear to be directed only at campaign activities as opposed to political activity during non-campaign times, if indeed there is such a thing as non-campaign time in the life of a political party.

iii. The enumerative approach

Another form of prohibition, somewhat akin to the two already discussed, might be termed the "enumerative" approach. Such statutes, rather than stating restrictions in general terms, enumerate the specific activities which are proscribed. The Illinois statute is of this variety:

Any employee subject to this Act may be discharged in accordance with the discharge procedures controlling his position for participation during regular working hours in any of the following acts:

- (a) Participating in the organization of any political meeting.
- (b) Soliciting money from any person for any political purpose.
- (c) Selling or distributing tickets for political meetings.
- (d) Assisting at the polls in behalf of any party or party-designated candidate on any election day.
- (e) Using or threatening to use the influence or authority of his position to coerce or to persuade any person to follow any course of political action.
- (f) Initiating or circulating any petitions on behalf of a candidate or in support of a political issue.
- (g) Making contributions of money in behalf of any candidate for office or of any public or political issue.
- (h) Distributing campaign literature or material in behalf of any candidate.⁷⁹

Seven other states adopt this enumerative approach.⁸⁰ Naturally some of the enumerations are rather thorough and produce prohibitions which have substan-

76 CONN. GEN. STAT. REV. § 5-61 (1958); Idaho, S.B. No. 69, § 11(2), 1965 Sess., Idaho Legislature; IOWA CODE ANN. § 365.29 (1946); Nebraska Merit System Rules, art. XVI; OHIO REV. CODE ANN. § 143.41 (Page 1953).

77 CONN. GEN. STAT. REV. § 5-61 (1958).

78 Regs. of the Civ. Serv. Comm'n, State Personnel Dept. (1961). These regulations not only adopt some of the language of the longer provision but in fact seem like a recitation of the activities which have been found to be violative of the Hatch Act, as summarized in PAMPHLET 20.

79 ILL. ANN. STAT. ch. 24½, § 38(t) (Smith-Hurd Supp. 1964). It is important to note that the prohibitions of this section apply to "regular working hours," a proviso which makes the restrictions much less stringent. This statute is cited here because it is a good example of the enumerative approach. Statutes which impose restrictions only during working hours are discussed below. In view of the complex nature of the state legislation under discussion, there will necessarily be other instances where statutes will fit more than one classification.

80 LA. CONST. art. XIV, § 15(N)(7) and La. Civ. Serv. Rules, Rule 14.1E; Rules of the Civ. Serv. Comm'n, State of Mich., § 7.1 (1964); MINN. STAT. ANN. § 43.28 (1961); MONT. REV. CODES ANN. § 94-1440 (1947); N.M. STAT. ANN. § 5-4-42B (1953); ORE. REV. STAT. § 240.705 (Supp. 1963); PA. STAT. ANN. tit. 71, § 741.904 (Supp. 1964). Maine prohibits employees from serving as delegates to state and county conventions, as of town and city party committees, and from circulating primary nomination papers. Letters From Mr. Ober C. Vaughn, Director of Personnel, State of Maine, to NOTRE DAME LAWYER, Mar. 22,

tially the same effect as the first type discussed.⁸¹ Others are not so thorough and impose very limited restrictions.⁸² Manifestly this type of prohibition will be ineffective if the enumerated activities are very specific but at the same time the enumeration is not thorough enough in its listing of various possible objectionable activities.

iv. The incompatibility approach

The "incompatibility" approach is yet another mode of restricting political activity. This kind of prohibition restricts those activities which are incompatible with the proper performance of the employee's function as an employee. Consider the New Jersey statute which provides:

No person holding a position in the classified service shall . . . during the hours of duty engage in any political activity *nor at any other time* participate in political activities or campaigns so as to impair his usefulness in the position in which he is employed.⁸³

Three states have enacted statutes similar to this one,⁸⁴ in that the prohibition applies beyond working hours. Three others⁸⁵ have statutes which prohibit activities only during working hours, apparently on the rationale that they are incompatible with the proper performance of employment duties.

The "incompatibility" approach seems to be a basically valid one although it is open to the objection that the standard of conduct required may be rather vague. The California approach⁸⁶ enables the authority closest to the affected employee to determine from its specialized knowledge which activities are particularly undesirable. Such a system may have its advantages but also may produce great disparity of regulation and consequent confusion among employees in the various state departments. There might also be some question as to the competence of department heads to designate activities which should properly be restricted. As for those states whose prohibitions apply only to working hours, such provisions would seem to be ineffective to reach all activities which should be regulated.

1965, on file in office of NOTRE DAME LAWYER. It must be admitted that some of these provisions were placed in this category for want of a better classification. Not all are truly enumerative as the Illinois statute. Some "enumerate" only one or two specific activities. However, because they prohibit specific activities, as opposed to more general restrictions, they are placed here.

81 *E.g.*, PA. STAT. ANN. tit. 71, § 741.904 (Supp. 1964). This statute recites the usual prohibition of participation "in political management or in political campaigns" and then enumerates specific activities which are proscribed—delegate to a political convention, member of a committee of a political party, officer of a political organization, interference with counting of ballots by election officers.

82 *E.g.*, MINN. STAT. ANN. § 43.28 (1961). This provision prohibits, apart from solicitation and contribution of funds for political purposes, only service as a delegate or alternate to a political convention and compelling an employee to join a political organization and to participate in political activity.

83 N.J. STAT. ANN. § 11:17-2 (1960) (Emphasis added).

84 CAL. GOV'T CODE § 19251; R.I. GEN. LAWS ANN. § 36-4-52 (1956); WIS. STAT. ANN. § 16.30 (1957). The California provision is not directed specifically at political activities. It empowers the appointing authority in each state agency to designate the particular activities which are deemed incompatible for employees of the particular agency. Some of the agencies (*e.g.*, the California Highway Patrol) have specified certain political activities as incompatible. Letter From Mr. Kelvin D. Sharp, Acting Exec. Officer, California State Personnel Board to NOTRE DAME LAWYER, Feb. 16, 1965, on file in office of NOTRE DAME LAWYER.

85 COLO. REV. STAT. ANN. § 26-6-31 (Supp. 1960); ILL. ANN. STAT. ch. 24½, § 38t (Smith-Hurd Supp. 1964); N.M. STAT. ANN. § 5-4-42F (Supp. 1963) ("No employee. . . shall engage in partisan political activity while on duty.") Note that New Mexico has broader prohibitions also; see note 80 *supra*.

86 See note 84 *supra*. The fact that the appointing authority designates activities specifically prohibited does much to overcome the objection to the "incompatibility" approach that the standard of conduct is too vague.

v. Affirmative provisions

Several states take an affirmative approach to employee political activity, expressly granting freedom to participate in certain activities which in other states are sometimes proscribed. Hawaii is probably the most representative of these states. Its statute reads as follows:

The foregoing prohibited activities shall not be deemed to preclude the right of any person in the civil service to vote as he chooses and to express his opinions on all political subjects and candidates, nor, to be a member of any political party, organization or club. Any person in the civil service may make voluntary contributions to a political organization for its general expenditures.⁸⁷

Massachusetts⁸⁸ and Florida⁸⁹ have more limited provisions of this type. A question with regard to such statutes is whether they by implication prohibit that which they do not affirmatively allow.

vi. Prohibition of office holding

In several of the types of restrictions thus far considered, there were specific or implied prohibitions of an employee holding public office. Seventeen states, among them some of the states already discussed above, have separate and specific restrictions either requiring that an employee resign if he wishes to run for office,⁹⁰ or simply prohibiting an employee from becoming a candidate for or from holding such an office, thus in effect forcing resignation.⁹¹

2. States utilizing a piecemeal approach

The substantive prohibitions of political activity viewed thus far have been for the most part applicable to all employees of the state government or applicable to all of the state government's civil service employees. As noted at the outset of this section, a number of states have no such provisions of state-wide applicability. Five of these states adopt instead what might be called a "piecemeal" approach.⁹²

87 HAWAII REV. LAWS § 3-70(d) (1955). The "foregoing prohibited activities" referred to in the statute are use of official authority or influence to interfere with an election or coerce action by a person or party and solicitation of funds. These are obviously very limited restrictions. Wyoming might be mentioned at this point of the discussion of affirmative restrictions since its provisions are unique and do not really fit under other categories. The Wyoming restriction, Rules and Regs. of State Personnel Comm'n, Rule XV, § 15-1 is as follows: "Participation by employees in the State service in politics or political campaigns, or freely expressing political opinions, will not be prohibited. . . ."

88 MASS. ANN. LAWS ch. 55, § 11 (1964) (affirmatively allows employees to be "members of political organizations or committees"). The only prohibitions of the statute are concerned with solicitation of funds for political purposes.

89 FLA. STAT. ANN. § 104.31(1)(c) (1960) (allowing employee to run for "any elective office in this state"). The prohibitions here are quite similar to those of the Hawaii statute, *supra* note 87. However, this is the Florida provision applying to all state, county and municipal employees. The Florida statute, *supra* note 70, which applies to classified employees has much broader restrictions.

90 ALASKA STAT. § 39.25.160(e) (Supp. 1962); Georgia State Personnel Board, Rules and Regs., Rule 3, par. 3.105; IND. ANN. STAT. § 60-1341 (repl. vol. 1961); KAN. GEN. STAT. ANN. § 75-2953 (1964); Rules of the Civ. Serv. Comm'n, State of Michigan, Rule 7.3 (1964); MINN. STAT. ANN. § 43.28 (1961); MO. ANN. STAT. § 36.150(5) (1949); Wyoming, Rules and Regs. of the State Personnel Comm'n, Rule XV, § 15-2 (employee must take unpaid leave of absence upon seeking nomination for public office).

91 ALA. CODE tit. 55, § 317 (1960); FLA. STAT. ANN. § 110.13(4) (1960); LA. CONST. art. XIV, § 15(N)(8); N.H. REV. STAT. ANN. § 98.18 (repl. vol. 1964); N.M. STAT. ANN. § 5-4-42B (Supp. 1963); OKLA. STAT. ANN. tit. 74, § 818 (1965); Oregon Civ. Serv. Rules, 131.005(3); WEST VA. CODE § 2835(17)(e) (1961). These statutes indicate rather clearly that an employee may not hold office, with certain exceptions for nonpaid local positions. Other statutes imply a prohibition against office holding and, of course, this implication could arise under any statute which prohibits "active participation" in political activities or campaigns.

92 Arizona, Delaware, Nevada, South Dakota and Utah. The specific provisions are not cited at this point because they will be listed in detail in the course of discussion.

Nevada presents a representative example of this approach. It prohibits certain political activities by members and/or employees of the state police force, of the Gaming Commission, of the Gaming Control Board, of the Industrial Commission and of the Public Service Commission.⁹³ These prohibitions (Nevada's) vary in content but most seem to restrict only membership on a committee of a political party or in a party delegation to a political convention.⁹⁴ Arizona⁹⁵ and Delaware⁹⁶ have provisions similar to Nevada's in that a number of state agencies are subject to the restrictions. South Dakota⁹⁷ and Utah⁹⁸ are concerned only with activities of the state police force.

A number of states which have prohibitions of general applicability nevertheless have statutes applicable to single state agencies.⁹⁹ In some states these individual provisions may be superfluous since they proscribe activities already prohibited by the general statute. In others, the agencies covered by the specific provisions may not be within the state classified service and hence the general provisions which apply to civil service employees do not reach them. In some cases where there are overlapping provisions, it would seem that the specific provisions are merely cases of legislative inadvertence or inertia since they do not appear to be especially designed to meet a particular problem of the agency covered by the restriction.¹⁰⁰

An examination of the specific restrictions of the states using the "piecemeal" approach fails to reveal any general pattern as to content. Some are thorough, patterned on general state prohibitions¹⁰¹ while others are very limited in scope.¹⁰² However, it is possible to make a more definite statement as to the agencies which

93 NEV. REV. STAT. §§ 230.130(2) (State Police), 463.025(2) (Gaming Comm'n), 463.040 (Gaming Control Board), 616.185(5) (Industrial Comm'n), 618.150(4) (Dept. of Industrial Safety), 703.040(4) (Public Service Comm'n) (Supp. 1963).

94 *E.g.*, NEV. REV. STAT. § 703.040(4) (Supp. 1963): "No commissioner shall be a member of any political convention or a member of any committee of any political party."

95 ARIZ. REV. STAT. ANN. § 4-111D (Supp. 1964) (Dept. of Liquor Licenses and Control); § 8-320B (1956) (officers and employees of state institutions for juveniles); § 17-213 (Supp. 1964) (Game and Fish Dept.); § 18-115 (Supp. 1964) (Highway Dept.); § 26-305 (1956) (civil defense organizations).

96 DEL. CODE ANN. tit. 17, § 111(d) (Supp. 1964) (Highway Dept.); tit. 19, § 3101(b) (Supp. 1964) (Employment Security Comm'n); tit. 20, § 3117 (1953) (civil defense organizations); tit. 31, § 110 (1953) (Dept. of Public Welfare).

97 S.D. CODE ch. 55.16B15(14) (Supp. 1960).

98 UTAH CODE ANN. § 27-11-21 (1953).

99 *E.g.*, FLA. STAT. ANN. § 21.20 (1961) (State Auditing Dept.); § 229.38 (1960) (employees in the vocational administration program); § 252.20 (1962) (civil defense organizations); § 440.44(4)(c) (Supp. 1964) (Industrial Comm'n employees); § 947.10 (1944) (employees of the Parole Comm'n). For the general Florida provisions, see notes 54, 56, 66, 70, 75 *supra*. Other states which have specific, in addition to general, provisions are Connecticut, Minnesota, Ohio and Pennsylvania. There may be other states in this category in which individual state agencies have imposed restrictions on their employees. However, the rules of such agencies are not conveniently accessible.

100 Continuing with the Florida example, FLA. STAT. ANN. § 110.06 (1960) lists exemptions to the classified service and thus to the political prohibitions imposed on classified employees. Section 110.06(2)(h) lists as one of the exemptions, employees in state penal and correctional institutions. Thus a specific restriction upon employees in such institutions is easily explained. They are not covered by the general restrictions upon classified employees. However, a civil defense organization does not seem to fall within any of the exemptions to classification. Yet there are specific restrictions upon such an agency as indicated in note 99 *supra*. This does not necessarily show inadvertence on the part of the legislature, although this would seem to be the case in some states. There may still be need for specific restrictions if for some reason the agency's employees cannot be classified or if some particular problem exists as to them.

101 *E.g.*, UTAH CODE ANN. § 27-11-21 (1953).

102 *E.g.*, S.D. CODE ch. 55.16B15(14) (Supp. 1960) (prohibits only use of political influence to gain employment advancement).

are the subjects of individual statutes. The most popular are the state police, civil defense agencies, industrial commissions and fish and game commissions.¹⁰³

3. Delegation to political subdivisions

In five of the states which have no general state-wide prohibitions concerning employee political activity, the state government has delegated to political subdivisions of varying sizes the power and in some cases the obligation to organize local civil service systems.¹⁰⁴ This delegation, if it may be called that, typically contains a direction that certain political prohibitions be imposed on the employees so organized. The Maryland scheme is not atypical of this approach. Its municipalities which have the municipal corporation charter form of government, and which create a merit system for their employees, subject such employees to the following restrictions:

. . . [N]o officer or employee in the classified service of the town shall continue in such position after becoming a candidate for nomination or election to any public office; . . . no person shall orally, by letter or otherwise, solicit or be in any manner concerned in soliciting any assessment, subscription, or contribution for any political party or political purpose whatever from any person holding a position in the classified service of the town; no person holding a position in the classified service of the town shall make any contribution to the campaign funds of any political party or any candidate for public office or take any part in the management, affairs, or political campaign of any political party or candidate for public office, further than in the exercise of his right as a citizen to express his opinion and to cast his vote.¹⁰⁵

As is evident from a cursory reading, this statute, like those in the other states which utilize this general approach, assumes the form of one of the general types of state prohibitions which have been discussed above.¹⁰⁶ Four other states attack the problem through municipal or county civil service systems.¹⁰⁷ The employees covered within such a system, however, may vary from state to state.

Again, some of the states with one form or another of general state-wide prohibitions have delegated to political subdivisions the power to create, or have directly created for them, a classified service, the employees of which will be subject to certain political restrictions. In two of these states the coverage of the prohibitions is very limited, applying only to city policemen and firemen.¹⁰⁸ In the other four states in this category, the coverage is broader, encompassing most employees in the affected municipalities.¹⁰⁹ The actual substance of the provisions again usually takes the form of one of the general provisions discussed above.¹¹⁰

103 See agencies listed in notes 93-99 *supra*.

104 Arkansas, Maryland, Mississippi, North Dakota and South Carolina. The specific provisions will be cited as the discussion proceeds.

105 MD. CODE ANN. art. 23B, § 70(a) (1957).

106 The Maryland statute may be characterized as prohibiting both solicitation and contribution of funds for political purposes, this type of restriction on the state-wide level having been discussed in the text accompanying note 57 *supra*. The activities restriction seems to be of the kind discussed in the text accompanying note 7 *supra*.

107 ARK. STAT. § 19-1312 (repl. vol. 1956) (employees in cities of over 75,000 pop.), § 19-1432 (Supp. 1963) (employees in cities of 20,000 to 75,000 pop.), § 19-1612 (repl. vol. 1956) (policemen, firemen, and/or nonuniformed employees in cities of the first class); MISS. CODE ANN. § 3825-13 (1942) (municipal civil service employees); N.D. CODE ANN. § 40-44-09 (1960) (municipal civil service employees—very thorough provision); S.C. CODE § 47-699.139 (1962) (employees in municipalities with Council-Manager form of government), § 47-762 (1962) (employees in cities of 28,000 to 29,000 pop.).

108 TEX. CIV. STAT. ANN. art. 1269m, § 22 (1963); WYO. STAT. ANN. §§ 15-384, 15-407 (1957).

109 CAL. GOV'T CODE §§ 3201-05; KY. REV. STAT. ANN. § 90.220(2) (1963); MASS. ANN. LAWS ch. 43, § 92(A) (1961); ORE. REV. STAT. § 241.515 (Supp. 1963).

110 *E.g.*, KY. REV. STAT. ANN. § 90.220(2) (1963) (applicable to civil service employees in cities of the first class):

No person in the classified service . . . shall directly or indirectly, give, solicit, receive, or remit, any assessment, subscription, or contribu-

As a final point with reference to those states which have both state-wide and local prohibitions covering the same employees, a question could occur as to which legislation would apply in case of conflict. In California, the Attorney General has ruled that the state legislation does not pre-empt non-conflicting local legislation.¹¹¹

D. *Issues Raised by the State Cases*

The foregoing discussion of the legislation and regulation in the field of political activity has been rather detailed. However, this dissection of the material was necessitated by the fact that there has been little judicial interpretation of the statutes or rules alluded to.

There are a number of reasons for this lack of judicial treatment of the problem. For one thing, in some states there simply is no problem. Several states report no violations of political activity prohibitions for quite some time.¹¹² In other states where there certainly are violations, any number of factors may account for failure of disputes to reach the courts. An employee who is in violation of the prohibitions may first be warned before any action is taken against him.¹¹³ An employee so warned will probably end participation in the objectionable activity rather than lose his job—dismissal from the state service being the most common sanction for violation.¹¹⁴ Thus, a large number of prospective cases are eliminated before they start. Even if a bona fide violation occurs, remedial action is most often taken by an administrative agency, empowered to dismiss the offender. The agency is usually a civil service commission, or some similar body which administers the civil service law in which the political activity restrictions are found. Two formidable barriers stand in the way of these cases ever advancing to a judicial determination. First, the whole question of judicial review of administrative decisions, with all of its vagaries, is interposed. A discussion of this question would range far beyond the scope of this survey. Secondly, the validity and procedures of political activity legislation are so well established that there can be little fresh "grist for the judicial mills." However, by the very fact that there has been little judicial action we may assume that the cases which have been decided have dealt with significant issues. Otherwise they probably would not have progressed as far as the courts.

At the outset of the discussion of the judicial materials, a few words with reference to the constitutionality and purposes of the restrictions upon political activity are in order. The initial discussion of the Hatch Act has touched on these points but the state decisions may be profitably considered for the sake of comparison and for the few additional points which they raise.

Considering first the constitutional issue, it is evident from the earlier discussion of the Hatch Act that the principal difficulties of legislation of this kind are its inherent restrictions upon freedom of speech and the rights of citizens to par-

tion, to or for any political party or any candidate for public office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee or governing committee of any political organization nor an officer in either; . . . provided, however, nothing herein shall prevent any such person from freely expressing his or her views as a citizen or to cast his or her vote in any election.

111 43 OP. ATT'Y GEN. 236 (Cal. 1964).

112 *E.g.*, Wisconsin reports that no case of employee political activity has been before the Personnel Board or the courts for thirty years. Letter From C. K. Wettengel, Director, Dept. of Administration, Bureau of Personnel, to NOTRE DAME LAWYER, Feb. 8, 1965, on file in office of NOTRE DAME LAWYER.

113 See, *e.g.*, Attorney General's Opinion at 22 Pa. D.&C. Rpts.2d 549 (1960). This opinion discusses a number of employee political activity problems which occurred in Pennsylvania and notes that in a number of prospective cases the employee abandoned his objectionable activities when warned that such activities were in violation of the law.

114 See, *e.g.*, Connecticut statute quoted in the text accompanying note 77 *supra*.

participate in the democratic process of government. From an early date in the history of political activity regulation on the state level, constitutional objections have been swept aside by the rationale that the holding of a public position is not a matter of right, but is a mere privilege. Thus, the government-employer has the power to impose certain conditions of employment, among them restrictions upon political activities. One of the earliest but yet most often cited judicial expressions of the constitutional validity of this kind of legislation is the incisive statement of Justice Holmes, then a member of the highest Court of Massachusetts, in *McAuliffe v. City of New Bedford*.¹¹⁵ The case involved a policeman who was dismissed from the force for violation of a political activity ordinance.

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.¹¹⁶

This Holmes opinion has been cited and followed in the later cases.¹¹⁷

However, the right to impose such restrictions is not unlimited. Again the older cases have defined the limits and their definitions have endured. The Supreme Court of Vermont, in *Brownell v. Russell*, stated:

It is doubtless true that the restrictions imposed must be a reasonable exercise of the power granted, and have some just relation to the end in view. It seems to us that the provision in question satisfies these requirements. We think the removal of the police force from the field of active politics is calculated to promote the efficiency of the force and the purity of municipal government, and that the rule adopted imposes no greater restriction than is reasonably necessary to the accomplishment of this purpose.¹¹⁸

What are the ends or purposes which the restrictions are reasonably designed to accomplish? As with the federal cases, the state cases are quite uniform in indicating that the principal purpose, as outlined in the quoted passage, is to prevent political allegiance, rather than efficiency, from becoming the criterion for choice of public servants. Or, as the Florida Supreme Court stated in upholding that state's prohibition against advising contributions from other employees, the purpose of such legislation is ". . . to preserve the political purity of public employment and to protect public employees against harassment and political annoyances as conditions to holding their jobs."¹¹⁹ Perhaps the most thorough discussion on the state level of the policy underlying political activity prohibitions is found in *State v. Kirby*,¹²⁰ at issue there was the constitutionality of the political activity restrictions contained in an amendment to the charter of the City of St. Louis. The Supreme Court of Missouri noted the distinction between elected officials, who, as those responsible for implementing public policy, must be responsive to the popular political will, and other public employees over whom there is no necessity of popular control since they perform only ministerial functions.¹²¹ It reasoned that efficiency is the measure of the worth of the latter class of employees.¹²² This efficiency is seriously impaired when political affiliation becomes one of the factors entering into the selection of public servants.¹²³ The reasonable method of pre-

115 155 Mass. 216, 29 N.E. 517 (1892).

116 *Id.* at 220, 29 N.E. at 517-18. *Accord*, *Duffy v. Cooke*, 239 Pa. 427, 86 Atl. 1076 (1913).

117 See, e.g., *Ricks v. Dept. of State Civ. Serv.*, 200 La. 342, 8 So.2d 49 (1942); *Stowe v. Ryan*, 135 Ore. 371, 296 Pac. 857 (1931). For a further discussion of the constitutionality of state restrictions upon political activities, see KAPLAN, *LAW OF CIVIL SERVICE* 346-49.

118 76 Vt. 326, 57 Atl. 103, 104 (1904).

119 *State v. Stuler*, 122 So.2d 1, 3 (Fla. 1960).

120 349 Mo. 988, 163 S.W.2d 990 (1942).

121 *Id.*, 163 S.W.2d at 995.

122 *Id.*, 163 S.W.2d at 996.

123 *Ibid.*

venting undesirable political effects, and one which is not beyond the legislative discretion, is to prohibit public employees from taking an active part in politics.¹²⁴

Thus do the arguments run on the constitutional and rational justification for political activity legislation. These arguments are quite simple. It is submitted that perhaps they are too facile. It seems that the early decisions on the subject, on both the state and national levels, have been followed without question or periodic re-evaluation. For example, in *State ex rel. Duren v. Patterson*,¹²⁵ the Supreme Court of Minnesota, in speaking of that state's statute requiring resignation of an employee upon filing as a candidate for office, commented that: "The constitutionality of the statute is not questioned. It could not very well be in view of *United Public Workers v. Mitchell*. . . ."¹²⁶ Such a statement typifies the unwillingness of the courts to re-examine the validity of political restrictions. The *United Public Workers* decision was an extremely close one. Moreover, it dealt with a specific statute. Certainly such a decision should not foreclose all further discussion of the validity of political activity restrictions, especially in cases where a different statute with perhaps radically different provisions is presented for consideration. This is not to say that the decisions and basic philosophy of political restrictions are erroneous. However, it is to say that perhaps a little more care should be taken in approving restrictions of constitutional rights than mere reference to a time-worn formula. Some decisions seem to uphold the general principle of regulation without examining the possible effects of the specific provisions in the statutes under consideration. The apparent exception to this statement is the one case in which a statute restricting political activity was held unconstitutional, *Fort v. Civ. Serv. Comm'n of Cty. of Alameda*.¹²⁷ In that case, the Supreme Court of California, without dissent, refused to follow the time honored formulas for upholding political activity legislation. Rather it examined the specific provisions of the ordinance in question and determined that the legislative body had gone too far in imposing certain prohibitions—specifically restrictions upon participation in activities concerned with referendum measures—on the ground that the proscribed activities were non-partisan in nature.

As was indicated during the discussion of the legislative materials, it is possible that some of the restrictions go further than is necessary. More care might also be taken particularly on the legislative level where, as is apparent from the haphazard and ill-considered scheme of restrictions in some states, the full weight of legislative know-how has not been brought to bear on the problem.¹²⁸

Putting aside policy and constitutional considerations, what do the state cases reveal in terms of substantive interpretation of this mass of legislation? Actually they do not reveal very much. There are few cases and they must be read in the light of the statutes with which they are concerned. Perhaps the statutes in most states are well understood and only novel and controversial points require judicial determination. At any rate, the cases may be taken for what they are worth—answers to a specific problem with possible implications of a wider nature.

A few of the cases emphasize that participation in political affairs, to be objectionable, must be *active*. In *Gibbs v. Orlandi*,¹²⁹ the Supreme Court of

124 *Ibid.*

125 234 Minn. 432, 48 N.W.2d 574 (1951).

126 *Id.*, 48 N.W.2d at 576.

127 38 Cal. Rptr. 625, 392 P.2d 385 (1964), noted in 10 VILL. L. REV. 152 (1964), discussed in the text accompanying note 132 *infra*.

128 The exception in some of the legislation which has been examined allowing participation in local non-partisan activities, *supra* note 72, seems to be one example of a legislative determination that sensible limitations designed to fit the circumstances in lieu of "blanket" restrictions are possible. Yet, broad prohibitions covering large groups of employees seem to be the rule.

129 27 Ill. 2d 368, 189 N.E.2d 233 (1963).

Illinois affirmed a lower court decision that a mine rescue supervisor, dismissed for distributing campaign literature in violation of the Illinois statute,¹³⁰ be reinstated with back pay. The supervisor had allowed certain campaign literature to remain on a desk in his office in plain sight of the employees who entered therein. However, there was no evidence that he had passed any of the literature out. The Court stated that all of the offenses under the statute "clearly denote positive affirmative political acts."¹³¹

The state decisions do not make the point as plainly as do the federal cases that partisanship is one of the necessary elements for finding activity unlawful. However, the state statutes, by their continual reference to parties, would seem to make it clear that partisanship is contemplated as an indispensable element in any violation. In fact, in *Fort v. Civil Service Commission of County of Alameda*,¹³² the one instance where political activity restrictions were found to overstep constitutional bounds, one of the principal grounds for decision seems to have been that the statute went beyond partisan activities and was "not limited to conduct regarding partisan offices and issues but relates equally to all candidates and questions, whether or not identified with a political party."¹³³ An interesting question concerning partisanship arose in *Gremillion v. Department of Highways*¹³⁴ — is it necessary for an employee to be an organized worker for his activities to be deemed partisan? The situation was that a state highway foreman had been dismissed for urging his subordinates to vote for a particular candidate. Dismissal of the foreman was upheld, despite the fact that he was not an organized worker, on the rationale that the evil which the activity prohibition seeks to eliminate is no less evil or present because the offender is not affiliated with a party organization.¹³⁵ Thus, if one actively supports a candidate, he is partisan.

The use of partisanship as one of the criteria for determining violations may prove unsatisfactory when an issue, e.g., bond approval, rather than a candidate is the object of political activity. Should active advocacy of one side of an issue be prohibited if no political party is involved? This question has given some difficulty in Ohio. In the case of *State ex rel Green v. City of Cleveland*,¹³⁶ it was held that campaigning in behalf of an issue was participation in political activity within the meaning of the city charter.¹³⁷ Fifteen years later, in *Heidtman v. City of Shaker Heights*,¹³⁸ it was held that firemen who were circulating an initiative petition seeking a city ordinance to establish a three-platoon system in the fire department, were not participating in politics within the meaning of the Ohio statute because the word "politics" had to be taken "in its narrower partisan sense. . . ."¹³⁹ The *Green* case had been distinguished by the court below on a number of grounds, including the language of respective prohibitions and the fact that the statute in *Heidtman* was penal in nature and therefore had to be strictly construed.¹⁴⁰ Neither decision made clear that political party involvement was a crucial consideration although this seems a reasonable inference from the language of the later case. Perhaps the same dangers to the public service are present whether

130 ILL. ANN. STAT. ch. 24½, § 38(t) (Smith-Hurd Supp. 1964), quoted in text accompanying note 79 *supra*.

131 27 Ill. 2d 368, 189 N.E.2d 233, 235 (1963). See *Rosenfelder v. Huttoe*, 24 So. 2d 108 (Fla. 1945).

132 38 Cal. Rptr. 625, 392 P.2d 385 (1964).

133 *Id.*, 392 P.2d at 388.

134 129 So. 2d 805 (La. 1961).

135 *Id.* at 808.

136 33 Ohio L. Abs. 72, 33 N.E.2d 35 (Ct. of Apps. Cuyahoga Cty. 1940).

137 *Id.*, 33 N.E.2d at 38-39. See *Commonwealth v. McCarthy*, 281 Mass. 253, 183 N.E. 495 (1932).

138 163 Ohio St. 109, 126 N.E.2d 138 (1955).

139 *Id.*, 126 N.E.2d at 143.

140 99 Ohio App. 415, 119 N.E.2d 644, 648-49 (1954). The *Green* and *Heidtman* cases are discussed in KAPLAN, *op. cit. supra* note 117 at 347-50.

or not political parties take sides on an issue.¹⁴¹ However in no case would the dangers appear to be so great as to justify a blanket prohibition of participation in all advocacy of issues before the electorate.

A final point of some interest considered in the state decisions concerns the provisions requiring an employee to resign before running for office.¹⁴² In *State ex rel Duren v. Patterson*,¹⁴³ an employee decided to run for office and handed in his resignation to take effect after election day. Then, apparently because political prospects were not too rosy, he attempted to withdraw the resignation and return to state employment; this after he had conducted certain campaign activities. It was held in essence that to permit such activities would obviously subvert the purposes of the statute.¹⁴⁴

The foregoing summary of the state cases serves as a convenient point of departure from the discussion of the restrictions on the political activities of state employees. The cases re-emphasize the salient points of the preceding sections — the purpose of political activity legislation, its constitutionality and the key concepts of active participation and partisanship. The cases also indicate, in conjunction with some of the seemingly ill-considered legislation, a need for a real reappraisal of this entire field of regulation with the purpose of better adapting the legislative restrictions to the actual dangers to the integrity of public employment which are presented by employee participation in political affairs.

III. THE RIGHTS OF PUBLIC EMPLOYEES TO ORGANIZE, BARGAIN COLLECTIVELY AND TO STRIKE

A. Introduction

This portion of the Survey will be directed to the law of labor relations in the public service. The problems arising in giving to public employees the rights to organize, to bargain collectively and to strike will be analyzed. Upon conclusion we shall examine arbitration and mediation as possible alternatives to the public employee strike.

Justice Hughes, speaking for the Supreme Court in the celebrated case of *NLRB v. Jones and Laughlin Steel Corp.*, made the assertion that:

“. . . [T]he right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer . . . is a *fundamental right*. . . . [A] single employee was helpless in dealing with an employer. . . . [U]nion was essential to give laborers opportunity to deal on an equality with their employer.¹⁴⁵

Although Justice Hughes called these rights fundamental, public employees have been denied them at all levels of government. The federal labor relations acts specifically exclude public employees from their provisions.¹⁴⁶ State labor relations acts similarly exclude those engaged in public employment.¹⁴⁷ Statutes which do not specifically exclude public employees have been interpreted so as to deny them the

141 The Legislature of the State of Washington apparently thinks not. The recently enacted Washington statute, WASH. REV. CODE § 41.06. 250(2) (Supp. 1964), specifically permits full participation in “campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for non-partisan offices.”

142 Such provisions have been discussed in the text accompanying notes 90-91 *supra*.

143 234 Minn. 432, 48 N.W.2d 574 (1951).

144 *Id.*, 48 N.W.2d at 576. See 1954 OP. ATT'Y GEN. 220 (Indiana 1954).

145 301 U.S. 1, 33 (1937). (Emphasis added.)

146 61 Stat. 137 (1947), 29 U.S.C. § 152(2): “The term ‘employer’ . . . shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof. . . .”

147 See, e.g., the labor relations act of New York, N.Y. LAB. LAWS § 715: “The provisions of this article shall not apply to . . . employees of the state or of any political or civil subdivision or other agency thereof. . . .” See also Minnesota’s anti-injunction act, MINN. STAT. ANN. § 185.19 (1947).

right to engage in collective activity.¹⁴⁸ Even President Roosevelt, who was an early backer of organized labor, said that it was impossible to give to public employees the rights afforded employees in private business.¹⁴⁹ Because of these express exclusions of public employment by statutes, judicial interpretation and executive policy, the public labor relations law has been slow to develop.

Many states have not passed legislation in the area of public employment at all,¹⁵⁰ whereas others have only fragmentary provisions,¹⁵¹ similarly the case law is relatively sparse. Legal commentary, however, which only a few years ago was almost non-existent in this area, is growing apace.¹⁵² This perhaps reflects a recognition of the problems created by the startling absence of law and the increased demand by public employee unions for better wages and conditions.

It is recognized that there is a trend in the law of public employer-employee relations. More employees and more unions are receiving rights of collective activity.¹⁵³ It is the confusion about the form and extent of this trend that we shall attempt to clarify.

The confusion in the law of public employer-employee relations exists on the state and local levels. The federal law, as comprehensively defined by regulation

148 *E.g.*, *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947) which held that Mo. CONST. art. I, § 29, giving to employees the right to unionize, does not apply to public employees. *But see Potts v. Hay*, 229 Ark. 830, 318 S.W.2d 826 (1958), which held a similar Arkansas provision applicable to public employees.

149 Letter from Franklin D. Roosevelt to President of National Federation of Federal Employees, Aug. 16, 1937: "The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The Employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative employees and officials alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters." As quoted in *CIO v. City of Dallas*, 198 S.W.2d 143, 145 (Tex. Civ. App. 1946).

150 Colorado, Delaware, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Mexico, South Carolina, Tennessee, Vermont, West Virginia, Wyoming.

151 *E.g.*, IND. STAT. ANN. §§ 40-2401-2415 (1952); ILL. REV. STAT. ch. 127, § 63b109(7) (Supp. 1964), ch. 24, §§ 10-3-8—11 (1962). *But see* MINN. STAT. ANN. §§ 179.51—60 (Supp. 1964) which provides for a complete Public Employee Labor Relations Act.

152 Of eighteen articles examined on this area, fifteen were published since 1960.

See generally, Anderson, *Labor Relations in the Public Service*, 1961 WIS. L. REV. 601, 12 LAB. L.J. 1069 (1961); Brinker, *Recent Trends of Labor Unions in Government*, 12 LAB. L.J. 13 (1961); Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities*, 44 MARQ. L. REV. 36 (1960); Seligson, *A New Look at Employee Relations in Public and Private Service*, 15 LAB. L.J. 287 (1964); Strayhorn, *Municipal Employees and the Law*, 1961 U. ILL. L.F. 377; Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 604 (1950); Note, *Labor Relations in the Public Service*, 75 HARV. L. REV. 391 (1961).

In the area of collective bargaining see, Cornell, *Collective Bargaining by Public Employee Groups*, 107 U. PA. L. REV. 43 (1958); Grady, *Collective Bargaining and Public Employees*, 9 BOS. B.J. 9 (1965); Wollet, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 LAB. L.J. 8 (1964).

In the area of mediation and arbitration see, Chisholm, *Mediating the Public Employee Dispute*, 12 LAB. L.J. 56 (1961); Killingsworth, *Grievance Adjudication in Public Employment*, 13 ARB. J. 3 (1958); Krislov and Schmulorvitz, *Grievance Arbitration in State and Local Government Units*, 18 ARB. J. 171 (1963); Moskowitz, *Mediation of Public Employee Disputes*, 12 LAB. L.J. 54 (1961); Parker, *The Role of the Michigan Labor Mediation Board in Public Employee Labor Disputes*, 10 LAB. L.J. 632 (1959).

In the area of the recent Executive Order 10988, issued by President Kennedy (see footnote 156, *infra*), and federal employee relations see, Barr, *Executive Order 10988: An Experiment in Employee-Management Cooperation in the Federal Service*, 52 GEO. L.J. 420 (1964); Hart, *Government Labor's New Frontiers Through Presidential Directive*, 48 VA. L. REV. 898 (1962); Wortman, *Labor Relations in Government Services*, 15 LAB. L.J. 482 (1964).

153 As one commentator put it: "The organization of public employees into trade unions . . . has grown apace in recent years." Wollet, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 LAB. L.J. 8 (1964). See also Brinker, *Recent Trends of Labor Unions in Government*, 12 LAB. L.J. 13 (1961); Cornell, *Collective Bargaining by Public Employee Groups*, 107 U. PA. L. REV. 43 (1958).

and statute, is however fairly well settled. Thus, in this Survey the federal law will be considered only as a preface to an analysis which will give special emphasis to the problems arising in state law.

B. The Federal Law of Public Labor Relations

Prior to 1962, the only federal law pertaining to public employees was the Lloyd-LaFollette Act.¹⁵⁴ It provides that membership in a union does not constitute cause for discharge so long as such union does not assert the right to strike. This provision, however, was not directed to the entire federal service, but only to postal employees.

Then in June, 1961, President Kennedy appointed a task force to study and make recommendations on employee-management relations in the public service.¹⁵⁵ The task force held hearings throughout the country and made a study from which it composed a report. This report was submitted to the President in November, 1961.¹⁵⁶ It expressed that an orderly and constructive employee-management relationship was necessary for the efficient administration of government. To fulfill these needs, it recommended that a clear statement of the respective rights and obligations of employee organizations and agencies be set forth.

The report concluded that a greater participation by employees in the determination and implementation of employment policies and procedures would lead to a more effective public service.

Pursuant to this report, President Kennedy implemented the recommendations by issuing Executive Order 10988, January 17, 1962.¹⁵⁷ This order provided for the exclusive, formal or informal recognition of employee organizations. It also provided for the preparation of a code of fair practices and standards of conduct.

Under Executive Order 10988, exclusive recognition may be granted by an agency to an employee organization which represents a majority of an appropriate unit.¹⁵⁸ The representative of this organization may negotiate agreements for the entire unit, which it shall represent non-discriminately. These agreements may relate to grievances, personnel policies and practices, and general working conditions. The obligation of the agency to negotiate, however, shall not be construed to extend "to such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work."¹⁵⁹

Where no organization has qualified as the exclusive representative of the appropriate unit, the agency may grant formal recognition to any organization which represents at least ten per cent of the employees in the unit.¹⁶⁰ Formal recognition permits the union to present its views as to matters of personnel policies and practices and general working conditions which affect the members of its organization. It is given no right to represent those outside of its membership. In no case of formal recognition is the agency bound to confer on matters about which it would not be bound to negotiate with organizations exclusively recognized.

Regardless of whether any other organization in a unit is exclusively or

154 37 Stat. 555 (1912), as amended, 5 U.S.C. § 652 (1958).

155 Appointment of President's Task Force on Employee-Management Relations in the Federal Service, 26 Fed. Reg. 8225 (1961). Appointed as members of the Task Force were: Arthur Goldberg, then Sec. of Labor, as Chairman; Chairman of the Civil Service Comm'n, as Vice-Chairman; Director of the Bureau of the Budget; Sec. of Defense; and Postmaster General.

156 The Task Force held hearings in Atlanta, Chicago, Dallas, Denver, New York, San Francisco, and Washington. It reported to the President on November 30, 1961.

157 27 Fed. Reg. 551 (1962).

158 § 6 at 553.

159 *Id.* § 6 at 554.

160 *Id.*, § 5 at 553.

formally recognized, any group may be granted informal recognition.¹⁶¹ An employee organization so recognized may present to the agency any matters which concern its members. However, the agency is not bound to consult with informally recognized organizations.

Appropriate units which organizations may represent are determined by the agency. Should the union seeking exclusive recognition challenge this unit such that the dispute cannot be settled, the matter is submitted to arbitration for determination.¹⁶²

Executive Order 10988 also prescribes the preparation of a code of fair practices and standards of conduct.¹⁶³ This was to be accomplished through the joint efforts of the Department of Labor and the Civil Service Commission. After studying and adopting ideas from the federal labor relations acts and the 1956-57 Codes of Ethical Practices adopted by the AFL-CIO,¹⁶⁴ the Department of Labor and the Civil Service Commission formulated the *Standards of Conduct for Employee Organizations*, and the *Code of Fair Labor Practices in the Federal Service*.¹⁶⁵ It was intended that the *Standards of Conduct* and the *Code of Fair Practices* be simpler to administer than its counterpart in private business, thus eliminating the necessity of creating a separate agency or board. Upon analysis, though, it becomes apparent that its simplicity is deceptive. It would seem that many of the problems in interpreting the unfair labor practices of the Taft-Hartley Act, will analogously arise in the administration of the *Standards of Conduct* and the *Code of Fair Practices*.

The *Standards of Conduct* impose restrictive conduct only on the internal organization and government of the employee unions. Failure to abide by these standards as prescribed may result ultimately in the loss of agency recognition. The *Standards of Conduct* require that a union operate in a democratic manner, that officers who are affiliated with communist or totalitarian movements be excluded, that officers not be permitted financial interests which conflict with the duty they owe the union, and that fiscal integrity be maintained through prescribed forms of accounting and reporting.¹⁶⁶

The *Code of Fair Practices* prescribes certain unfair labor practices for both agency management and employee organizations. For agency management, it is an unfair labor practice to interfere with the rights of employees granted by Executive Order 10988, to discriminate in the hiring or retaining of employees, to dominate union activity, to discipline an employee because he testifies or files a complaint pursuant to the *Standards of Conduct* or the *Code of Fair Practices*, to refuse appropriate recognition of unions or organizations, or to refuse to negotiate when required to do so by Executive Order 10988.¹⁶⁷ For unions, on the other hand, it is an unfair labor practice to interfere with the rights granted employees under Executive Order 10988 or to induce management to do so, to discipline members performing duties which are demanded by their jobs, to slow down or to strike, or to discriminate in granting union membership.¹⁶⁸

These unfair labor practices as provided by the *Code of Fair Practices* resemble the unfair labor practices which govern the employee-employer relationship in private business. There is, however, an additional practice which patently sets the *Code of Fair Practices* apart from the Taft-Hartley Act. The *Code of Fair Practices*

161 *Id.*, § 4 at 552.

162 *Id.*, §§ 11 at 555.

163 *Id.*, § 13 at 555.

164 *Explanation of Provisions of the Standards of Conduct For Employee Organizations and Code of Fair Labor Practices in Employee-Management Cooperation in the Federal Service*, Attachment to Federal Personnel Manual Letter 711-2, Aug. 30, 1963.

165 28 Fed. Reg. 5127 (1963).

166 *Id.*, §§ 2.2(a)—(d) at 5128.

167 *Id.*, § 3.2(a) at 5130.

168 *Id.*, § 3.2(b) at 5130.

makes it an unfair labor practice to strike, slow down or carry on any activity which would have the result of a strike, slowdown or work stoppage.¹⁶⁹ There is also a federal statute which makes it a felony to strike or assert the right to strike against the federal government while in the federal service.¹⁷⁰ It is clear that these provisions deprive the unions of their most powerful weapon.

Thus, employees in the federal service, under Executive Order 10988 and the *Standards of Conduct* and the *Code of Fair Practices* issued pursuant thereto, may organize, gain exclusive recognition, and bargain collectively. In no case, however, is a strike, work stoppage or slowdown tolerated.

C. *The Concept of Publicness*

It is necessary that the concept of publicness be analyzed to show why public and private employees are treated differently in labor relations. Therefore this discussion is intended as a prerequisite to the subsequent discussions on the rights of organizing, collective bargaining and striking.

Employees in private industry have been enjoying rights of collective activity for thirty years. Public employees, however, are still seeking these elementary rights. This discrimination¹⁷¹ of guaranteeing to private employees the rights to organize, to bargain collectively and to strike, while not granting these rights to public employees must derive from the basic notion of publicness. Certain characteristics of publicness can be defined which support the general exclusion of public employees from private enterprise labor relations acts. The courts recognize differing characteristics in their decisions. This inconsistency makes it difficult to point to any one reason why public employees have been denied certain rights.

Perhaps the most fundamental characteristic of publicness is that of sovereignty. The government is bestowed with sovereignty which is inherent in the people to accomplish matters which cannot be accomplished by individuals. Thus it serves as a practical device by which the will of the people is carried out by representatives. It is this notion of government which has most bedeviled efforts of unionization. The court in *CIO v. City of Dallas*¹⁷² reasoned that to give to a few agents or employees of government the rights of collective activity would be to transfer to them all governmental power. The Connecticut Supreme Court in *Norwalk Teachers' Ass'n v. Board of Education*¹⁷³ supported this contention. It said that the sovereignty is delegated to government to be exercised by its agents who "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."¹⁷⁴ A lower Ohio court went so far as to consider that any collective activity, which was directed at exacting from government that which the people have not acquiesced in giving, was "a rebellion against government," a "means of destroying government."¹⁷⁵ From this notion of governmental sov-

169 *Id.*, § 3.2(b)(4) at 5130.

170 5 U.S.C. § 118 p (1958): "No person shall accept or hold office or employment in the Government of the United States or any agency thereof, including wholly owned Government corporations, who — . . . (3) participates in any strike or asserts the right to strike against the Government of the United States or such agency; or (4) is a member of an organization of Government employees that asserts the right to strike against the Government of the United States or such agencies, knowing that such organization asserts such right."

5 U.S.C. § 118r (1958): "Any person who violates section 118p of this title shall be guilty of a felony, and shall be fined not more than \$1,000 or imprisoned not more than one year and a day, or both."

171 See notes 146-149 *supra*.

172 198 S.W.2d 143 (Tex. Civ. App. 1946).

173 138 Conn. 269, 83 A.2d 482 (1951).

174 *Id.*, 83 A.2d at 485.

175 *City of Cleveland v. Division 268 of Amalgamated Ass'n of Street Employees*, 57 Ohio L. Abs. 173, 90 N.E.2d 711, 715 (C.P. 1949).

ereignty, flows the policy that a few agents of government should not be able to impede its operations.

Closely related to the notion of respecting sovereignty as derived from the people is the characteristic of publicness based on the purposes for which sovereignty was granted. One of the accepted purposes of government is to provide for the safety and welfare of the community. The accomplishment of this must remain unimpeded. For this reason, the court in *Perez v. Board of Police Comm'rs*¹⁷⁶ sustained a rule forbidding the unionization of policemen. In *New York City Transit Authority v. Loos*,¹⁷⁷ the Court felt that the public interest and welfare demanded that the rapid transit lines remain uninterrupted by union activity. Since the people authorized a public corporation to manage transportation in New York City, the union of relatively few members should not be permitted to frustrate this purpose.

The manner of carrying out the purposes of government raise yet another policy consideration incidental to publicness. Government operates for all the people and not for itself. It therefore has no profit motive. Its operations must be carried out as efficiently and economically as possible. This was recognized in the *Norwalk* case where the Court pointed out that certain types of collective activity would impede the economic and efficient operation of government.¹⁷⁸

Whether it is with the nature of sovereignty, or its purposes, or the manner of accomplishing these purposes that we deal, in each case these considerations dictate that publicness be treated differently from that of privateness.

Closely related to the discussion of the concept of publicness, which concept has supported the denial of rights to public employees, is the discussion of the governmental-proprietary distinction which has been suggested in support of the granting of rights to public employees. "Governmental" and "proprietary" are terms given different functions of government. The particular term given any function depends on the degree to which the function resembles purely governmental operations or private operations. The more like a private operation a function of government becomes, the more probable it is that this function will be characterized as proprietary and the more likely it is that employees working in that function will be given rights guaranteed private employees.¹⁷⁹

Two serious problems arise in connection with this distinction. First, what is it that will determine exactly whether a function is governmental or proprietary? Secondly, do courts generally recognize the dichotomy, or is it that the basic notion of publicness cannot be overcome by reasoning that because the public employee works in a function which is similar to functions carried on by private employees, he is to be afforded rights of private employees? We shall take these up in order.

The basic notion of what is governmental and what is proprietary becomes

176 78 Cal. App.2d 638, 178 P.2d 537 (1947).

177 2 Misc. 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *affirmed*, 161 N.Y.S.2d 564 (App. Div. 1957).

178 *Norwalk Teachers' Ass'n v. Board of Education*, 138 Conn. 269, 83 A.2d 482, 484 (1951).

179 Cf. Seligson, *A New Look at Employee Relations in Public and Private Service*, 15 LAB. L.J. 287, 294 (1964): "The more similar a government activity is to that of a private economy, in which workers normally organize, the more often it will be found that the government workers are also organized and that relations with management officials approach the pattern of such relations in private."

Reasons given for this phenomenon were that most of the workers in such an organization had previously worked for private employers; or, that the operation of the agency was similar to an operation often performed by private business; or, that the agencies involved were often more autonomous bodies with greater discretion in employee relations than is customary in other government agencies. See also, *Hamler v. City of Jacksonville*, 97 Fla. 807, 122 So. 220, 221 (1929), where the court stated that because the city was acting in a proprietary capacity, it is "governed by the same laws and may exercise the same rights of a private corporation engaged in a similar undertaking."

a facsimile of what is public and what is private. Hence an absence of incidents of publicness may tend to support the proprietary classification. More generally stated, those functions which, in the normal situation, are accomplished by private corporations are functions which we call proprietary. Those functions which cannot be, or normally are not, accomplished by private corporations are governmental. Thus the function of a municipality engaged in installing electric wiring in private homes was held in *Hamler v. City of Jacksonville*¹⁸⁰ to be proprietary, for that function is normally accomplished by private corporations. The Florida Supreme Court in *Hamler* said: ". . . [w]e must recognize that it is a well-established rule that municipalities have two classes of power, one of which is the legislative, governmental, or public power, and the other is proprietary and quasi private; that is, corporate power."¹⁸¹

The Supreme Court of Washington in *Christie v. Port of Olympia*¹⁸² made a similar comparison to private industry. There, the function of longshoremen who were unloading a vessel for the Port Authority was considered proprietary. The Court easily distinguished this operation from a fireman who works in a governmental function.¹⁸³

The Arizona Supreme Court in *Local 266, Int'l Bhd. of Elec. Workers v. Salt River Project Agricultural Improvement and Power Dist.*¹⁸⁴ held that a public function was proprietary where it possessed characteristics of private corporations. The state created Power District was operated for profit and it was privately owned. Its function did not extend to the entire public, but only to a select area. Thus the Court reasoned that the Power District's close similarity to private business supported its classification as proprietary.

A distinction between governmental and proprietary has also been supported on the basis of vitalness to the community. Thus in the *New York City Transit Authority*¹⁸⁵ case, the court classified the Transit Authority as a governmental function, because its cessation would cause disastrous results to the community. New York is vitally dependent on rapid transit. Even though the operation is one often accomplished by private corporations, its very vital nature was held to make it governmental.

One of the most popular notions of what is governmental and what is proprietary turns on the delegability of functions.¹⁸⁶ The court in *Weakley County Municipal Elec. System v. Vick*¹⁸⁷ reasoned that a proprietary function is a delegation to an arm of government to accomplish some purpose in a manner similar to that of private business. However, the discretion and authority of a governmental function may not be delegated. Support for this distinction is reflected in *Mugford v. Mayor and City Council of Baltimore*.¹⁸⁸ There, the court stated: "The city has no right under the law to delegate its governing power to any agency.

180 97 Fla. 807, 122 So. 220 (1929).

181 *Id.*, 122 So. at 221.

182 27 Wash.2d 534, 179 P.2d 294 (1947).

183 *Id.*, 179 P.2d at 301.

184 78 Ariz. 30, 275 P.2d 393 (1954).

185 2 Misc. 733, 154 N.Y.S.2d 209 (Sup.Ct. 1956), *affirmed*, 161 N.Y.S.2d 564 (App. Div. 1957).

186 The court in *CIO v. City of Dallas*, 198 S.W.2d 143, 145 (Tex.Civ.App. 1946), made the classic statement of policy based on public safety and delegability: "Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that Government employees have power to halt or check the functions of Government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous. . . . Government is formed for the benefit of all persons, and the duty of all to support it is equally clear. . . . [U]nless the people surrender some of their natural rights to the Government it cannot operate."

187 43 Tenn. App. 513, 309 S.W.2d 792 (1957).

188 185 Md. 266, 44 A.2d 745 (1945).

. . . To delegate such power to an independent agency would be a serious violation of the law.¹⁸⁹ This manner of distinguishing proprietary and governmental is closely related to the concept of sovereignty as an incident of publicness. In truth the governmental-proprietary distinction is but a distinction between public and private incidents of any one function of government.

Though the governmental-proprietary distinction is often discussed, it is not often applied so as to give to public employees those rights which are afforded private employees. However, the *Salt River Power District*¹⁹⁰ and *Christie*¹⁹¹ cases do give collective rights to employees because of the proprietary function in which the employees were engaged.

Other cases discuss the distinction, but then hold that the matter before them is governmental in nature, thus eliminating the necessity of applying the distinction.¹⁹² Two cases held that the very functions at issue might be operated in a proprietary manner, but since there was no statute recognizing the difference, the function had to be governmental.¹⁹³

Many courts are now rejecting the dichotomy. In *Port of Seattle v. International Longshoremen's Union*, the Court rejected the governmental-proprietary distinction by stating:

" . . . [T]he influence of the above-mentioned shadowy and ill-defined legal terms or judicial concepts is waning. . . . [T]here is unquestionably no logical basis for the application of those terms (governmental and proprietary) in the particular area of the law with which we are concerned in the case at bar. (strikes in public employment)¹⁹⁴

The court in the *New York City Transit Authority* case asserted that the distinction was outworn, having been developed for tortious actions brought against a city to prevent it from escaping liability on the grounds of governmental immunity.¹⁹⁵ Both *City of Springfield v. Clouse* and the *Weakley*¹⁹⁶ cases rejected it, not on substantive grounds, but because the distinction had not been recognized by statute.¹⁹⁷

189 *Id.*, 44 A.2d at 747.

190 78 Ariz. 30, 275 P.2d 393 (1954). Actually, it seems strange that the Arizona court's jurisdiction was not pre-empted by the federal labor relations law. The Supreme Court in *Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951), held that a Wisconsin statute forbidding strikes in Public Utilities which were privately owned was invalid because it interfered with the field occupied by federal law, i.e. the Taft-Hartley Act. Privately owned public utilities, even if entirely with a state and carrying on entirely intrastate activity, were held to be subject to the Taft-Hartley Act in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). In the Arizona case, the District, called a political subdivision, was a privately owned operation for profit. Similarly in *Consolidated Edison* and *Wisconsin Board* cases the public utilities were privately owned, but in these the NLRB had jurisdiction of the labor dispute. In *Dade County v. Amalgamated Ass'n of Street Employees*, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963), *appeal dismissed mem.*, 166 So. 2d 149 (Fla. 1964), *solicitor gen. invited to file briefs for U.S.*, 85 Sup. Ct. 185 (1964), *cert. denied*, 85 Sup. Ct. 642 (1965), the union filed with the NLRB, but the Board declined jurisdiction. The transit authority there was a public utility, partially controlled by private money. The line of demarcation must lie somewhere between the entirely privately owned utility in the *Wisconsin Board* case and the hybrid ownership arrangement in the *Dade County* case.

191 27 Wash.2d 534, 179 P.2d 294 (1947).

192 *E.g.*, *Mugford v. Mayor & City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945).

193 *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *Weakley County Municipal Electric System v. Vick*, 43 Tenn. App. 513, 309 S.W.2d 792 (1957).

194 52 Wash.2d 317, 324 P.2d 1099, 1101 (1958).

195 2 Misc. 733, 154 N.Y.S.2d 209, 215 (Sup. Ct. 1956), *affirmed*, 161 N.Y.S.2d 564 (App. Div. 1957). See also, *City of Los Angeles v. Los Angeles Bldg. & City Trade Council* 94 Cal. App.2d 36, 210 P.2d 305 (1949).

196 Cases cited note 193 *supra*.

197 *But see State v. Julian*, 359 Mo. 539, 222 S.W.2d 720 (1949), where the court recognized that at the time of the decision in *City of Springfield v. Clouse*, *supra* note 49, the legislature had in fact separated the governmental and proprietary function in Missouri by creating a Board of Public Utilities with authority that is usually possessed by private corporations, Mo. REV. STAT. §§ 91.330—430 (1949).

However, it should be pointed out that if the nature of the function is looked to, and not the source of its financing, the governmental-proprietary distinction takes on a rational explanation. Certainly it can be seen that there is a difference between the granting of rights of collective activity to policemen and the granting of rights of collective activity to grounds-keepers in municipal parks. It is upon this difference that perhaps a logical clarification of public employee labor relations can be made.

D. *The Right To Organize*

Although the status of labor relations in the public service has been characterized as chaotic,¹⁹⁸ there is one facet that is clear. The growth of organized labor in the public service has been phenomenal, and the trend continues. In a period from 1943 to 1958 union membership of public employees increased 60% as opposed to a 32% increase in membership of private employee unions.¹⁹⁹ In the short period 1956-58, the membership of public employee unions increased 13%, whereas the membership in unions of private employees decreased almost 2%.²⁰⁰ The number of cities having public employee unions more than doubled during the period from 1943 to 1958.²⁰¹ These statistics illustrate the clear trend towards increased unionization in public employment. In fact, one need only follow current events to notice that teachers, social workers and other public employees are in fact organizing and demanding better wages and conditions.²⁰²

The law of union organization of public employees is not as clearly defined as are the trends and purposes of union activity. Although it is fair to say as a general proposition that the right to organize is permitted, it is interesting to note that only seventeen states have affirmatively granted the right by constitutional provision or by statute.²⁰³ Arizona, Arkansas, New Jersey and South Dakota have constitutional provisions which assure the right to organize, either explicitly, or as interpreted by case law.²⁰⁴ For instance the New Jersey constitution, in explicitly granting the right to organize, provides: "Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."²⁰⁵ The Arkansas constitution, however, is not as clear. It provides that "No person shall be denied employment because of membership in . . . a labor union. . . ."²⁰⁶ This raises the question of whether the term "person" includes public employees. In affirmatively answering this, the Arkansas Supreme Court in *Potts v. Hay*²⁰⁷ held that the "plain language" of the provision

198 Rock, *Practical Labor Relations in the Public Service*, 18 PUB. PERSONNEL REV. 73 (1957), as cited at 12 LAB. L.J. 13 n.3 (1961). See generally 12 LAB. L.J. 13 n.3.

199 Brinker, *Recent Trends of Labor Unions in Government*, 12 LAB. L.J. 13, 14 (1961).

200 *Id.* at 15.

201 *Id.* at 16.

202 *E.g.*, "Strike in a Welfare State [Welfare Workers]," *Time Magazine*, Jan. 22, 1965, p.20; "Teamsters to Fight Court Rule on Pike [New Jersey Turnpike Workers]," *Newark News*, May 3, 1964, p.29; "Teachers and City Board Agree to a One-year, No-strike Pact," *New York Times*, Sept. 14, 1962, p.1; "City Gives Police Right to Bargain," *New York Times*, Oct. 17, 1962, p.35; "Agreement Signed by DS, Union [Department of Sanitation Employees]," *Long Island Star Journal*, Feb. 3, 1961, p.4.

203 Alaska, Arizona, Arkansas, California, Hawaii, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, and Wisconsin. Arizona and New Jersey have both constitutional provisions and statutes. See notes 60 & 65 *infra*.

204 ARIZ. CONST. art. 25; ARK. CONST. amend. 34, as held applicable to public employees by *Potts v. Hay*, 229 Ark. 830, 318 S.W.2d 826 (1958); N.J. CONST. art. 1, § 19; S.D. CONST. art. 6, § 2, as held applicable to public employees by *Levasseur v. Wheeldon*, 79 S.D. 411, 112 N.W.2d 894 (1962).

205 N.J. CONST. art. 1, § 19.

206 ARK. CONST. amend. 34.

207 229 Ark. 830, 318 S.W.2d 826 (1958).

leaves but one interpretation; the term person includes everyone, including the public employee.²⁰⁸

Fifteen states grant the right to organize in public employment by statute.²⁰⁹ Some of these grants are with reservations. For instance, Massachusetts does not permit policemen to organize,²¹⁰ while California limits the right only to firemen.²¹¹ However, the right to organize, when given, is usually given without reservation.

The District of Columbia, Indiana, New York, Pennsylvania and Washington have executive provisions which permit union organization in the public employment. New York,²¹² Pennsylvania²¹³ and Washington²¹⁴ grant the right through executive orders which resemble the federal executive order issued by President Kennedy in 1962.²¹⁵ An Indiana executive order grants the right to organize to employees of state mental hospitals, without mentioning other public employees.²¹⁶ The District of Columbia²¹⁷ and Washington²¹⁸ have civil service rules and regulations which protect the right.

Only Alabama and Florida purport to deny public employees the right to organize by statute.²¹⁹ Even these are not outright denials. The Alabama statute denies the right to organize to all public employees except teachers, employees of the State Docks Board and employees of cities and counties. The Florida statute makes it a crime for any public employee to join a union which asserts the right to strike.

Statutes denying the right to organize to certain classes of employees are more common. The District of Columbia, Georgia, Massachusetts, and North Carolina have such provisions. The District of Columbia provision prohibits only policemen from joining any organization which asserts the right to strike.²²⁰ The North Carolina statute which is similar, although expanding the prohibition to firemen, provides that no law enforcement or fire control employee shall join a union of national affiliation which asserts the right to strike.²²¹ Georgia and Massachusetts have stronger provisions, directed to policemen, completely denying them the right to organize.²²²

In the absence of statute, the right to organize is generally presumed to be supported by the first amendment guarantee of free assembly.²²³ It is difficult,

208 *But see* *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947), which held a similar provision not to be applicable to public employees. The court said that if the legislature had intended inclusion of public employees, it would have so provided.

209 ALASKA STAT. ANN. §§ 23.40.010—040 (Supp. 1962); ARIZ. REV. STAT. ANN. § 23-1302 (1956); CAL. LAB. CODE § 1962 (firemen only), CAL. GOV'T. CODE § 3502; HAWAII REV. LAWS § 3-80 (1955) (if right to strike is not asserted); MASS. GEN. LAWS ANN. ch. 149, §§ 178D&F (Supp. 1964) (except policemen); MICH. STAT. ANN. § 17.454(8) (1960); MINN. STAT. ANN. § 179.52 (Supp. 1964); N.J. STAT. ANN. § 34:13B-2 (1965); N.Y. CIV. SERV. LAWS § 108(1); N.D. REV. CODE ANN. § 34-11-01 (1960); ORE. REV. STAT. § 243.730 (1963); R.I. GEN. LAWS ANN. § 36-11-1 (Supp. 1964), § 28-9.1-4 (Supp. 1964) (firemen), § 28-9.2-4 (Supp. 1964) (policemen); TEX. REV. CIV. STAT. ANN. art. 5154C(4)—5154C(6) (1962); UTAH CODE ANN. § 34-16-2 (Supp. 1963); WIS. STAT. ANN. § 111.70(2) (Supp. 1965).

210 MASS. GEN. LAWS ANN. ch. 149, §§ 178D & F (Supp. 1964).

211 CAL. LAB. CODE § 1962.

212 By Nelson E. Rockefeller, Aug. 28, 1963.

213 By George M. Leader, May 27, 1957.

214 By Albert D. Rosellini, February, 1958.

215 27 Fed. Reg. 551 (1962). See text accompanying notes 156-62 *supra*.

216 By Matthew E. Welsh, July 31, 1962.

217 District Personnel Manual, Ch. 25, *Employee Relations*, September, 1962.

218 Merit System Rules, Article XX, May 25, 1962.

219 ALA. CODE tit. 55, §§ 317(1)—(4) (1958); FLA. STAT. ANN. § 839.221 (Supp. 1964).

220 D.C. CODE ANN. § 4-125 (1961).

221 N.C. GEN. STAT. § 95-97 (1965).

222 GA. CODE ANN. § 54-909, § 54-9923 (1961); MASS. GEN. LAWS ANN. Ch. 149, § 178D (Supp. 1964). Both provisions have criminal sanctions.

223 See Anderson, *Labor Relations in the Public Service*, 1961 WIS. L. REV. 601, 611. Presumably the first amendment argument would rely upon the fundamental right of free

though, to measure the acceptance of this argument, for the right of organization is seldom challenged. One can only point to the apparently unchallenged existence of public employee unions in almost every large city and state.²²⁴

Where, however, the right to organize was challenged, the Supreme Court of South Dakota in *Levasseur v. Wheldon*²²⁵ pointed to the first amendment, without discussion, to grant to public employees the right to organize. The Court utilized the first amendment right to free assembly to make applicable to public employees a South Dakota constitutional provision²²⁶ which guarantees that no one is to be denied employment because of membership in a labor union. Although not often cited explicitly, the first amendment argument is the underlying pressure in support of public employee union organization.

It is clear that the arguments for granting the right of organization do not support the rights of bargaining or striking. The New Jersey Supreme Court, in *New Jersey Turnpike Authority v. American Fed'n of State Employees, Local 1511*,²²⁷ pointed out that the right to organize does not carry with it the right to strike. A Texas Civil Court of Appeals, in *Beverly v. City of Dallas*,²²⁸ held that a statute which gave to public employees the right to organize did not incorporate the right of collective bargaining and contracting. It seems proper to limit the right to organize for presenting grievances so as not to include the right to bargain. Presenting grievances through a representative is a unilateral affair on the part of the union, whereas negotiating involves bilateral discussion, imposing upon the employer the duty to meet with the union and perhaps to contract. The arguments which support giving public employees the right to organize do not justify giving them rights of collective bargaining and striking.

Although the right to organize does not carry with it the right to bargain collectively or to strike, it may imply a right not to organize. Whether this right not to organize exists depends on the nature of the law in a jurisdiction. There are two types—one simply grants to public employees the right to organize,²²⁹ whereas the other is an extension of right-to-work law so as to include public employees.²³⁰

It is the right-to-work-law jurisdiction in which the right to organize also includes the right not to organize. This correlative right has been supported by the reasoning that to require organization would be discriminatory.²³¹ Thus the Supreme Court of Montana struck down a union security provision in a contract between the teachers union and the school district because it was discriminatory in favor of unions.²³² A Minnesota statute reflects this same reasoning. It provides:

assembly as incorporated in the fourteenth amendment by *De Jonge v. Oregon*, 299 U.S. 353 (1937). It was held there that legislative intervention by states of this right would be justified only when the right was abused — “. . . [L]egislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves may not be curtailed.” *Supra* at 364-65.

224 See Brinker, *supra* note 199, at 16.

225 79 S.D. 411, 112 N.W.2d 894 (1962).

226 S.D. CONST. art. 6, § 2.

227 83 N.J. Super. 389, 200 A.2d 134 (1964).

228 292 S.W.2d 172 (Tex.Civ.App. 1956).

229 See, e.g., note 234 *infra*. Of the fifteen states affirmatively granting the right to organize by statute, see note 209 *supra*, nine have simple right-to-organize statutes: Alaska, Massachusetts, Michigan, New Jersey, New York, North Dakota, Oregon, Rhode Island, and Wisconsin.

230 See, e.g., note 233 *infra*. Of the fifteen states affirmatively granting the right to organize by statute, see note 209 *supra*, six have right to work laws which are applicable to public employees: Arizona, California, Hawaii, Minnesota, Texas, and Utah.

231 See, e.g., *Mugford v. Mayor & City Council of Baltimore*, 185 Md. 266, 44 A.2d 745, 747 (1945) (dictum), where the court said: “A citizen who is a member of a union cannot, by that fact alone, be barred from a position in the public service.”

232 *Benson v. School Dist. No. 1 of Silver Bow County*, 136 Mont. 77, 344 P.2d 117 (1959).

"Public employees shall have the right to form and join labor organizations, and shall have the right not to form and join labor organizations. . . . It shall be unlawful to discharge or otherwise *discriminate* against an employee for the exercise of such rights. . . ." ²³³ In these right to work jurisdictions a union shop will not stand. Thus one must not be deceived by the discrimination argument into believing that this expands the right to organize. On the contrary this tends to curb the right thereby retarding unionization.

The unions naturally favor the jurisdictions which simply grant the right to organize, without explicitly providing for the right not to organize. The Oregon statute exemplifies the type found in a right to organize jurisdiction. It provides: "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."²³⁴ Under such a statute a union may acquire a union shop whereby employees must join the union as a condition of employment. A union which recently negotiated a union shop in Philadelphia claims to have eighty-eight other such contracts in effect.²³⁵ It is this arrangement which the unions favor and for which they are pressing.

The right to organize is by no means an absolute right, and the reasons which support the right are by no means inviolable. Municipal and state rules and regulations, even ordinances, which prohibit a certain class of employee from joining a union or organization have been upheld all over the country.²³⁶ The court in *GIO v. City of Dallas*²³⁷ claims that its review of the case law sustains this.

The employees most often affected by these prohibitory regulations have been policemen and firemen,²³⁸ although teachers²³⁹ and even all the public employees of a city have been included.²⁴⁰ As has been said several times: "Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance."²⁴¹ In order to sustain these various regulations and ordinances, the strong arguments supporting organization have to be held inapplicable.

Few courts have addressed themselves directly to the argument that the first amendment protects the right to organize. Justice Holmes, while on the Massachusetts bench, presented the best reasoning to circumscribe the first amendment

233 MINN. STAT. ANN. § 179.52 (Supp. 1964). (Emphasis added.)

234 ORE. REV. STAT. § 243.730 (1963).

235 See Zander, *A Union View of Collective Bargaining in the Public Service*, 22 PUB. ADMIN. REV. 6, 8 (1962).

236 *Perez v. Board of Police Comm'rs of City of Los Angeles*, 78 Cal. App.2d 638, 178 P.2d 537 (1947) (joining union or organization not exclusively composed of policemen prohibited); *People ex rel. Fursman v. City of Chicago*, 278 Ill. 318, 116 N.E. 158 (1917) (teachers belonging to union not hired); *Local 201, American Fed'n of State Employees v. City of Muskegon*, 369 Mich. 384, 120 N.W.2d 197, cert. denied, 375 U.S. 833 (1964) (policemen); *City of Jackson v. McLeod*, 199 Miss. 161, 24 So.2d 319 (1946) (policemen); *King v. Priest*, 357 Mo. 68, 206 S.W.2d 547 (1947), appeal dismissed, 333 U.S. 852 (1948) (policemen); *Hutchinson v. Magee*, 278 Pa. 119, 122 Atl. 234 (1923) (firemen); *GIO v. City of Dallas*, 198 S.W.2d 143, (Tex.Civ.App. 1946) (public employees of Dallas not permitted to unionize); *San Antonio Fire Fighters' Local 84 v. Bell*, 223 S.W. 506 (Tex. Civ.App. 1920) (firemen); *McNatt v. Lawther*, 223 S.W. 503 (Tex.Civ.App. 1920) (firemen); *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410 (1935) (policemen); *Seattle High School Ch. No. 200 v. Sharples*, 159 Wash. 424, 293 Pac. 994 (1930) (teachers belonging to union not hired).

237 198 S.W.2d 143, 145 (Tex.Civ.App. 1946).

238 Of the eleven cases cited *supra* note 236, eight pertain directly to policemen or firemen. See also notes 220-222 *supra*.

239 *People v. City of Chicago*, 278 Ill. 318, 116 N.E. 158 (1917); *Seattle High School Ch. No. 200 v. Sharples*, 159 Wash. 424, 293 Pac. 994 (1930).

240 *GIO v. City of Dallas*, 198 S.W.2d 143 (Tex.Civ.App. 1946).

241 *Fraternal Order of Police v. Harris*, 306 Mich. 68, 10 N.W.2d 310, 312 (1943); *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410, 412 (1935).

argument. Holding in *McAuliffe v. Mayor of City of New Bedford*²⁴² that the first amendment rights are personal and may be waived by the person involved, he stated that one "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech. . . ."²⁴³ By force of similar reasoning, if one wishes to unionize he may, but he may not also have the privilege of working for the government. There is no law which purports to let a person have both, when a statute forbids unionization.

A lower California court supported this reasoning in *Perez v. Board of Police Comm'rs*.²⁴⁴ In upholding a rule forbidding policemen from unionizing, the Court said that the statute does not regulate union activity; it regulates the police department. The Washington Supreme Court supported its decision in *Seattle High School Ch. 200 v. Sharples*²⁴⁵ with the same reasoning. Upholding a regulation which denied teachers employment because they were union members, the Court said that teachers were free to contract for their employment. If they did not favor the conditions of the contract, they were not obligated to enter into it. The concept that one waives certain rights when he enters into the public employment as illustrated by *Perez* and *Sharples*, is the gravamen of this argument.²⁴⁶ This argument is no longer the weightiest in sustaining regulations prohibiting organization. More often discussed are the policy considerations that arise upon permitting certain classes of employees to unionize. It has been held that to permit policemen to join unions would present a conflict of allegiance which would jeopardize a policeman's dedication to the safety and well-being of a community.²⁴⁷ For should a concerted activity of a union, as a strike, get out of hand, it is the policeman who is responsible for keeping order.²⁴⁸

A similar, but not as convincing, argument is made for prohibiting the unionization of firemen.²⁴⁹ The service which firemen perform is certainly essential to the welfare of the community. However, the interruption of fire control, although a serious matter, does not go to the heart of law and order as would an interruption of police protection.²⁵⁰

242 155 Mass. 216, 29 N.E. 517 (1892).

243 *Id.*, 29 N.E. at 517-18.

244 *Perez v. Board of Police Comm'rs*, 78 Cal. App.2d 638, 178 P.2d 537 (1947).

245 159 Wash. 424, 293 Pac. 994 (1930).

246 As restated in *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539, 542 (1947), ". . . [A] public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization." See also *Fraternal Order of Police v. Harris*, 306 Mich. 68, 10 N.W.2d 310 (1943); *King v. Priest*, 357 Mo. 68, 206 S.W.2d 547 (1947), *appeal dismissed*, 333 U.S. 852 (1948); *CIO v. City of Dallas*, 198 S.W.2d 143 (Tex.Civ.App. 1946).

247 *Perez v. Board of Police Comm'rs*, 78 Cal. App.2d 638, 178 P.2d 537 (1947); *King v. Priest*, *supra* note 246.

248 The Boston Police Strike, Sept. 10, 1919, illustrates the breakdown of law and order: "Late that afternoon, at five forty-five, the union policemen struck; 1,117 of 1,544 patrolmen left their posts. That night there was disorder, rioting and robbery. While the situation was grave, the disorder consisted chiefly of boisterous rowdyism. . . . Shop windows were broken; some jewelry was stolen; shoes and hats were removed from store cases; cans were taken off the shelves in grocery stores. Men are reported to have come supplied with suitcases to carry off the loot."

SPERO, GOVERNMENT AS EMPLOYER 272-73 (1948). *But cf.* that during a police strike in Cincinnati in September, 1918, home guardsmen and boy scouts kept the order for three days after which police returned to work, with no serious consequences having occurred. SPERO, *op. cit. supra* at 252.

249 See *McNatt v. Lawther*, 223 S.W. 503 (Tex.Civ.App. 1920); *San Antonio Fire Fighters' Local 84 v. Bell*, 223 S.W. 506 (Tex.Civ.App. 1920).

250 The vital necessity of police protection and national security is reflected in Executive Order 10988, § 16, 27 Fed. Reg. 551, 556 (1962), which specifically excludes from its provisions, the CIA, the FBI, and other similar agencies.

It has been said that the "most compelling objection to unionization of public employees springs from the realization that whenever workers organize, they increase their capacity to strike."²⁵¹ This is essentially a manifestation of a fear of strikes and not an argument against organization per se. Of course, to support this position it would have to be presumed that strikes are against public policy. This position which supports regulations against tempting the strike is not wanting for support. The regulation which was held by a lower California court in *Perez* denied affiliation with any union of non-police membership.²⁵² The rule was presumably directed against the strike weapon with which most unions are armed. Similarly a North Carolina statute prohibits law enforcement employees and fire control employees from affiliating with a national union asserting the right to bargain.²⁵³ This force of reasoning was carried to another area in *Young v. Board of Bldg. and Safety Comm'rs of City of Los Angeles*²⁵⁴ where the court upheld a rule which prohibited the employment of union officers, but permitted employing rank and file union members. All these situations seem to rest on the notion that organizational prohibitions can be sustained by reason of increased capacity to bargain or to strike. It would seem that in order to maintain this argument, the particular class of public employee affected by such a rule would have to be one in which a strike would clearly be of serious consequence to the safety and well-being of the community.

Although legislation is not yet predominant in granting the right to organize, the right is generally afforded. For policy considerations, policemen have been a significant exception. Firemen have also been excepted, but not to the same extent. Aside from these exceptions, the trend has been towards increasing the right to organize thus recognizing what Justice Hughes has called a fundamental right.²⁵⁵

E. Collective Bargaining in Public Employment

"To seek a living wage and normal working conditions, the policeman must rely on the fairness of municipal officials to whom he is compelled to take his case. In this respect, policemen have not been notably successful."²⁵⁶

The above quote exemplifies the situation facing over seven million state, county and municipal employees throughout the country.²⁵⁷ They are denied the right to bargain collectively with their governmental employer to acquire those benefits given employees in private industry.²⁵⁸ As a result, government wage rates have not kept up with wage increases enjoyed by non-public employees.²⁵⁹

It has been suggested that "a government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar favorable basis. . . ."²⁶⁰ Nevertheless, recent court decisions indicate that the policy of denying public employees the right to collectively bargain is still being followed by the courts.²⁶¹

251 Note, *Labor Relations in the Public Service*, 75 HARV. L. REV. 391, 395 (1961).

252 *Perez v. Board of Police Comm'rs*, 78 Cal. App.2d 638, 178 P.2d 537 (1947).

253 N.C. GEN. STAT. § 95-97 (1965).

254 100 Cal. App.2d 468, 224 P.2d 16 (1950).

255 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1936).

256 Keresman, *Constructive Employee Relations in Police Departments*, 8 LAB. L.J. 556, 557 (1957).

257 86 MO. LAB. REV. 732 (1963).

258 31 A.L.R. 2d 1142.

259 See generally, Rains, *Collective Bargaining in Public Employment*, 8 LAB. L.J. 548 (1957).

260 American Bar Ass'n, *Second Report of the Committee on Labor Relations of Government Employees*, p.2 (1955).

261 *Dade County v. Amalgamated Ass'n of Street Employees*, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963), *appeal dismissed mem.*, 166 So. 2d (Fla. 1964), *Solicitor General invited to file briefs for the U.S.*, 379 U.S. 898 (1964), *cert. denied*, 379 U.S. 971 (1965); *New Jersey Turnpike Authority v. American Federation of State Employees, Local 1511*, 83 N.J. Super. 389, 200 A.2d 134 (1964).

This section analyzes the reasons and policies underlying government's refusal to extend to its own employees those rights accorded to the workers engaged in private enterprise.

1. Existing Law

One of the main reasons why the right of collective bargaining is not extended to government employees seems to be that public employees cannot be treated the same as their counterparts in private industry. This is so because of the nature of their governmental employer and the legislative restrictions within which it must operate. This theme, often referred to as the public-private employment distinction, permeates a letter from President Roosevelt to the National Federation of Federal Employees. It read in part:

All Government employes should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employe organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employes alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.²⁶²

This legislation often takes the form of civil service laws regulating wages, working conditions, and grievance procedures for public employees.²⁶³ Since the legislature sets the rules governing discharge and grievance procedures and state and municipal budgets fix wages of public employees, it is felt that the public official does not have the authority to discuss these pre-determined items with the employees he supervises. For him to do so would be a direct departure from the expressed intent of the legislature.²⁶⁴ This is unquestionably the view taken by several courts dealing with the problem.

For example, in *Nutter v. City of Santa Monica*,²⁶⁵ the California Labor Relations Act, which guaranteed the right of collective bargaining, was held inapplicable to the City's motor coach operators because a civil service law was in effect. The Court said that in the absence of an express provision to the contrary, the existence of the civil service law reflected a legislative intent that public employees were not to be treated in the same manner as privately employed workers. A similar result was reached in *Mugford v. Mayor and City Council of Baltimore*.²⁶⁶ In that case, city employees were held to be covered by a budgetary and civil service system created in accordance with the power vested in the city by its charter.²⁶⁷

A variation of the argument that collective bargaining is to be denied to public employees because of existing civil service laws is that a state or city would surrender some of its sovereign authority and discretion by allowing its officials to bargain with its employees.²⁶⁸ Furthermore, it is felt that the state or city should not relin-

262 As cited in *State v. Brotherhood of R.R. Trainmen*, 37 Cal.2d 412, 232 P.2d 857, 860 (1951); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539, 542 (1947); *C.I.O. v. City of Dallas*, 198 S.W.2d 143, 144-45 (Tex. Civ. App. 1946).

263 See Anderson, *Labor Relations in the Public Service*, 1961 Wis. L. Rev. 601, 614. See generally, 56 MICH. L. REV. 645 (1958).

264 Zander, *A Union View of Collective Bargaining in the Public Service*, 22 PUB. ADMIN. REV. 6, 9-10 (1962). See generally, 56 MICH. L. REV. 645 (1958).

265 74 Cal. App. 2d 292, 168 P.2d 741 (1946).

266 185 Md. 266, 44 A.2d 745 (1945).

267 *Accord*, *State v. Brotherhood of R.R. Trainmen*, 37 Cal.2d 412, 232 P.2d 857 (1951); *Miami Water Works, Local 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946); *Weakley County Municipal Elec. Sys. v. Vick*, 43 Tenn. App. 513, 309 S.W.2d 792 (1957).

268 *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305 (1949); *Mugford v. Mayor & City Council of Baltimore*, 185 Md. 266, 44 A. 2d 745 (1945); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); Zander, *supra* note 264 at 10.

quish its discretion in such matters as the hiring and firing of employees.²⁶⁹ The rationale of this argument is that the legislature, rather than being bound for any fixed period of time, should be free to change its conditions of employment as it sees fit.²⁷⁰

Another reason for refusing to allow collective bargaining to public employees was presented in *Springfield v. Clouse*.²⁷¹ There, the Missouri Supreme Court distinguished public employees from non-public employees in the following words: ". . . [A] public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare. . . ."²⁷²

Another objection to allowing collective bargaining in public employment was presented in *Springfield*. The gravamen of this objection was that the fixing of wages and conditions of employment was a legislative function which, according to principles of constitutional law, could not be delegated to any administrative or executive department. Therefore, since fixing wages and conditions of employment involves lawmaking, they cannot be the subject of bargaining by executive or administrative officials without statutory authorization. While it may be that executive or administrative officers have been granted a limited amount of discretion, it can only be exercised within standards set by the legislature.

In addition to the judicial refusal to extend the right of collective bargaining to public employees, Texas and North Carolina have statutes denying the right of collective bargaining.²⁷³ For example, the Texas statute provides:

It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.²⁷⁴

Against the great weight of authority denying the right of collective bargaining to public employees, there are several counterarguments which seek to discredit and raze the traditional wall of denial. It is first argued that collective bargaining contracts could be made subject to any outstanding civil service provisions. Thus, if any conflict develops between the terms of an agreement and the existing law, the contract would be automatically subordinated to the law.²⁷⁵ This argument speaks for itself. If the public employer is subject to "laws which establish policies, procedures or rules in personnel matters,"²⁷⁶ there seems little objection to a system whereby employees, or their representatives, meet with the employer to bargain within the framework of existing legislation.

In an analogous situation, the Connecticut Supreme Court, in *Norwalk Teachers' Ass'n v. Board of Education*,²⁷⁷ had no objection to collective bargaining within the power given the Board to make contracts. In that case, the Board questioned whether or not it had the power to bargain with the teachers' representatives on wage increases, even though it had done so in the past. Although it held that a

269 *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305 (1949); *Mugford v. Mayor & City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947).

270 *Anderson*, *supra* note 263 at 615.

271 356 Mo. 1239, 206 S.W.2d 539 (1947).

272 *Id.* at 542. (Emphasis added.)

273 N.C. GEN. STAT. § 95-98 (1965); TEX. REV. CIV. STAT. art. 5154(c) (1962).

274 TEX. REV. CIV. STAT. art. 5154(c) (1962). The constitutionality of the act was upheld in *Beverly v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App. 1956), which also declared the act to be decisive in prohibiting collective bargaining to public employees.

275 56 MICH. L. REV. 645, 647 (1958).

276 Letter from Franklin Delano Roosevelt to National Federation of Federal Employees, Aug. 16, 1937, found in cases cited note 262 *supra*.

277 138 Conn. 269, 83 A.2d 482 (1951).

strike by the teachers to compel the Board to bargain with their union was unlawful, the court went on to say that there was no reason why the teachers could not organize and bargain for wages and working conditions which "may be in the power of the board of education to grant."²⁷⁸

Two practical examples illustrate the fact that civil service laws and public employee bargaining can coexist.²⁷⁹ The experience of the City of Philadelphia presents an outstanding illustration. In 1958, a contract was signed giving the American Federation of State, County and Municipal Employees, Council 33, the exclusive bargaining rights for all non-uniformed employees of the City. Then in 1962, the city approved a modified union shop agreement establishing three categories of employees: (1) those who must join the union as a condition of employment, (2) those for whom union membership is voluntary, and, (3) those for whom union membership is strictly prohibited. The city personnel director was given jurisdiction over labor relations and authorized by the civil service commission to engage in negotiations. He was also empowered to enter into agreements with Council 33. Neither the city council nor the civil service commission are directly involved in the bargaining. However, those items agreed on at the bargaining table must be approved by the city council and the commission so that such items can be reconciled with the civil service rules and the budget planned for the ensuing year. Constant communication between the city officials participating in the negotiations and the members of the city council and civil service commission is emphasized, so that each is aware of what they can do or may be called on to do.

In view of the great weight of authority which denies public employees the right of collective bargaining, the Philadelphia agreement is truly a "precedent-setting plan."²⁸⁰ To progress from a history of no collective bargaining to a plan affecting 18,000 city employees is, as Mr. Donald C. Wagner, Managing Director of Philadelphia, stated, a "long step towards stabilizing" city-union relationships.²⁸¹

Another example illustrating that collective bargaining can function within the framework of civil service procedures and budgetary considerations is presented by the City of Cincinnati. The history of public employee unionization in that city was not unlike any other city or county in the country; namely, public employee unions were denied the right to collectively bargain with their employer. However, in 1960, a union-management agreement was reached. The most important feature of this agreement was an exclusive bargaining rights clause in which the city agreed not to change any of the then existing working conditions. It was further agreed that the city administrators were not to make any recommendations to the city council affecting the bargaining unit without negotiating with the employees' union.

From these two examples, it may be seen that collective bargaining can work successfully within the framework of civil service legislation. The recognition that a city or county is restricted by legislatively established budgets and procedures serves as a natural limitation on what the city may grant, or what the union may seek. Any departure from such limitation will undoubtedly be struck down by the courts.²⁸² However, the mere assertion that the area is governed by civil service, standing alone, does not appear to be a sound basis for denying public employees the right of collective bargaining.²⁸³ Subordinating an agreement to the existing

278 *Id.*, 83 A.2d at 486.

279 The following information is taken from Zander, *supra* note 264 at 10-12.

280 *Business Week* Aug. 6, 1960, p. 61.

281 *N.Y. Times*, July 31, 1960, p. 57.

282 *Accord*, *State v. Brotherhood of R.R. Trainmen*, 37 Cal. 2d 412, 232 P.2d 857 (1951); *Miami Water Works, Local 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946); *Weakley County Municipal Elec. Sys. v. Vick*, 43 Tenn. App. 513, 309 S.W.2d 792 (1957).
283 *Eric County Water Authority v. Kramer*, 4 App. Div. 2d 545, 167 N.Y.S.2d 557 (1957), *aff'd.*, 5 N.Y.2d 954, 184 N.Y.S.2d 833, 157 N.E.2d 712 (1959). See also, American Bar Ass'n, *Second Report of the Committee on Labor Relations of Governmental Employees*, p. 2 (1955).

law would readily resolve any possible conflicts. This could easily be done as is illustrated by a 1962 contract between the City of New York and the United Federation of Teachers. A key provision of their agreement specified that: "If any provision of this agreement is or shall at any time be contrary to law, then such provision shall not be applicable or performed or enforced, except to the extent permitted by law. . . ." ²⁸⁴

In answer to objections that collective bargaining in public employment would involve an unlawful delegation of authority or a surrender of sovereignty or discretion, it has been said that such is not the case if the concept of sovereignty is brought into proper focus. Mr. Arnold S. Zander, former president of the American Federation of State, County and Municipal Employees, feels that ultimately, sovereignty resides in the people who delegate its exercise to the government which they have established. If this is true, then granting the right of collective bargaining does not involve a surrender of sovereignty; rather, something new is created to meet an existing need.²⁸⁵ Applying this proposition to the area of collective bargaining in public employment, Mr. Zander concluded that:

When the government employer fails to keep abreast of conditions, some method of handling the situation must be devised. If the people who are the real source of sovereign power conclude that a new method should be devised, they are not surrendering anything; rather they are requiring law and order in a field where such law has never existed and an institution which will guarantee the rights of employees in public employment.²⁸⁶

Even though government has not kept pace with the advantages accorded to employees in private industry²⁸⁷ no legislature nor court has specifically adopted the principle advanced by Mr. Zander as a basis for allowing collective bargaining. This is not to say, however, that this principle may not be lurking behind the reasoning of some courts which have justified collective bargaining by formulating several interesting distinctions.

Before proceeding to an analysis of judicial thinking in this area, it must be pointed out that judicial inertia has been one of the stifling influences in the recognition of the right to collectively bargain for public employees.²⁸⁸ The only method of overcoming such judicial inaction is legislation empowering the state or its subdivisions to negotiate collective bargaining agreements with its employees. Thus, unions attach a great deal of importance to the securing of legislation embodying their programs and objectives. One of the main stratagems employed by the unions to obtain such legislation is the application of political pressure. Apparently, this tactic works, for Mr. Zander regards the use of such pressures as "one of the most important channels used by public employee unions to support their programs. . . ." ²⁸⁹

Several states have enacted such legislation. However, these statutes are not uniform in content, some being more restrictive than others. For example, Alaska has a very general statute providing:

The state or a political subdivision of the state, including but not limited to an organized borough, municipal corporation, independent school district, incorporated school district, and public utility district, may enter into a contract with a labor organization whose members furnish services to the state or political subdivision.²⁹⁰

284 Other contracts containing a similar provision include: Cincinnati (1960); Dayton (1964); Philadelphia (1963); Green Bay (1964); Marion County, Wash. (1964); Preble, Wis. (1964). These contracts are on file in the office of the Notre Dame Lawyer.

285 Zander, *supra* note 264 at 9.

286 *Ibid.*

287 Rains, *supra* note 259.

288 *Glidewell v. Hughey*, 314 S.W.2d 749 (Mo. 1958); *Miami Water Works, Local 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946); *Port of Seattle v. International Longshoremen's Union*, 52 Wash. 2d 317, 324 P.2d 1099 (1958); *International Union of Operating Engineers, Local 321 v. Water Works Bd. of Birmingham*, 276 Ala. 462, 163 So. 2d 619 (1964).

289 Zander, *supra* note 264 at 9.

290 ALASKA COMP. LAWS ANN. § 23.40.010 (1962). Compare, ILL. ANN. STAT. ch. 127, § 63b 109(7) (Smith-Hurd Supp. 1964); ORE. REV. STAT. § 243.740 (1963).

Other statutes permitting collective bargaining confine themselves to towns²⁹¹ or public utility district employees.²⁹² Another general class of statutes excludes certain groups of employees. For example, the Massachusetts collective bargaining statute provides: ". . . [A]ny city or town may engage in collective bargaining with labor organizations representing its employees, except police officers, and may enter into collective bargaining agreements with such organizations."²⁹³

As previously noted, courts have not been overanxious to extend the right of collective bargaining to public employees. Thus, in only one case has a court rejected the argument that collective bargaining in public employment would be an unlawful delegation of authority and a surrender of sovereignty and discretion. This was done by the Arizona Supreme Court in *Local 266, International Bhd. of Electrical Workers v. Salt River Project Agricultural Improvement and Power District*.²⁹⁴ In that case, a power district, created by statute, was given the right to negotiate and enter into whatever contracts were deemed necessary by the District. The main function of the District was production of hydroelectric power for consumption by approximately 100,000 private and commercial interests. Its employees of the District were represented by a union. When a collective bargaining agreement between the District and its employees expired, the District refused to negotiate with the union on the new contract. It argued that since it was a political subdivision of the state, it did not have the power to bargain, citing *Mugford*,²⁹⁵ *Springfield*²⁹⁶ and *Nutter*.²⁹⁷

In distinguishing these cases, the Arizona Supreme Court considered the differences between this power district and most other municipal corporations. In so doing, the court first defined public employment as "employment by some branch of government or body politic specially serving the needs of the general public."²⁹⁸ It then applied this definition to the following distinguishing facts: the owners of the district were private individuals; the employees were not paid from public funds as are public employees; and, the profits realized from operation of the district went to private individuals for their own use. On the basis of these facts, the court concluded that if it was necessary for the District to enter into an agreement with its employees to secure its continuous operation, it could not refuse to do so on the grounds that it did not have such power. To the contrary, the District was held to have the power because of the proprietary nature of its function, even though it had been created by an act of the state legislature. The court reasoned that "when a governmental entity functions in a *proprietary* nature . . . it should be permitted to perform it in a manner *as efficiently as would a private person*."²⁹⁹ In rejecting the argument that to grant collective bargaining authority to the District would involve a surrender of its discretion, the high court of Arizona pointed out that the District could enter or refuse to enter a particular agreement as it saw fit.

The principle advanced by *Salt River* — that when a government acts as a

291 N.H. REV. STAT. ANN. § 31.3 (Supp. 1963).

292 IND. ANN. STAT. §§ 40-2401-2415 (1952); MICH. STAT. ANN. § 17.454(15) (1960); MO. ANN. STAT. ch. 295 (1949); NEB. REV. STAT. § 14-1825 (1962); N.J. STAT. ANN. § 34:13B-2 (1965); OHIO REV. CODE ANN. § 717.03 (Page 1954); OKLA. STAT. ANN. tit. 82, § 862(m) (1951); S.D. CODE § 52.1729 (Supp. 1960); WASH. REV. CODE § 54.04.170 (Supp. 1964).

293 MASS. ANN. LAWS ch. 40, § 4c (1961). Compare, CONN. GEN. STAT. ANN. §§ 7-466 (Supp. 1964), which excludes teachers.

294 78 Ariz. 30, 275 P.2d 393 (1954).

295 *Mugford v. Mayor & City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945).

296 *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947).

297 *Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 168 P.2d 741 (1946).

298 *International Bhd. of Elec. Workers v. Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 275 P.2d 393, 402 (1954).

299 *Id.*, 275 P.2d at 399. (Emphasis added.)

private person, it should be treated as such — was incorporated into statutes by several states. These statutes permit collective bargaining by employees of public utilities, including such operations as transit systems, and water and gas works.³⁰⁰ In *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen*,³⁰¹ for example, the California statute creating the transit authority provided that it could enter into collective bargaining agreements with its employees. The California Supreme Court held that this statute superseded the common law rule nullifying such agreements. Aside from these statutes, however, the *Salt River* case stands alone in recognizing and applying the governmental-proprietary distinction. The distinction has otherwise been discussed, but never accepted, for several reasons.

One line of reasoning in rejecting the distinction has been that it was created for tort actions against a city. It is felt, therefore, that the distinction is misused when it is advanced as a basis for extending collective bargaining to public employees. For example, in *City of Los Angeles v. Los Angeles Building and Construction Trades Council*,³⁰² the California Court of Appeals refused to consider the governmental-proprietary dichotomy in deciding whether city water and electrical workers had the right to bargain with the city. The court said that it could find no legitimate basis for making such a distinction. It stated that the distinction was developed for determining the tort liability of a municipal corporation, and that its purpose was to eliminate the technical defense of sovereign immunity behind which governmental bodies shielded themselves from the torts of their employees.³⁰³ Other cases have also rejected the governmental-proprietary distinction as a basis for extending collective bargaining to public employees. They reason that the general welfare and public safety will be impaired by its application in certain cases.³⁰⁴

Some courts, on the other hand, recognize the governmental-proprietary dichotomy, but refuse to apply it where the statute creating the proprietary unit of the city or state does not clearly specify the powers of the unit. For example, in *Weakley County Municipal Electric System v. Vick*,³⁰⁵ the Tennessee Court of Appeals recognized that the municipality was acting in a private corporate capacity, as if it were a purely private employer engaged in producing electricity. Nevertheless, since the electric system did not have the express statutory authority to contract, the court held that the employees of the System could not engage in collective bargaining with their employer.³⁰⁶

2. Trends and Conclusions

An argument often advanced for the proposition that public employees should have the right to strike, is that employees engaged in the same or similar occupation in private industry do have such a right.³⁰⁷ The fact that in one case the government is the employer, and in another case private industry is the employer,

300 See compilation of statutes, *supra* note 292.

301 54 Cal. 2d 905, 355 P.2d 905 (1960).

302 94 Cal. App. 2d 36, 210 P.2d 305 (1949).

303 Other cases doing away with the governmental-proprietary dichotomy include: *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *New York City Transit Authority v. Loos*, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 App. Div. 2d 739, 161 N.Y.S.2d 564 (1957); *Port of Seattle v. International Longshoremen's Union*, 52 Wash. 2d 317, 324 P.2d 1099 (1958).

304 *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305 (1949); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947). For a discussion of this doctrine see text accompanying note 322 *Infra*.

305 43 Tenn. App. 513, 309 S.W.2d 792 (1957).

306 *Accord*, *Glidewell v. Hughey*, 314 S.W.2d 749 (Mo. 1958); *Zander*, *supra* note 264 at 9.

307 *Anderson*, *supra* note 263 at 607.

furnishes no reasonable basis for varying the rights of the employees. Thus it can be argued that there is little justification for denying the right of collective bargaining to employees of a publicly-owned electric system or transportation operation, where employees similarly engaged in private employment are not only permitted but guaranteed this right.³⁰⁸

This general rationale for extending collective bargaining rights to public employees seems to underly the decision in *Wisconsin Employment Relations Board v. Evangelical Deaconess Society*.³⁰⁹ In that case, the Wisconsin Supreme Court held that a nonprofit hospital, certainly classifiable as a quasi-public institution, was required to bargain with the union representing its maintenance men, engineers and orderlies. In so holding, the Court stated that:

Collective bargaining in institutions whose operation is so intimately connected with human life places a great responsibility on the parties thereto . . . but there is no reason to suppose that if each enters into negotiations ready to cooperate and appreciating the problems of the other party to the negotiation, there may not be a fair, friendly and mutually satisfactory adjustment of whatever controversies may arise . . .³¹⁰

The rationale of the Wisconsin Court would seem to be applicable, by analogy, to public employees working in public service institutions. Identical consequences are present in allowing either one of these groups of employees to collectively bargain with their employer. That danger of course is the possible disruption of an absolutely necessary public service. The Wisconsin Supreme Court was aware of this danger, but was convinced that responsibility to the public welfare on both sides of the bargaining table would minimize the possible detrimental effects.

Based on this analysis, it is suggested that collective bargaining can be successfully utilized in public employment. The experiences of Philadelphia and Cincinnati, where employees are allowed to bargain, would certainly seem to buttress this conclusion, as would the fact that 16 states have enacted legislation permitting collective bargaining in one form or another.³¹¹

If statistics are indicative of trends, collective bargaining is becoming increasingly prevalent in public employment. For example, the American Federation of Teachers reports that as of May 30, 1964, it has secured bargaining agreements covering 100,109 teachers. In 1953, the figure was 42,212.³¹² The American Federation of State, County and Municipal Employees reports that as of February 1, 1965, it has 397 bilateral agreements in 30 states and Washington, D.C., and 127 unilateral agreements in 27 states, with union security clauses in 65 of these agreements.³¹³ With new agreements being signed every day,³¹⁴ it is a reasonable conclusion that collective bargaining has arrived in public employment.

F. Strikes in Public Employment

Public opinion on collective bargaining by public employees is closely related to the public attitude toward the use of strikes in governmental employment. It has been suggested that fear of such strikes has adversely affected passage of legislation which would extend the right of collective bargaining to public em-

308 *Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

309 242 Wis. 78, 7 N.W.2d 590 (1943).

310 *Id.*, 7 N.W.2d at 592-93.

311 For a compilation of statutes see notes 280-83 *supra*.

312 THE STORY OF THE AMERICAN FEDERATION OF TEACHERS 1963-64, p. 68 (a report to the American Federation of Teachers 1964 Convention in Chicago).

313 Analysis of American Federation of State, County and Municipal Employees Union Agreements as compiled by the Department of Research and Retirements, American Federation of State, County and Municipal Employees, AFL-CIO, on file in the office of the NOTRE DAME LAWYER.

314 See, e.g., *Wisconsin Teamster*, Mar. 25, 1964, p. 127 (Watertown, Wis. contract); *AFL-CIO News*, Oct. 24, 1964, p. 3 (Chicago, Ill. contract).

ployees.³¹⁵ In this section, the present legal status of public employee strikes will be examined and analysis will be made of the opposing arguments.

In general, public employees are denied the right to strike by judicial decision.³¹⁶ Two theories are utilized to support this denial: 1) the lack of a profit motive in public employment makes resort to the strike unnecessary; and 2) the idea that government operations are not to be impeded.

In *Norwalk Teachers' Ass'n v. Board of Education*,³¹⁷ the Court employing the profit motive argument, concluded that strikes by governmental employees are unnecessary because the economic motivations found in private industry are not present in public employment. In holding that the teachers' union could not engage in a strike, work stoppage, or any other collective refusal to carry on their teaching duties, the Court said:

Under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle.³¹⁸

City of Pawtucket v. Pawtucket Teachers' Alliance, Local 930,³¹⁹ supports the *Norwalk* decision and presents an additional ground for denying the right to strike to public employees: "governmental functions may not be obstructed or impeded."³²⁰ Thus, the Rhode Island Supreme Court held that public employees must be denied the right to strike if we are to maintain efficient and beneficial governmental operations.³²¹

The rationale of the *Pawtucket* case, that government functions are not to be impeded, has been employed by some courts as the sole basis for denying public

315 Anderson, *supra* note 263 at 628.

316 Newmarker v. Regents of Univ. of California, 160 Cal. App. 2d 640, 325 P.2d 558 (1958); *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305 (1949); *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Miami Water Works, Local 654 v. City of Miami*, 57 Fla. 445, 26 So. 2d 194 (1946); *Dade County v. Amalgamated Ass'n of Street Employees*, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963), *appeal dismissed mem.*, 166 So. 2d 149 (Fla. 1964), *Solicitor General invited to file briefs for U.S.*, 379 U.S. 898 (1964), *cert. denied*, 379 U.S. 971 (1965); *International Longshoremen's Union v. Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733 (1962), *cert. denied*, 370 U.S. 922 (1962); *Hansen v. Commonwealth*, 344 Mass. 214, 181 N.E.2d 843 (1962); *City of Detroit v. Division 26, Amalgamated Ass'n of Street Employees*, 332 Mich. 237, 51 N.W.2d 228 (1952), *appeal dismissed*, 344 U.S. 805 (1952); *City of Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 131 A.2d 59 (1957); *New Jersey Turnpike Authority v. American Federation of State Employees, Local 1511*, N.J. Super. 389, 200 A.2d 134 (1964); *Pruzen v. Board of Educ.*, 9 N.Y. 2d 680, 212 N.Y.S.2d 416, 173 N.E.2d 237 (1961); *New York City Transit Authority v. Loos*, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 App. Div. 2d 739, 161 N.Y.S.2d 564 (1957); *City of Cleveland v. Division 268, Amalgamated Ass'n of Street Employees*, 41 Ohio Op. 236, 90 N.E.2d 711 (Ohio Ct. C.P. 1949); *Broadwater v. Otto*, 370 Pa. 611, 88 A.2d 878 (1952); *City of Pawtucket v. Pawtucket Teachers' Alliance, Local 930*, 87 R.I. 364, 141 A.2d 624 (1958); *City of Alcoa v. International Bhd. of Elec. Workers, Local 760*, 203 Tenn. 12, 308 S.W.2d 476 (1957); *South Atlantic Longshoremen's Ass'n v. Harris County Nav. Dist.*, 358 S.W.2d 658, *aff'd*, 360 S.W.2d 181 (Tex. Civ. App. 1962), *cert. denied*, 372 U.S. 975 (1963); *Port of Seattle v. International Longshoremen's Union*, 52 Wash. 2d 317, 324 P.2d 1099 (1958). See generally, Spero, GOVERNMENT AS EMPLOYER 16-44 (1948).

317 138 Conn. 269, 83 A.2d 482 (1951).

318 *Id.*, 83 A.2d at 484.

319 87 R.I. 364, 141 A.2d 624 (1958).

320 *Id.*, 141 A.2d at 628.

321 Other cases directly in line with this reasoning are: *International Longshoremen's Union v. Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733 (1962), *cert. denied*, 370 U.S. 922 (1962); *Hansen v. Commonwealth*, 344 Mass. 214, 181 N.E.2d 843 (1962); *Board of Educ. v. Public Employees' Union, Local 63*, 233 Minn. 144, 45 N.W.2d 797 (1951); *New Jersey Turnpike Authority v. American Federation of State Employees, Local 1511*, 83 N.J. Super. 389, 200 A.2d 134 (1964); *South Atlantic Longshoremen's Ass'n v. Harris County Nav. Dist.* 358 S.W.2d 658 (Tex. Civ. App. 1962), *aff'd*, 372 U.S. 975 (1963).

employees the right to strike. These courts reason that if government employees are permitted to strike, public safety and general welfare will be endangered. *City of Los Angeles v. Los Angeles Building and Construction Trades Council*³²² is a typical case following this rationale. There, the California Court of Appeals, enjoining a strike by Los Angeles water and electrical workers, emphasized the "dominant public interest" in the "uninterrupted performance" of government functions.

In addition to the case law, 15 states and the District of Columbia have enacted legislation denying the right to strike to those engaged in public employment.³²³ Two additional state statutes provide that if the Governor considers a strike detrimental to or contrary to the public interest, he may seize the struck plant or function.³²⁴ Such a statute can be effectively used to deny public employees the right to strike. The statutes denying the right to strike may be classified as restrictive or general. A New York statute is illustrative of the restrictive category. It provides:

No person holding a position by appointment or employment in the government of the State of New York, or in the government of the several cities, counties, towns, villages thereof, or any other political or civil division of the state, or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any branch of the public service, hereinafter called a "public employee," shall strike.³²⁵

Ohio's short and simplified statute represents the more general legislative approach. It merely states: "No public employee shall strike."³²⁶

Although the usual penalty provided for engaging in or aiding a strike is dismissal,³²⁷ some statutes impose fines and/or imprisonment for public employees participating in a strike.³²⁸ The District of Columbia and Florida provide penalties for mere membership in a union asserting the right of public employees to strike.³²⁹

Although the general rule is no strike, several courts have upheld the right to strike. The governmental-proprietary distinction has been suggested as a basis for granting public employees the right to strike. The leading case here is *Local 266, International Brotherhood of Electrical Workers v. Salt River Project Agricultural Improvement and Power District*.³³⁰ Yet, *Salt River* is a difficult case to

322 94 Cal. App. 2d 36, 210 P.2d 305 (1949).

323 D.C. CODE ANN. § 4-125 (1961) (police officers); FLA. STAT. ANN. § 839.221 (Supp. 1964); GA. CODE ANN. §§ 89-1301-1304 (1963); HAWAII REV. LAWS ch. 5, § 8 (1955); IND. ANN. STAT. § 40-2401 (1952) (public utilities); MASS. ANN. LAWS ch. 149, § 178F (Supp. 1964); MICH. STAT. ANN. § 17.455(2) (1960); MINN. STAT. ANN. § 179.51 (Supp. 1964); NEB. REV. STAT. § 48-821 (1960); N.Y. CIV. SERV. LAWS § 22-a(2); OHIO REV. CODE ANN. § 4117.02 (Page 1965); ORE. REV. STAT. § 243.760 (1963); PA. STAT. ANN. tit. 43, § 215.2 (1964); R.I. GEN. LAWS ANN. § 28-7-45 (1956) (by specific exclusion from labor relations act); TEX. REV. CIV. STAT. ANN. art. 5154c(1) (1962); VA. CODE ANN. § 40-65 (1953).

324 MO. ANN. STAT. §§ 295.180-200 (1949); N.J. STAT. ANN. § 34:13B-13 (1965).

325 N.Y. CIV. SERV. LAWS § 108(2). Compare MICH. STAT. ANN. § 17.455(2) (1960); MINN. STAT. ANN. § 179.51 (Supp. 1964).

326 Ohio Rev. Code Ann. § 4117.02 (Page 1965). Compare HAWAII REV. LAWS ch. 5, § 8 (1955); MASS. ANN. LAWS ch. 149, § 178F (Supp. 1964); NEB. REV. STAT. § 48-821 (1960); ORE. REV. STAT. § 243.760 (1963); PA. STAT. ANN. tit. 43, § 215.2 (1964); TEX. REV. CIV. STAT. ANN. art. 5154c(1) (1962); VA. CODE ANN. § 40-65 (1953).

327 D.C. CODE ANN. § 4-125 (1961); FLA. STAT. ANN. § 839.221 (Supp. 1964); GA. CODE ANN. § 89-1303 (1963); HAWAII REV. LAWS ch. 5, § 9 (1955); MICH. STAT. ANN. § 17.455(4) (1960); MINN. STAT. ANN. § 179.54 (Supp. 1964); OHIO REV. CODE ANN. § 4117.05 (Page 1965); PA. STAT. ANN. tit. 43, § 215.3 (1964); VA. CODE ANN. § 40-65 (1953). In Texas, the penalty is a forfeiture of civil service rights, TEX. REV. CIV. STAT. ANN. art. 5154c(3) (1962).

328 IND. ANN. STAT. § 40-2413 (1952) (\$500 to \$2500 fine & 6 mos. imprisonment); MASS. ANN. LAWS ch. 149, § 180 (1957) (\$100 fine); NEB. REV. STAT. § 48-821 (1960) (\$10 to \$5000 fine and/or 5 days to 1 yr. imprisonment).

329 D.C. CODE ANN. § 4-125 (1961) (\$300 fine and/or 6 months imprisonment); FLA. STAT. ANN. § 839.221 (Supp. 1964) (discharge).

330 78 Ariz. 30, 275 P.2d 393 (1954).

apply because of the unique factual situation involved.³³¹ It is submitted, therefore, that the rationale of *Salt River* will be limited to its own peculiar facts, and will not be an effective advancement of the governmental-proprietary distinction as a basis for extending the right to strike to public employees. Indeed, this distinction has been unsuccessfully advanced in a good number of cases. The opponents of this distinction have raised several counterarguments which can be classified as follows: (1) if public employees are allowed to strike, the public health and safety will be impaired;³³² (2) even if a city is acting in a proprietary character, it is still public in nature since the city engages in the function to serve the public purpose;³³³ and, (3) the distinction was developed in tort actions against sovereign authorities and should not be applied in the area of public employee strikes.³³⁴

Interpreting a special statutory provision, the Supreme Court of California in *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen*,³³⁵ allowed public employees of the city transit system the right to strike. The statute creating the transit authority empowered its employees to bargain collectively and engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."³³⁶ The Court held that the statute sufficiently expressed a legislative intention to depart from the common law rule prohibiting public employee strikes. The majority used the statute to distinguish several cases,³³⁷ and cited *Salt River* as authority for interpreting the statute as a legislative departure from the common law rule. The dissent in the *Los Angeles Metropolitan Authority* case felt *Salt River* was distinguishable on its facts and argued that policy considerations demand that public employees be denied the right to strike.³³⁸

Upon analysis, the grave concern which courts express when asked to extend the right to strike to public employees is not unreasonable. One has only to picture a city with its police or fire departments on strike to appreciate the grave implications of such an extension. Even public employee unions recognize that certain employees must not have the power to strike. For example, the American Federation of State, County and Municipal Employees includes no-strike provisions in its charters to police locals.³³⁹ However, the unions do object to the blanket no-strike policy prevailing in several states.³⁴⁰ The union objection is based on the theory that it is illogical to deprive an employee of the right to strike simply because he is employed in governmental service, since "many services are performed interchangeably by public employees and by employees in private industry . . ."³⁴¹

331 See text accompanying note 294 *supra*.

332 McAleer v. Jersey City Incinerator Authority, 79 N.J. Super. 142, 190 A.2d 891 (1963); Port of Seattle v. International Longshoremen's Union, 52 Wash. 2d 317, 324 P.2d 1099 (1958).

333 City of Detroit v. Division 26, Amalgamated Ass'n of Street Employees, 332 Mich. 237, 51 N.W.2d 228 (1952), *appeal dismissed*, 344 U.S. 805 (1952); Donevero v. Jersey City Incinerator Authority, 75 N.J. Super. 217, 182 A.2d 596 (1962); City of Alcoa v. International Bhd. of Elec. Workers, Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957).

334 New York City Transit Authority v. Loos, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 App. Div. 2d 739, 161 N.Y.S.2d 564 (1957).

335 54 Cal. 2d 905, 355 P.2d 905 (1960) (5-4 decision).

336 Los Angeles Metropolitan Transit Authority Act, as amended 1959, CAL. STAT. ch. 547, § 3.6(c) (1957).

337 The more important cases distinguished were *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *City of Manchester v. Manchester Teachers' Guild*, 100 N.H. 507, 131 A.2d 59 (1957); *City of Pawtucket v. Pawtucket Teachers' Ass'n*, Local 930, 87 R.I. 364, 141 A.2d 624 (1958); *Port of Seattle v. International Longshoremen's Union*, 52 Wash. 2d 317, 324 P.2d 1099 (1958).

338 54 Cal. 2d 905, 355 P.2d 905, 911 (1960) (Justice Schauer dissenting).

339 Zander, *A Union View of Collective Bargaining in the Public Service*, 22 Pub. Admin. Rev. 6, 9 (1962).

340 *Ibid*; *Public Employees in the Central States Area* (A Manual for Union Organizers, prepared by the Research Dept., Central Conference of Teamsters, p. 27, Nov., 1959).

341 Zander, *supra* note 339 at 9.

The American Civil Liberties Union has echoed this union objection, stating that strikes should be denied public employees only in those areas where the public welfare will be impeded.³⁴²

In view of the fact that the right to strike—denied to public employees—is protected in similar areas of private industry, perhaps the above criticisms have some validity. For example, while the right to strike is guaranteed by law to private hospital employees,³⁴³ no similar protection is afforded public hospital employees.³⁴⁴ Furthermore, in *Dade County v. Amalgamated Ass'n of Street Employees*,³⁴⁵ the Florida District Court held that employees of a privately owned transit system lost their right to strike when the system was purchased by the municipality. There seems to be little logic in allowing a strike against a privately-owned utility while denying the right to strike against a public utility performing the same function.

Without disparaging the validity of the above criticisms, a cautious approach must be taken in their application. Public convenience and necessity may well demand that city employees not be given the right to strike even though similarly engaged employees in private industry do not face such a restriction. For this very reason the municipality may have purchased the transit system in the *Dade County* case—to protect its citizens from strikes by transit employees.

It must be acknowledged, however, that regardless of public opinion towards strikes, and no matter what legal barriers may be raised by legislatures or courts, public employee strikes will never be entirely eliminated. This is the nature of our free society.³⁴⁶ One need only recall the New York public school teacher's strike in April of 1962 to be reminded that public employees can and do strike. However, even though such tactics are available to public employees, it is significant that their use of the strike is diminishing.³⁴⁷ While the average number of strikes by public employees during the period from 1942 to 1953 was 34 per year, the annual average dropped to 14 strikes during the period from 1954 to 1961.³⁴⁸

The use of mediation and arbitration procedures has received considerable attention as an alternative to the strike as a means of soliciting and procuring public employee demands. The need for such procedures in the absence of the right to strike was recognized by the Supreme Court of New York in *New York City Transit Authority v. Loos*.³⁴⁹ Even though the court enjoined a city transit worker's strike, it sympathized with the problem facing public employees in their efforts to secure the benefits of collective bargaining. The court stated:

Deprived as they are of the right to strike . . . there should be statutory provision, in case of a dispute between labor employed by and the management of a public authority, for the ultimate determination of wages, hours, working conditions, etc., by a responsible and competent governmental agency wholly outside of and beyond the control of the employing authority. Perhaps methods of mediation . . . could be devised. . . .³⁵⁰

The American Bar Association apparently agrees with this position. It advocates some form of machinery for adjusting the grievances of public employees.³⁵¹ The

342 N.Y. Times Apr. 13, 1959, p. M33. Also in agreement are Professors Robert F. Fuquay and Russell W. Maddox, Oregon State Univ., Department of Political Science, quoted in *The Public Employee*, July 13, 1962, p. 6.

343 *St. Joseph's Hosp. v. Wisconsin Employment Relations Bd.*, 264 Wis. 396, 59 N.W.2d 448 (1953); *Wisconsin Employment Relations Bd. v. Evangelical Deaconess Soc'y*, 242 Wis. 78, 7 N.W.2d 590 (1943).

344 See Anderson, *Labor Relations in the Public Service*, 1961 Wis. L. Rev. 601, 607.

345 157 So. 2d 176 (Fla. Dist. Ct. App. 1963).

346 Bureau of Labor Statistics, Report No. 247, Apr., 1963, p. 1.

347 *Id.* at 2.

348 *Ibid.*

349 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 App. Div. 2d 739, 161 N.Y.S.2d 564 (1957).

350 *Id.*, 154 N.Y.S.2d at 218.

351 American Bar Ass'n, *Second Report of the Committee on Labor Relations of Government Employees*, pp. 6-9 (1955).

Association feels that it would be "too idealistic" to presume that employees can personally approach their superior with a complaint which he will remedy.³⁵²

While the idea of settling such disputes through mediation is fundamentally sound, it has not escaped criticism. The objection is made that if the dispute is not settled at the mediation level, then resort to arbitration would be necessary to achieve a conclusive and binding solution. It is contended that submission to arbitration would constitute an unlawful delegation of legislative responsibility; i.e., fixing terms and conditions of employment.³⁵³

In the *Norwalk* case, the Connecticut Supreme Court answered this objection. It stated that arbitration was permissible within certain limits. Namely, the subject matter of the arbitration must be limited to a determination of the governmental agency's liability to its employees within the framework of existing laws. The court reasoned that policy considerations underlying the law are not proper subjects of arbitration. In other words, it would not be within the province of an agency to grant a wage increase exceeding a ceiling fixed by the legislature. Therefore, submission of such a dispute to arbitration would be improper. However, there seems to be no apparent objection to submitting a wage increase or similar demand to arbitration where the agency has the power to grant such demands. Mediation has been judicially approved by a number of jurisdictions,³⁵⁴ and ten states have enacted legislation providing for submission of disputes to arbitration and/or mediation by certain classes of public employees.³⁵⁵

Mediation and arbitration have been effective measures for adjusting grievances in private industry³⁵⁶ and in helping to promote and maintain "labor peace."³⁵⁷ Consequently, there appears to be no reason why such methods should not be utilized in the area of public employment. Some of the more recent public employee agreements contain clauses providing for arbitration or mediation of disputes which cannot be settled at the employer-employee level.³⁵⁸ Such contracts tend to indicate that both government and its employees are becoming more aware of the fact that this may be the answer to their problem. The American Bar Association feels there is every reason to believe that the use of such grievance pro-

352 *Id.* at 7.

353 *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482, 486-87 (1951).

354 *Petition of the Labor Mediation Bd.*, 365 Mich. 645, 114 N.W.2d 183 (1962); *City of Detroit v. Division 26, Amalgamated Ass'n of Street Employees*, 332 Mich. 237, 51 N.W.2d 228 (1952); *appeal dismissed*, 344 U.S. 805 (1952); *In re Richfield Federation of Teachers*, 263 Minn. 21, 115 N.W.2d 682 (1962); *City of Cleveland v. Division 268, Amalgamated Ass'n of Street Employees*, 141 Ohio Op. 236, 90 N.E.2d 711 (Ohio Ct. C.P. 1949).

355 ILL. ANN. STAT. ch. 24, §§ 10-3-8 to 10-3-11 (Smith-Hurd 1962) (firemen); IND. ANN. STAT. §§ 40-2401-2415 (1952) (public utilities); MICH. STAT. ANN. § 17.454(14) (1960) (public utilities & hospitals); MINN. STAT. ANN. §§ 418.21 (1958) (police & fire depts. in cities of 1st class status); N.J. STAT. ANN. §§ 34:13B-18 to 34:13B-23 (1965) (public utilities); N.D. REV. CODE § 34-11-01 (1960); ORE. REV. STAT. § 243.750 (1963); PA. STAT. ANN. tit. 43, § 213.1 (1964) (public utilities); R.I. GEN. LAWS ANN. § 28-9.1 (1956) (police); WIS. STAT. ANN. § 1-111.70(4)(b) (Supp. 1965).

356 American Bar Ass'n, *Report of the Committee on Law of Government Employee Relations*, p. 7 (1959).

357 *Ibid.*

358 See, e.g., a contract entered into by the Brown County Highway Comm'n, Brown County, Wisc., and Teamsters Union, Local 75, covering the maintenance employees of the Comm'n. A clause of the contract provides: "Should any disagreement arise between the Employer and the Union which cannot be amicably settled, the matter shall be submitted to a Board of Arbitration . . ." The clause goes on to specify the method to be employed in selecting the arbitrators, the number to be selected, etc. Similar provisions are found in other contracts made by the Teamster's locals and the City of Jeannette, Pa. (1964); Green Bay, Wisc. (1964); Allouez, Wisc. (1964); and Preble, Wisc. (1964). Copies of the above contracts are on file in the office of THE NOTRE DAME LAWYER.

cedures will promote better employer-employee relations, and lead to the elimination of strikes by public employees.³⁵⁹

CONFLICTS OF INTEREST

This portion of the Survey deals with the problems encountered by the public employee in his personal dealings as they affect his public employment. The concept of public employment spans the entire spectrum of positions within the political body. Our analysis concerns only the problems arising within the structure of the executive branch of government, since the judicial and legislative branches are subject to a form of special regulation and self-regulation.

Broadly speaking, a conflict of interest arises any time a public employee, charged with complete loyalty to his governmental employer, faces a situation where he can choose between two courses of action, one which will benefit him personally, the other which will achieve the maximum benefit to the public. It can be seen that the basic elements are the conflict in the courses of action and the benefit to be derived therefrom, along with the discretion in the public employee to choose between the two.

The element of discretion could suggest that the problem is one peculiarly applicable to executives and officers of the public. They are certainly the persons facing these problems most frequently. But the scope cannot be so limited. Many statutes phrase their proscriptions in terms encompassing both officer and employee. The logic of the problem also suggests that whenever any person on the public payroll is invested with the kind of discretionary authority necessary for a conflict of interest he should be considered within the terms of the law, irrespective of his title or classification. Thus, it can be seen that this analysis should not be limited to the higher echelons of public administration. It is intended to extend as far as the problem requires.

A. *Interests in Public Contracts*

1. Direct Interests

Before the legislative pronouncements in the area of public officers' interests in public contracts, the common law approach was one of principle, resembling the courts' approach to private trusts. "The officers of government are trustees and both the trust and trustees are created for the benefit of the people."³⁶⁰ This approach is sound and fairly easily understood. It was obvious that a trustee could not have an adverse interest in a contract made for his cestui. Since public office is a trust, the same principles analogously applied.

Legislators, however, were far from content with the judicial solution to the problem. They could observe the judicial confusion in determining which of the public employees were officers and therefore trustees for the public.³⁶¹ In 1892 the Supreme Court of New York took the broad approach and included almost everybody. It stated: "[i]t is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers . . ."³⁶² On the other hand, even recent cases have found some high officers not within the conflicts of interest laws. In *Marion County v. Dufficy*³⁶³ the Court held that the county physician is not a public officer and was therefore free to contract with himself for the leasing of offices to himself.

The legislators adopted the broad approach to the problem and tried to get

³⁵⁹ American Bar Ass'n, *Report of Committee on Law of Government Employee Relations*, p. 7 (1959).

³⁶⁰ *Driscoll v. Burlington-Bristol Bridge Co.*, 10 N.J. Super. 545, 77 A.2d 255, 265 (Ch. 1950).

³⁶¹ See, e.g., *State ex rel. Stock v. Kubiak*, 262 Wis. 613, 55 N.W.2d 905 (1952).

³⁶² *Beebe v. Sullivan County*, 64 Hun. 377, 19 N.Y.S. 629, 630 (Sup. Ct. 1892), *aff'd*, 142 N.Y. 631, 37 N.E. 566 (1894).

³⁶³ 144 C.A.2d 238, 300 P.2d 721 (1956).

almost every public employee within their statutes. Though their statutes aimed at a single mode of conduct, they adopted language such as "no member, officer or employee,"³⁶⁴ "no state, county or municipal officer . . . nor any deputy or employee of any state, county or municipal officer"³⁶⁵ or "any public officer or public employee."³⁶⁶ However, some courts adopted a narrow standard by which to judge the coverage of the statute. Though not dealing with a statute with very broad language, in the *Dufficy* case the Court said: "Thus, it is clear that, since the Legislature legislated on this subject and concerned itself only with 'officers,' it must have intended to exclude 'employees.'"³⁶⁷ The Court mistook the intention of the legislature, however, and the situation was corrected by a 1961 amendment to the California statute, specifically including employees within its proscriptions.³⁶⁸

It would seem that the public servant involved in the contract must be one who could abuse his discretion to further his personal interest. If he acts as a public officer but exercises no influence over the making of the contract, generally he will be outside the legal sanctions. For example, in *Tonkins v. City of Greensboro*³⁶⁹ a member of the parks and recreation commission organized a corporation to purchase the city swimming pool. The Fourth Circuit said that the statute³⁷⁰ did not apply since the officer involved was a member of a commission which served only in an advisory capacity while the legal authority to sell the property was in the city council. It is significant to note that a question was raised as to motives, since there was a strong suggestion that the purpose of the sale was the continuation of racial discrimination. The Fourth Circuit rejected this on the grounds that the evidence was not sufficient to support this claim. It is apparent that the motives behind the contract are not relevant to the question of a conflict of interest, since the proscription is based on the interest, not the cause, whether heinous or laudatory.³⁷¹

Thus we can return to the concept expressed earlier: a conflict of interest can arise only where there is some discretion to abuse. It has been stated in different ways by different courts, but the underlying principle remains.³⁷² Some older cases indicate a rigid standard which takes no account of any abuse of discretion, but these seem to have led to extreme results, little followed today.³⁷³ However, one recent case in the Supreme Court of Arkansas held that the statute had been violated when a contract was let by the secretary of state to a firm in which the chairman of the highway commission was a stockholder.³⁷⁴ The dissent seemed to express a more reasonable interpretation of the provision and is much more consistent with the general thinking in the area. The more general rule seems to be that even where there may be a close relationship between the contracting agency and the agency of which the interested official is a member, absent a showing of actual improper influence, there will be no violation.³⁷⁵

Apparent as it may seem that the courts are strict guardians of the public trust when armed with broad statutes, the appearance is more than a little decep-

364 COLO. REV. STAT. ANN. § 3-4-6 (1953).

365 NEV. REV. STAT. § 281.230(1) (Supp. 1963).

366 N. M. STAT. ANN. § 40A-23-6 (1953).

367 *Marin County v. Dufficy*, 144 G.A.2d 238, 300 P.2d 721, 725 (1956).

368 CAL. GOV'T CODE § 1090, as amended by STATS. 1961, c. 381, p. 1435, § 1; STATS. 1963, c. 2172, p. 4559, § 1.

369 276 F.2d 890 (4th Cir. 1960).

370 N. C. GEN. STAT. § 14-234 (1951).

371 *Cf.*, *Quackenbush v. City of Cheyenne*, 52 Wyo. 146, 70 P.2d 577 (1937).

372 See, e.g., *Raymond v. Larsen*, 11 Utah 2d 371, 359 P.2d 1048 (1961) ("fiduciary situations").

373 See, e.g., *In re Opinion of the Justices*, 108 Me. 545, 82 Atl. 90 (1911).

374 *Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co.*, 234 Ark. 697, 354 S.W.2d 560 (1962).

375 *Tonkins v. City of Greensboro*, 276 F.2d 890 (4th Cir. 1960); *Kentucky State Fair Board v. Fowler*, 310 Ky. 607, 221 S.W.2d 435 (1949); *State v. Bennett*, 213 Wis. 456, 252 N.W. 298 (1934).

tive.³⁷⁶ The statutes are clear and demanding when applied to a direct contractual interest, and the courts find few problems enforcing the law against such interests. The fact is, however, that a direct contractual interest is rare. The rationale is simple. An honest public servant will not enter into such a direct contract for he generally knows that it may cast a shadow of doubt upon him, regardless of how admirable or innocent his purpose. The dishonest public official will usually be clever enough to hide his corrupt influence in some form or device which can shield his dealings from the public view. Thus the intentional direct contract interest is a small problem at its worst.

This is not to say that such interests are extinct. Some exceptions have even worked their way into the law to make direct interests, in some instances, permissible. If the interest in the contract clearly is accidental or results from an emergency, some court may be inclined to disregard the danger to the public as minimal. In *Miller v. Huntington & Ohio Bridge Co.*³⁷⁷ the Supreme Court of Appeals of West Virginia was confronted with a situation where a member of the county court was a director of the bank being paid to handle the financing for the purchase of a bridge. It was shown that the member did not know of the agreement with his bank. The Court could have sidestepped the question by holding that merely being a director was not an interest. The Court faced the question by finding him to be sufficiently interested in the contract, yet said: ". . . we think it would be unreasonable to hold that a member of the court could have been influenced by an agreement of which he had no knowledge."³⁷⁸ Thus the contract was upheld. The case apparently denotes an encroachment by a form of rule of reason.

Somewhat in the same vein is a recent Tennessee case, *State v. Yoakum*.³⁷⁹ Decided by the Court of Appeals of Tennessee, the case concerned a loan of money to the school district by a bank whose president and controlling stockholder was a member of the county school board. The Court held that a loan of money is not a contract within the meaning of the conflict of interest statute, absolving the transaction on that ground. A rule of reason approach more akin to that suggested in the *Miller* case³⁸⁰ would commend itself as more rational, perhaps even easier of judicial administration.

New York has apparently added another exception to the general rule against contract interests by placing condemnation proceedings on a special footing. The New York Supreme Court, in the case of *In re Parking Place in the Village of Hempstead*,³⁸¹ said firmly: "It seems clear that the acquisition of real property by condemnation possesses no contractual attributes."³⁸² It concluded that the statute forbidding interests in contracts³⁸³ does not apply, relying heavily upon the proposition that condemnation proceedings are subject to the supervision of the courts. This position, however, seems open to question about the practical ability of the courts to assure proper representation of the real party in interest, the public.

These reasoned exceptions, however, are far from commonly accepted. For example, in *Marin County v. Messner*,³⁸⁴ the Court refused to concede any exception and held that a county engineer violated the statute³⁸⁵ by contracting with the county for the rental of equipment used in his work, even though he was

376 "Statutes prohibiting such 'conflict of interest' by a public officer are strictly enforced." Terry v. Bender, 143 C.A.2d 198, 300 P.2d 119, 125 (1956).

377 123 W.Va. 320, 15 S.E.2d 687 (1941).

378 *Id.*, 15 S.E.2d at 700.

379 43 Tenn. App. 123, 306 S.W.2d 39 (1957).

380 Miller v. Huntington & Ohio Bridge Co., 123 W.Va. 320, 15 S.E.2d 687 (1941).

381 207 Misc. 402, 140 N.Y.S.2d 341 (Sup. Ct. 1955).

382 *Id.*, 140 N.Y.S.2d at 343.

383 N.Y. PENAL LAW § 1868.

384 44 C.A.2d 577, 112 P.2d 731 (1941).

385 CAL. POL. CODE § 920, amended STATS. 1921, c. 489, p. 743, § 1. (Now CAL. GOV'T CODE § 1090.)

reluctant to agree to rent the equipment and did so only at the behest of the county board of supervisors.

2. Corporate Holdings

When concerning ourselves with interests in contracts, a discussion of direct interests is merely preliminary. The problem truly presents itself in questions of indirect interests, and the major vehicle of these indirect interests is the corporation. Given the situation where an official has an interest in a corporation and the corporation an interest in a public contract: is the official interested in the contract so as to contravene the applicable statute?

The logical, reasonable approach to this question seems to be whether or not the official is so interested in the corporation as to equate the interests of the corporation with the interests of the official. An example of this approach is *State v. Robinson*.³⁸⁶ There the department of motor vehicles bought \$31.40 in gas and oil products from a corporation one of whose stockholders was the registrar of motor vehicles. In holding the contract illegal, the Court said:

. . . [S]tatutes . . . when they prohibit an officer from becoming interested directly or indirectly in a contract made by him in his official capacity, apply where the interest of the officer is that of a substantial stockholder and officer in the corporation with which he makes the contract.³⁸⁷

In *Robinson*, the Court, dealing with the problem of criminal sanctions, said: "Criminal liability must depend upon evidence as to interest other than the bare existence of the relationship of a stockholder in a corporation. The interest made criminal by the statute is a question of fact . . ." ³⁸⁸ This kind of *ad hoc* approach and rule of reason appears more difficult of application than a blind standard of any interest being condemned. But pushed to its logical ends, that standard would indict most, if not all, of our public officials, due to the complex, interrelated nature of our society. Given that we need some line of demarcation, a rule of reason commends itself as familiar to the courts and at the same time logically defensible.

This rule of reason appears to have been translated into the "substantial interest" test, as mentioned in *State v. Robinson*.³⁸⁹ In *Alexander v. Ritchie*³⁹⁰ it was termed a "substantial portion"³⁹¹ of the stock in the corporation which would disqualify the official. There it was held that 525 out of 1150 shares was such a "substantial portion" so as to make the contract illegal and require the removal of the official from office. Thus it appears that this "substantial interest" rule is not the same as a mere majority-minority analysis.³⁹²

Another tack suggested is not the importance of the official in the corporation, but the importance of the corporation to the official. An official might have stock in a large corporation such that it would not come within any "substantial interest" rule, while at the same time the holding could be the principal or only basis for the official's wealth. The Supreme Court of Washington put it succinctly when it said: "That which touches one's pocket is apt to warp the judgment."³⁹³ An interest may touch one's pocket without being a substantial part of the corporation's stock. More precisely the question should be divided into the importance of employment by, or salary from, the corporation, which will be discussed later; and the significance of the dividend income or value of the stock. As to the latter, the courts have not recognized any standard. For the court which rejects any

386 71 N.D. 463, 2 N.W.2d 183 (1942).

387 *Id.*, 2 N.W.2d at 188.

388 *Id.*, 2 N.W.2d at 189.

389 71 N.D. 463, 2 N.W.2d 183 (1942).

390 132 W.Va. 865, 53 S.E.2d 735 (1949).

391 *Id.*, 53 S.E.2d at 739.

392 See, *Peabody v. Sanitary Dist. of Chicago*, 330 Ill. 250, 161 N.E. 519 (1928) (24%); *Bartley, Inc. v. Town of Westlake*, 237 La. 413, 311 So. 2d 328 (1959) (minority).

393 *Mumma v. Town of Brewster*, 174 Wash. 112, 24 P.2d 438, 440 (1933).

interest as unlawful, the question is academic. The courts applying the "substantial interest" rule evidently feel that their test is sufficient and they need not consider this aspect.³⁹⁴

The older cases demonstrate the rigidity of the rule that any interest in the corporation renders the contract unlawful. In *People ex rel. Schenectady Illuminating Co. v. Bd. of Sup'rs of Schenectady County*,³⁹⁵ a member of the board of supervisors was the secretary and treasurer of the Schenectady Illuminating Co., a local utility unit of a major system. The contract in question was for light bulbs sold to the county in the amount of \$7.44. The court said: "He has . . . no substantial financial interest in that company, being the owner of only one share of stock."³⁹⁶ However, he needed no substantial financial interest. Thus the contract was declared void as a conflict of interest, even though the interest was not substantial.

Though the view in *Schenectady County*³⁹⁷ is somewhat extreme, a few courts still adhere to it. In *Reetz v. Kitch*³⁹⁸ the Supreme Court of Wisconsin said: ". . . the stockholder in a corporation has such an interest as will disqualify him from acting on behalf of a city or other governmental unit."³⁹⁹ The only interest involved there was that of the city clerk who owned stock in the bank which was to sell a building to the city.

This rigid thinking may also influence a court in its interpretation of statutes, as it did in *Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co.*⁴⁰⁰ This 1962 holding was that a public officer who was a stockholder in a corporation had an interest in a contract between the corporation and the state. A strong dissent by Justice Johnson demonstrated the weakness of the majority position by showing that the contract voided was advantageous to the state and the question of improper influence was actually quite negligible. What is more significant, the majority seems to have disregarded the language of the provision⁴⁰¹ they were interpreting.

Legislatures have entered this area of corporate holdings as conflicts of interest by providing that a certain proportion of the stock of a corporation is not such an interest. It amounts to a legislative adoption of the "substantial interest" rule except for the relatively insignificant amounts being exempted. In all, a total of nine states have injected a form of exemption for minor corporate holdings into their laws. Of these nine, six have percentage limits,⁴⁰² two have dollar amount limits,⁴⁰³ and one has both.⁴⁰⁴

An example of a simple percentage exemption is the Hawaiian provision for interests in corporations.⁴⁰⁵ It is typical of the simple percentage exemption, specifying that a holding of not more than five per cent in a corporation shall not be subject to the conflict of interest proscription. Kentucky has a similar provision, again at the five per cent level.⁴⁰⁶ It is interesting to note that five per cent is the largest interest permitted by any state, except Massachusetts. Apparently this figure

394 See text accompanying note 48 *infra*.

395 166 App. Div. 758, 151 N.Y.S. 1012 (1915).

396 *Id.*, 151 N.Y.S. at 1012.

397 166 App. Div. 758, 151 N.Y.S. 1012 (1915).

398 230 Wis. 1, 283 N.W. 348 (1939).

399 *Id.*, 283 N.W. at 355.

400 234 Ark. 697, 354 S.W.2d 560 (1962).

401 ARK. CONST. art. 19, § 15.

402 HAWAII REV. LAWS § 9-54 (1955); KY. REV. STAT. § 61.096(2) (1963); NEB. REV. STAT. § 18-301 (Supp. 1962); WIS. STAT. ANN. § 946.13 (Supp. 1965); CAL. GOV'T CODE § 1091.5(a); MASS. ANN. LAWS ch. 268A, § 7 (Supp. 1964).

403 N.Y. PUB. OFFICERS LAW § 74(3)(j); ORE. REV. STAT. § 279.360 (Supp. 1964).

404 OHIO REV. CODE § 2919.11 (Page 1953).

405 HAWAII REV. LAWS § 9-54 (1955).

406 KY. REV. STAT. § 61.096(2) (1963).

is below anything a court would consider a "substantial interest."⁴⁰⁷ Nebraska and Wisconsin have been even less generous, permitting only one and two per cent respectively.⁴⁰⁸

California has seemingly tried to cover all of the possibilities with a series of different tests for the exemption.⁴⁰⁹ They exempt any holding of less than three per cent but add the conditions that the total dividends from the corporation shall not exceed five per cent of the employee's total annual income, nor shall all other payments (primarily salary and fees) exceed five per cent of his total annual income. This approach reflects the considerations expressed above, namely that a person can be very concerned about the welfare of a corporation, even though his holdings do not amount to a great portion of its stock. A significant consideration under the California statute is the degree of the officer's dependence upon the corporation for his material well-being. Ohio also has a mixed form of exemption in permitting an interest in a corporation so long as the interest is five per cent or less and the value of the holding is less than \$500.⁴¹⁰

Massachusetts has raised the percentage limit while broadening the base of the coverage.⁴¹¹ Thus while the limit is at ten per cent of the total proprietary interests in the corporation, it applies to the total of the official's holdings and those of his immediate family. Evidently the Massachusetts legislators felt that a ten per cent holding would not be sufficient to influence the judgment of the official, and at the same time concluded that the interests of the members of his immediate family would influence him as much as his own. Both seem to be tenable approaches.

The other two of the nine states with corporate holding exemptions, New York and Oregon, provide limited exceptions. New York's exemption is for an interest of more than \$10,000 in an activity regulated by a state agency, provided the interest is registered with the state.⁴¹² Oregon, on the other hand, has probably the most severely limited exception. It applies only to public officers in cities with a population of less than 5000 and only with the unanimous approval of the governing body, and in all cases is limited to \$500 in any year.⁴¹³ It is suggested that not many officers will qualify for this exception.

Such exemptions for corporate interests may not give the public servant much freedom. There are, however, a few other areas which remain uncovered by the proscriptions against conflicting interests. One of these may be the centralized purchasing of all state supplies. With such a scheme there is no reason why a state should fear the interests of its employees, since the final arbiter of all purchases is an independent body. This narrows the problem to the conflicts of interests of the few members of the state purchasing agency. These can be reached by a rigid standard without burdening the entire structure of public employment.

Of the states which have adopted a system of centralized purchases, only two maintain a contract interest prohibition against state officers not within the central purchasing agency.⁴¹⁴ All, of course, have provisions against the members of the central purchasing agency being interested in a contract.⁴¹⁵ The penalties for violation on the whole seem to be more stringent when provided for this particular agency, often providing as high as five years imprisonment plus fines.⁴¹⁶ Of course,

407 See, *Peabody v. Sanitary Dist. of Chicago*, 330 Ill. 250, 161 N.E. 519 (1928).

408 NEB. REV. STAT. § 18-301 (Supp. 1962); WIS. STAT. ANN. § 946.13 (Supp. 1965).

409 CAL. GOV'T CODE § 1091.5(a).

410 OHIO REV. CODE § 2919.11 (Page 1953).

411 MASS. ANN. LAWS ch. 268A, § 7(Supp. 1964).

412 N.Y. PUB. OFFICERS LAW § 74(3)(j).

413 ORE. REV. STAT. § 279.360 (Supp. 1964).

414 COLO. REV. STAT. ANN. § 3-4-6 (1953); N.M. STAT. ANN. § 40A-23-6 (1953).

415 CONN. GEN. STAT. ANN. § 4-116 (1958); MICH. STAT. ANN. § 3.392 (1961); MO. ANN. STAT. § 34.160 (1949); NEB. REV. STAT. § 81-150(3) (Supp. 1958); VA. CODE ANN. § 2-213 (1950).

416 See, e.g., VA. CODE ANN. § 2-214 (1950) (up to five years and/or \$1000 fine).

centralized purchasing, in addition to being advantageous to the state as regards efficiency, removes the opportunity for a corrupt official to violate his trust. This seems a more desirable way to protect the public than punishment of offenders.

Competitive bidding may also be a method of assuring the public a fair and honest transaction. The relationship of competitive bidding to conflicts of interests in public contracts is, however, unsettled. In *City of Valdosta v. Harris*⁴¹⁷ the Court pointed out that the "[r]elation of a bidder to the mayor does not render the latter disqualified to award the contract to the former."⁴¹⁸

While six states provide simply that the prohibition against interests in contracts shall not apply if the contract is let to the lowest responsible bidder,⁴¹⁹ Massachusetts combines this with the condition that the interest still be less than ten per cent of the total proprietary interests.⁴²⁰

It may be that there is some latitude where a public officer is the only party willing or able to supply the required goods or services. A South Dakota Code provision illustrates this latitude by providing that a contract with such an interested official shall not be subject to the proscription against conflicts of interest.⁴²¹ In Oregon, however, such latitude has not been allowed. There, a question arose as to the deposit of funds by a school district in the only bank in the district, the manager of which was a member of the school board. In the absence of such a provision the Attorney General of Oregon would not permit the interest and directed the school board to find another bank in the county.⁴²² Due to the sparse authority in the area, no conclusion as to the extent of such permissible interests can be reached.

3. Indirect Interests

Thus far we have been discussing the relatively direct ways in which a public official may be interested in public contracts and the different ways these interests may be viewed by the law. But the statutes usually say something like "any interest, direct or indirect"⁴²³ when proscribing conflicts of interest. The only way to describe an indirect interest is an interest in the interest of another. In the area of public contracts, this would broadly describe the role of the subcontractor. This leads to the question of whether a public official can be interested as a subcontractor in a public contract.

First, we must divide the question into two kinds of subcontracts; those pursuant to an agreement between the contractor and the public official prior to the making of the general contract with the public body, and those not pursuant to such an agreement. Clearly the former kind of relationship is unlawful. In *Emanuel v. Engst*,⁴²⁴ the mayor had sold land with a promise that he would get the city to buy a certain amount of gravel from the buyer. The Court found the contract for the purchase of gravel to be void because of the mayor's interest and refused any help to the defrauded buyer, intimating a kind of *in pari delicto* rule. When the subcontract is made pursuant to an agreement, it seems clear that the subcontract is a kind of reward for having influenced the general contract, and it is

417 156 Ga. 490, 119 S.E. 625 (1923).

418 Syllabus of the court, No. 10, *City of Valdosta v. Harris*, 156 Ga. 490, 119 S.E. 625, 627 (1923). See also, *Panozzo v. City of Rockford*, 306 Ill. App. 443, 28 N.E.2d 748 (1940).

419 *E.g.*, COLO. REV. STAT. § 3-4-6 (1953): ". . . provided that this restriction shall not apply in cases where the purchase of supplies . . . is made upon a contract awarded after open competitive bidding and such member . . . is the lowest responsible bidder. . . ." Also, FLA. STAT. ANN. § 839.091(a) (Supp. 1964); GA. CODE ANN. § 23-1713 (Supp. 1963); HAWAII REV. LAWS § 9-54 (1955); OHIO REV. CODE ANN. § 2919.09 (Page 1953); ORE. REV. STAT. § 279.362 (Supp. 1963).

420 MASS. ANN. LAWS ch. 268A, § 7 (Supp. 1964).

421 S.D. CODE § 10.0708(2) (Supp. 1960).

422 OPS. ORE. ATT'Y GEN. No. 5424 (1962).

423 See, *e.g.*, ILL. ANN. STAT. ch. 102, § 3 (Smith-Hurd 1934).

424 54 N.D. 141, 208 N.W. 840 (1926).

thus close to being a bribe. *Directors of School Dist., Thurston County v. Libby*⁴²⁵ was a situation where the school district, of which Mrs. Libby was a director and its clerk, made a contract with certain employees of the Libby farm for the transportation of the Libby children to school. It seems that the employees had an agreement to give Mrs. Libby a portion of the money they received from the school district. The Supreme Court of Washington was kind enough not to describe the payment as a bribe, but decided that the contract was void due to Mrs. Libby's interest and therefore payment upon it was properly refused.⁴²⁶

It is clear that this agreement or arrangement does not have to be written. In fact, it need not even be spoken. In *People v. Darby*⁴²⁷ the agreement was deduced from the circumstances and the peculiar activities of the public official involved. Darby was a member of the Los Angeles Board of Education and leased a building he owned to an ice cream company for what was found to be twice its value. He then had himself put on the purchasing committee and argued that his lessee should get a substantial portion of the school system's ice cream business. The Court said: "If the jury were convinced by all the evidence that appellant intentionally created a situation whereby he became interested in the contract to be awarded by the board and that he actively participated in effectuating the contract their verdict cannot be upset."⁴²⁸ Though the court relied on the jury's verdict, it seems clear that the underlying principle is that proof of the agreement established the unlawful interest. The Court, in so concluding, relied upon an earlier California case, *People v. Deysher*,⁴²⁹ in establishing the existence of an agreement. There a county supervisor ordered improvement of the county roads and the contractor rented equipment from a copartnership of which the county supervisor was a member. The Court said:

The purchase, after award of contract and *without previous agreement so to do*, by the contractor . . . from a member of the board awarding the contract . . . does not create . . . an interest in the contract which will invalidate it. . . . However, if the purchase is made pursuant to an agreement, made before the award of the contract, the latter is void.⁴³⁰

A recent case adopted this same approach. In *State v. Holovachka*,⁴³¹ the chairman of the board of public works bought public contracts at a discount through a company he owned. The Supreme Court of Indiana rejected his contention that he had no interest until his purchase of the contracts, the evidence showing that the pattern of the sales of the contracts suggested an agreement. Thus the conclusion seems to be that any subcontract or interest obtained subsequent to the making of the general contract is an invalidating interest if it comes about pursuant to an agreement or arrangement made prior to the general contract.

Though the law is settled with regard to subcontracts made pursuant to an agreement, it is far from settled with regard to subcontracts free from any such collusive agreement, the statement of the California Court in *People v. Deysher*⁴³² notwithstanding. The courts seem to be divided into two camps, each espousing a position inconsistent with the other. One camp, asserting that a subcontract not pursuant to an agreement is lawful, is represented by *Fredericks v. Borough of Wanaque*.⁴³³ There, a borough committeeman was engaged in the lumber business and Fredericks bought lumber from him in order to perform according to his

425 135 Wash. 233, 237 Pac. 505 (1925).

426 For another case close to bribery, see, *State v. Hurd*, 5 Wash. 2d 662, 106 P.2d 323 (1940).

427 114 C.A.2d 412, 250 P.2d 743 (1952), *appeal dismissed*, 345 U.S. 937 (1953).

428 *People v. Darby*, 114 C.A.2d 412, 250 P.2d 743, 757 (1952).

429 2 Cal. 2d 141, 40 P.2d 259 (1934).

430 *Id.*, 40 P.2d at 261. (Emphasis by the court.)

431 236 Ind. 565, 142 N.E.2d 593 (1957).

432 2 Cal. 2d 141, 40 P.2d 259 (1934).

433 95 N.J.L. 165, 112 Atl. 309 (1920). *Accord*, *Henscher v. Bd. of School Inspectors*, 267 Ill. App. 296 (1932); *Ferguson v. City of Coffeerville*, 77 Kan. 391, 94 Pac. 1010 (1908).

contract with the borough. The Court pointed out that there was no agreement or understanding and stated: ". . . manifestly the test of the legality of the contract must be determined as of the time when the resolution was passed, and not by the free act of the plaintiff in purchasing materials."⁴³⁴

Though the Court in *Fredericks* thought the proposition manifest, the Supreme Court of California re-examined the logic of the position and arrived at a similar conclusion. "The purchase, after award of contract and *without previous agreement so to do*, by the contractor of material used in the performance of the contract . . . does not create . . . an interest in the contract which will invalidate it."⁴³⁵ The Court sharply defined the issue by adding: ". . . however, if the purchase is made pursuant to an agreement, made before the award of contract, the latter is void."⁴³⁶

On the other side is the camp following *Bissell Lumber Co. v. Northwestern Casualty & Surety Co.*⁴³⁷ There the clerk of the school district was an employee of a lumber company which obtained a contract with the school district. The Supreme Court of Wisconsin was quick to declare the contract void for an unlawful interest, despite the fact that there was no element of discretion in the clerk's relationship to the contract. The loss, however, fell upon the clerk's employer who was refused recovery under quantum meruit. The justification for this was stated in *City of Bristol v. Dominion Nat'l Bank*.⁴³⁸ "Those who deal with public officials must at their peril take cognizance of their power and its limits. A failure to do so places them in *pari delicto*."⁴³⁹

Of the two positions on subcontractor interests, the *Fredericks* position is most easily defended in logic. It, of course, relies upon a continuing chain of actual interest to invalidate a contract, and if the interest is at any time merely prospective, the interest is insufficient to invalidate the contract. On the other hand, the *Bissell* position rests solidly upon the public policy in removing any possible questions of tainted interests in the public contracts. The practical question of resolving questions of the existence of pre-contract agreements has probably been a great sustaining force behind the *Bissell* position.

Thus far we have discussed indirect interests by way of investigating the position of the official as a subcontractor. But an indirect interest may arise by way of a creditor interest in the contract. The language of the decisions seem to indicate that a creditor's interest alone is sufficient to invalidate the contract if the contract would have substantial effect on the security for the debt. Apart from the language, however, the cases usually contain a strong suggestion of other interests. In *Moody v. Shuffleton*⁴⁴⁰ a county supervisor had discovered that he could not contract for printing with the county. To avoid this barrier he sold his business to his son, taking back a chattel mortgage for the purchase price. When his son attempted to collect for the printing done by him for the county, the Court voided the contract citing the debt interest of the father. The decision is certainly reinforced by the familial relationship.

The Supreme Judicial Court of Maine alluded to this vague additional interest in *Tuscan v. Smith*.⁴⁴¹ ". . . mere indebtedness does not necessarily create an interest in fact in the business transactions of the debtor, yet it may do so; . . ."⁴⁴² The Court discussed the importance of the contract to the security and the fact

434 *Fredericks v. Borough of Wanaque*, 95 N.J.L. 165, 112 Atl. 309, 311 (1920).

435 *People v. Deysher*, 2 Cal. 2d 141, 40 P.2d 259, 261 (1934) (Emphasis by the Court).

436 40 P.2d at 261.

437 189 Wis. 343, 207 N.W. 697 (1926).

438 153 Va. 71, 149 S.E. 632 (1929).

439 *Id.* at 636. *Accord*, *Lexington Insulation Co. v. Davidson County*, 243 N.C. 252, 90 S.E.2d 496 (1955).

440 203 Cal. 100, 262 Pac. 1095 (1928).

441 130 Me. 36, 153 Atl. 289 (1931).

442 *Id.* at 293.

that the debtor and creditor were brothers. It held the contract void for the interest of the creditor-public official. The Court did not specify whether it was the importance of the contract to the security behind the debt or the family relation which converted the indebtedness into a contract interest.

Moody and *Tuscan* hint at the idea of family relationships giving rise to conflicts of interest, but surprisingly the cases which deal squarely with the problem have often held that the family relation is insufficient to taint the contract. The problem most often arises for the husband-wife relationship. In *Thompson v. District Bd. of School Dist. No. 1 of Moorland Tp.*,⁴⁴³ the Supreme Court of Michigan was presented with the problem of a teacher who was the wife of a member of the school board. Though to the average man this would suggest an interest, the Court merely pointed to the Married Women's Acts to establish that the interests of a man and his wife are separate and distinct. Though the Court may have been deciding the case on the lack of evidence of actual misconduct, the reasoning leaves something to be desired.

Much more logically sound is *State v. Miller*,⁴⁴⁴ where the Supreme Court of Washington seemed to take it for granted that the county auditor who employed his wife in two different positions was interested in her contract of employment. "By so doing he received, indirectly at least, a compensation from the county in addition to his salary."⁴⁴⁵ The fact that Washington is a community property state does not seem to be sufficient to resolve the difference since the same Court as that in *Thompson*, the Supreme Court of Michigan, a few years earlier seemed to assume that an interest in the public contract flowed from the marriage relation. "It is useless to argue that, when the wife sells her property at the top price, and thereby secures a good profit, the husband does not indirectly profit by it."⁴⁴⁶

The problem of family relations such as father and son or brothers has usually been treated in connection with another factor which might produce an unlawful interest in the contract, such as *Moody* and *Tuscan*. In a similar case, however, the Supreme Court of Iowa held that where the son of a member of the city council leased equipment from his father to perform his contract with the city, it was a question for the jury whether the father had an interest in the son's contract.⁴⁴⁷ The Court chose not to make it a matter of law that the father-son relationship was so close as to create an interest in one for the contracts of the other. In New Jersey, however, it may be a matter of law that the father has an interest in his son's contracts. In *Ames v. Board of Education*⁴⁴⁸ the New Jersey Court of Chancery held that a contract by a son who bought land from the school district of which his father was a member, with money borrowed from the father, was void.

In a case involving a similar relationship, *Brewer v. Howell*,⁴⁴⁹ The Supreme Court of Arkansas refused to decide that the son is necessarily interested in his father's contracts. There the father sold supplies to the school district of which the son was a member. In addition, the son was employed in the business by the father. ". . . we agree with the trial court that purchases made from a business concern employing a school board member are not in violation of the law, for such director is not interested either 'directly or indirectly' as is contemplated by the statute."⁴⁵⁰

In both *Ames* and *Brewer* the question of motives or fair dealings came up. In *Brewer* it was noted that the prices charged by the father were fair and reasonable; the Court approved of the transactions. In *Ames* the Court had nothing but

443 252 Mich. 629, 233 N.W. 439 (1930).

444 32 Wash. 2d 149, 201 P.2d 136 (1948).

445 *Id.* at 138.

446 *Woodward v. Wakefield*, 236 Mich. 417, 210 N.W. 322, 323 (1926).

447 *Wayman v. City of Cherokee*, 204 Iowa 675, 215 N.W. 655 (1927).

448 97 N.J. Eq. 60, 127 Atl. 95 (1925).

449 227 Ark. 517, 299 S.W.2d 851 (1957).

450 *Id.* at 856.

praise for the intentions of the father who was attempting to preserve land for the building of a school, but the Court struck the contract down. The only conclusion to be drawn is that motives are probably not a significant factor unless they would indicate an intent to cheat the public. But motives reflecting high public spirit could certainly incline a court to a liberal view.

4. Federal Treatment

Though this survey is directed at state and municipal government problems, little can be said without considering the treatment accorded the problem by the federal government. It is certain that federal decisions cannot in any way be binding upon the states. That, however, does not preclude a guidance by the federal judiciary in the interpretation of conflict of interest statutes.

The most significant federal decision in the area of conflicts of interest is *United States v. Mississippi Valley Generating Co.*,⁴⁵¹ the heart of the Dixon-Yates controversy. The case concerned the activities of a Mr. Wenzell, who was a vice-president of First Boston Corporation, an important dealer and underwriter of public utility securities. Mr. Wenzell had joined the government as an advisor on interest costs while retaining his position with First Boston. Dixon and Yates each represented major privately owned utilities in the South. The TVA was seeking additional electric power to supply the AEC, and President Eisenhower directed that it be supplied by private sources. Wenzell advised the government in negotiations with Dixon's Southern Company and Yates' Middle South Utilities, each of which was a very good customer of First Boston. When the deal fell through, the corporation which had been organized to supply the power, Mississippi Valley Generating Company, sued to recover its out-of-pocket expenses and the government challenged the contract claiming Wenzell had a conflict of interest. Somewhat surprisingly the Supreme Court upheld the government's position. Though there was some evidence that Wenzell had actually advised Dixon on a related matter during the negotiations, there was no question of divulging a confidence. The Court said that Wenzell's employer, First Boston, stood to gain from the contract and therefore Wenzell had an indirect interest in that contract. This meant that the contract was void. At first glance one might say that Wenzell, as a quasi-judicial official, had a subcontractor's interest in the contract and the Supreme Court was merely applying the generally accepted principles in the area. Mr. Justice Harlan, taking sharp issue with the majority, jointed out that there was no agreement between First Boston and the Utilities; First Boston's interest was at best speculative. "I do not mean to suggest that such an arrangement must be evidenced by a formal agreement, for of course any sort of tacit understanding or 'gentlemen's agreement' will suffice. But here the Court of Claims has expressly found against the existence of any such thing."⁴⁵²

The Court in *Mississippi Valley Generating* was dealing with what was then 18 U.S.C. § 434.⁴⁵³ It adopted a very rigid interpretation which apparently gives little in the way of guidelines to the federal employee. ". . . the statute establishes an objective, not a subjective, standard, and it is therefore of little moment whether the agent thought he was violating the statute, if the objective facts show that there was a conflict of interest."⁴⁵⁴ 18 U.S.C. § 434 has been replaced, however, by a new set of federal standards.⁴⁵⁵ Hopefully they will be a more helpful guide to the federal employee than *Mississippi Valley Generating*.⁴⁵⁶

451 364 U.S. 520 (1961).

452 *Id.* at 569.

453 Repealed by Pub. L. 87-849, § 2, Oct. 23, 1962, 76 STAT. 1126.

454 364 U.S. at 560-61.

455 18 U.S.C. § 201 et. seq., especially § 208.

456 The repeal of 18 U.S.C. § 434 should not be understood as a disapproval of *United States v. Mississippi Valley Generating Co.* See, S. REP. NO. 2213, 87th CONG., 2d Sess. (1962).

B. Nepotism

Nepotism is the fine art of showing favoritism to relatives in the making of appointments to jobs. It has been a particular problem in the sphere of public employment.

Statutes prohibiting nepotism are fairly common and follow a general pattern. They provide that no officer shall appoint to public office a person related to him within a certain degree of affinity or consanguinity. One state permits closer relatives in affinity than consanguinity to be appointed.⁴⁵⁷ Florida permits the employment of one relative within the designated degree without a violation.⁴⁵⁸ Iowa exempts school teachers,⁴⁵⁹ whereas South Dakota extends its proscription only to school teachers.⁴⁶⁰ Maine also prohibits second cousins.⁴⁶¹ New Mexico permits nepotism to a certain dollar limit in pay.⁴⁶² Oklahoma extends the proscription to appointments of other officers.⁴⁶³ With these modifications, however, the anti-nepotism statutes are almost uniform attempts to deal with this problem. The courts, as might be expected, have not been quite so uniform in their treatment of the problem.

The courts do not disfavor anti-nepotism laws. The Supreme Court of Utah in *Backman v. Bateman*⁴⁶⁴ approved the purpose of such laws by saying: "The vice at which anti-nepotism statutes are aimed is avoiding inefficiency in public office by preventing officials from favoring their relatives and appointing those who may not be qualified to serve."⁴⁶⁵ The Court then declared the Utah statute⁴⁶⁶ unconstitutional as applied to prior appointees.⁴⁶⁷ The Supreme Court of Idaho was much stronger: "Nepotism is recognized as an evil that ought to be eradicated and stamped out . . ."⁴⁶⁸ In spite of such a view, a few courts have taken some force out of the laws by strict construction. In *State ex rel. Robinson v. Keefe*⁴⁶⁹ the Supreme Court of Florida said its anti-nepotism law should be "construed strictly as an act of such highly penal character is required to be construed."⁴⁷⁰ It held that teachers were not covered by the anti-nepotism law since they were required to demonstrate their qualifications separately. In Ohio the Supreme Court said the anti-nepotism law does not cover the wife of the appointing official since that relation is not within those enumerated by the statute.⁴⁷¹

We do not mean to intimate that the decisions, such as *Robinson*, are unreasonable in this area, at least not all of them. But an example of questionable application seems to be raised in *State ex rel. Hoagland v. School District No. 13 of Prairie County*.⁴⁷² There the school district had only three persons who qualified for membership on the school board, a man, his wife and his brother. The children of the man and his wife were the only pupils. The Supreme Court of Montana held that the employment of the wife to teach the children violated the

457 MONT. REV. CODES ANN. § 59-519 (1947).

458 FLA. STAT. ANN. § 116.10 (1960).

459 IOWA CODE ANN. § 71.1 (1946).

460 S.D. CODE § 15.3814 (Supp. 1960).

461 ME. REV. STAT. ANN. ch. 10, § 22, Rule XXV (1954).

462 N.M. STAT. ANN. § 5-1-10 (1953) (to \$600).

463 OKLA. STAT. ANN. tit. 21, § 483 (1951).

464 1 Utah 2d 153, 263 P.2d 561 (1953).

465 *Id.*, 263 P.2d at 564. *Accord*, *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W.2d 100 (1933).

466 UTAH CODE ANN. § 52-3-1 (1953).

467 To overcome this problem, an exception was made for prior appointees, UTAH CODE ANN. § 52-3-1(a) (1953).

468 *Barton v. Alexander*, 27 Idaho 286, 148 Pac. 471, 475 (1915).

469 111 Fla. 701, 149 So. 638 (1933).

470 *Id.*, 149 So. at 638.

471 *Board of Education of Zaleski School Dist. v. Boal*, 104 Ohio St. 482, 135 N.E. 540 (1922).

472 116 Mont. 294, 151 P.2d 168 (1944).

Montana Nepotism Act⁴⁷³ and was therefore invalid. It is difficult to see whom the act was protecting in this case.

It should be noted that unless provided by statute, the appointment of a relative of another officer will be valid,⁴⁷⁴ and that acts done by a person guilty of making nepotistic appointments are still valid.⁴⁷⁵ Also, absent statutory provisions, the civil law method of calculating degrees of relationship is used rather than the common law method.⁴⁷⁶ This shortens the reach of the statute since fewer relations will fall within a certain degree under the civil law method.

Penalties for nepotism run from little more than statutory suggestions that it should not be done to substantial fines and imprisonment.⁴⁷⁷

C. Dual Employment Limitations

At the outset we must distinguish between public officials who hold employment outside public office and those who hold a second public position.

Only one state outlaws private employment in addition to public position.⁴⁷⁸ This appears strange since at first glance it would seem that such secondary private employment would give rise to more significant problems than secondary public employment. Upon consideration, however, the argument is that the only danger from outside private employment is that of favoritism shown to the employer. Arguably this danger is substantially met by the laws, both legislative and judicial, against public servants having interests in contracts. To the extent that the interests in contracts doctrine meets the danger this is true. A case where the contracts doctrine was sufficient is *Stockton Plumbing & Supply Co. v. Wheeler*.⁴⁷⁹ There a city councilman was employed by a plumbing contractor dealing with the city but the councilman refrained from voting on the contract. The Court said the interest was sufficient to vitiate the contract. Even though the city charter provided that such contracts *may* be declared void by the council, the court said: ". . . all such contracts made by the city should be absolutely void."⁴⁸⁰ Thus the law on interests in contracts was sufficient to meet the problem, even to the extent that the government body could not condone the interest of one of its members.⁴⁸¹

The kind of situation where the weakness of the contract interest doctrine to deal with this problem becomes apparent was demonstrated in *Pressey v. Township of Hillsborough*,⁴⁸² where the mayor was also the salesman for a construction equipment firm at the time the township was purchasing road graders. By rigging the specifications he, in effect, had excluded all competition for his employer. The Court ruled that there was not necessarily an interest in the contract, but that the contract was brought about by improper influence and therefore void. This illustrates the danger that absent some reliable criteria for protecting the public interest, a significant loophole exists in attempts to curb such abuses.

The laws against dual public employment, fairly common,⁴⁸³ seem to be directed at an entirely different evil. Such a situation arises where a commission or board finds that they need additional services and hire one of the members

473 MONT. REV. CODES ANN. § 59-519 (1947).

474 State ex rel. McKittrick v. Becker, 336 Mo. 815, 81 S.W.2d 948 (1935).

475 State v. King, 379 S.W.2d 522 (Mo. 1964).

476 Graham County v. Buhl, 76 Ariz. 275, 263 P.2d 537 (1953).

477 Compare, N.Y. PUB. OFFICERS LAW § 74 (no penalty), with, MONT. REV. CODES ANN. § 59-520 (1947) (\$50 to \$1000 fine and/or not less than six months imprisonment).

478 CONN. GEN. STAT. REV. § 4-8 (1958) ("no other gainful employment").

479 68 Cal. App. 592, 229 Pac. 1020 (1924).

480 *Id.*, 229 Pac. at 1023.

481 *Accord*, People v. Elliott, 115 C.A.2d 410, 252 P.2d 661 (1953); Miller v. City of Martinez, 28 C.A.2d 364, 82 P.2d 519 (1938); State ex rel. Abernathy v. Anthony, 206 Tenn. 597, 335 S.W.2d 832 (1960).

482 37 N.J. Super. 486, 117 A.2d 646 (Ch. 1955).

483 See, e.g., ILL. ANN. STAT. ch. 102, § 1 (Smith-Hurd 1934); N.C. GEN. STAT. § 128-1 (1951).

for that purpose.⁴⁸⁴ In this area the law is fairly well settled. It is best expressed by the Supreme Court of Mississippi in describing the situation where hospital trustees paid themselves for additional services they rendered.⁴⁸⁵ “. . . [A]n office is taken cum onere, and public officers have no claim for official services rendered except where, and to the extent that, compensation is provided by law.”⁴⁸⁶ The payments were therefore held illegal.

D. Post Employment Limitations

It has been argued that those limitations placed upon the public servant which restrain him from taking personal advantage of the public trust should continue to restrain him so long as it is reasonably possible that he could take advantage of the public, even though his formal public employment may have ended. This gives rise to the statutes which generally forbid a public officer or employee from participating for a certain length of time in any matter which he was forbidden to participate in while in office. These laws have been passed by a few states⁴⁸⁷ and the federal government.⁴⁸⁸

Questions concerning these limitations have not frequently reached the courts. In *Village of Bethesda v. Mallonee*⁴⁸⁹ the Court injected some equitable considerations to mitigate the effect of the statute. The Ohio statute⁴⁹⁰ proscribed contract interests for one year after the termination of employment, but a member of the village council entered into a contract to construct a fire house only five months after resigning from the council. Since the village received full value, the Court refused to undo the transaction.

More recently a California court voided a contract without the help of a post employment statute by extending the contract interests doctrine.⁴⁹¹ The Court said that the making of a contract includes the “planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids . . .”⁴⁹² Under this definition of a contract, his interest arose during his employment. Most courts would probably follow California in this extension if it was found desirable to avoid the contract. The meager authority, however, is hardly sufficient to indicate any judicial trends.

E. Codes of Ethics

As a new approach to the entire subject of conduct while in public office, it has been suggested that the state enact a comprehensive code of ethics or set of standards of conduct. The intent is to settle questions such as those discussed above, and others, as can be seen by the statements of purpose incorporated into some of the legislative enactments. Minnesota says: “. . . a need exists to define and regulate the conduct of public officials and employees to eliminate conflicts of interest in public office so as to improve standards of public service and strengthen the faith and confidence of the people of Minnesota in their government . . .”⁴⁹³ This is based on the premise that “. . . high moral and ethical standards among

484 See *Board of Comm'rs of Natrona County v. Casper Nat'l Bank*, 56 Wyo. 132, 105 P.2d 578 (1940).

485 *Golding v. Salter*, 234 Miss. 567, 107 So. 2d 348 (1958).

486 *Id.*, 107 So. 2d at 360.

487 MICH. STAT. ANN. § 5.353(4) (Supp. 1963) (one year); MISS. CODE ANN. § 2301 (1956) (one year); OHIO REV. CODE ANN. § 2919.10 (Page 1953) (one year); PA. STAT. ANN. tit. 71, § 776.3 (1962) (advisor may never be interested in a contract he recommends); TENN. CODE ANN. § 12-403 (1956) (cannot bid on contract for six months).

488 18 U.S.C. § 207 (may never be interested in a matter worked on; one year for matters for which officer was responsible).

489 60 Ohio Op. 107, 136 N.E.2d 457 (C.P. 1955).

490 OHIO REV. CODE ANN. § 2919.10 (Page 1953).

491 *Stigall v. City of Taft*, 52 Cal. 2d 565, 375 P.2d 289 (1962).

492 *Id.*, 375 P.2d at 292.

493 MINN. STAT. ANN. § 3.87 (Supp. 1964).

public officers and employees . . . are essential to the conduct of free government"⁴⁹⁴ Unfortunately, these statements of purpose and requirements are the most significant part of the Minnesota statute which they describe as their code of ethics. It provides only for the establishment of legislative committees⁴⁹⁵ and that the head of each agency shall promulgate a "code of public service ethics appropriate to the specific needs of such agency"⁴⁹⁶ for the guidance of the officers and employees.

Other states have formulated much more substantial plans for dealing with the subject. Kentucky is more specific in its statement of purpose, prescribing "specific standards" with the bulk of the provisions carrying out this intent.⁴⁹⁷ Kentucky apparently was impressed by the New York provision, enacted in 1955,⁴⁹⁸ which was the first true code of ethics as an exhaustive guide for the conduct of public office. Massachusetts⁴⁹⁹ and Washington⁵⁰⁰ are the other two states which have attempted such a complete guideline. All four states also make specific provisions forbidding interests in contracts,⁵⁰¹ Kentucky and Massachusetts, however, making certain percentage allowances for corporate interests.⁵⁰² All, except Washington, have some form of dual employment limitation,⁵⁰³ though New York phrases it in very broad terms,⁵⁰⁴ and Kentucky's applies only to members of the legislature.⁵⁰⁵

The conduct sought to be guided by their codes of ethics is more extensive, however, than those areas such as interests in contracts and dual employment which are already covered by law in many states. New York, Massachusetts and Washington have provisions to the effect that public officers and employees should not disclose confidential information and should not place themselves in a position where they would have to.⁵⁰⁶ They also have provisions that no officer or employee should use his office for special privileges.⁵⁰⁷ New York and Massachusetts have extended their provisions to require that their public officers and employees conduct themselves so as not to give a poor impression or raise suspicion among the public.⁵⁰⁸ These provisions thus go to the heart of the matter more than any other. They are enactments implementing the idea expressed in the Minnesota statement of purpose,⁵⁰⁹ that the confidence of the people is an essential element in a free government. This idea comes closest to covering all of the laws discussed under the heading of conflicts of interest.

All of the material on conflicts of interest revolves around the concept that

494 *Ibid.*

495 MINN. STAT. ANN. § 3.89 (Supp. 1964).

496 MINN. STAT. ANN. § 3.91 (Supp. 1964).

497 KY. REV. STAT. § 61.092 (1963).

498 N.Y. PUB. OFFICERS LAW § 74.

499 MASS. ANN. LAWS ch. 268A (Supp. 1964).

500 WASH. REV. CODES ANN. § 42.22.010 *et seq.* (1961).

501 KY. REV. STAT. § 61.096(6) (1963); MASS. ANN. LAWS ch. 268A, § 7 (Supp. 1964); N.Y. PUB. OFFICERS LAW § 74(2); WASH. REV. CODE ANN. § 42.22.030 (1961).

502 KY. REV. STAT. § 61.096(6) (1963); MASS. ANN. LAWS ch. 268A, § 7 (Supp. 1964).

503 KY. REV. STAT. § 61.096(5) (1963); MASS. ANN. LAWS ch. 268A, § 23(a) (Supp. 1964); N.Y. PUB. OFFICERS LAW § 74(3)(a).

504 ". . . employment which will impair his independence of judgment . . ." N.Y. PUB. OFFICERS LAW § 74(3)(a).

505 KY. REV. STAT. § 61.096(5) (1963).

506 N.Y. PUB. OFFICERS LAW § 74(3)(b), (c); MASS. ANN. LAWS ch. 268A, § 23(b), (c) (Supp. 1964); WASH. REV. CODE ANN. § 42.22.040(5), (6) (1961).

507 N.Y. PUB. OFFICERS LAW § 74(3)(d); MASS. ANN. LAWS ch. 268A, § 23(d) (Supp. 1964); WASH. REV. CODE ANN. § 42.22.040 (1961).

508 N.Y. PUB. OFFICERS LAW § 74(3)(f), (h); MASS. ANN. LAWS ch. 268A, § 23(e), (f) (Supp. 1964). See *Normas de Etica, Departamento de Comercio de Puerto Rico*: ". . . de preservar el buen nombre de la agencia que representan." (To preserve the good name of the agency which they represent.)

509 MINN. STAT. ANN. § 3.87 (Supp. 1964).

no man can serve two masters.⁵¹⁰ For the public servant there can be only one master, the interest of the public. When that public servant's private, personal interest in any matter relating to his public responsibility reaches the level where it threatens to challenge his devotion to the public, the law seeks to intervene. In the past it has achieved this intervention by proscription and criminal sanctions, and this is still the pattern in most states. It is to be hoped that if the people can state succinctly, through their legislature, what it expects of its employees, we can maximize the public benefit consistent with the maximum freedom for individual public employees. Thus our law would be preventive rather than only punitive.

THOMAS J. KENNEY, JR.

PAUL V. NIEMEYER

MICHAEL F. DEL FRA

ROSS W. PETERSON

⁵¹⁰ *Matt.* 6:24. The District Court of Appeal in California has approved the strength of this principle, commenting, "The voice of divinity, speaking from within the sublimest incarnation known to all history, proclaimed and emphasized the maxim nearly two thousand years ago on occasions of infinite sacredness." *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020, 1024 (1924).