Davis v. Henry: One More Piece to the Public Employee Strike Rights Puzzle

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I. INTRODUCTION

On January 8, 1990, the Supreme Court of Louisiana shed a glimmer of light upon the present status of public employee labor law in Louisiana. In Davis v. Henry,1 Chief Justice Dixon, speaking for the court, held that the district court had correctly refused to enjoin a three month old Terrebonne Parish school employees' strike.2 The supreme court decision resolved in the negative the previously unanswered question of whether any public employee strike was "per se" illegal and would be enjoined. The total impact of this decision and how it is to be reconciled with existing legislation and jurisprudence will be the focus of both employees and employers in future public labor disputes.

At a minimum, the Davis decision has removed Louisiana state courts as participants in public labor disputes provided the strike involves "non-essential"3 employees. At a maximum, the decision grants public employees an affirmative, judicially protected right to strike, and certain

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1. 555 So. 2d 457 (La. 1990).
2. The court reversed the Louisiana First Circuit Court of Appeal decision of Davis v. Henry, 555 So. 2d 484 (La. App. 1st Cir. 1990). The supreme court held that Louisiana state courts were without jurisdiction to enjoin the teachers' strike at issue. The court reasoned that Louisiana's anti-injunction statute, commonly referred to as our "Little Norris-LaGuardia Act," was applicable to public employee strikes. The Louisiana statute, La. R.S. 23:821-849 (1985), is modeled after the federal Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982), and provides in pertinent part:
   No court shall issue any restraining order or temporary or permanent injunction which in specific or general terms prohibits any person or persons from doing, whether singly or in concert, any of the following acts:
   (1) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement to do such work or to remain in such employment;
   (2) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise . . . .
3. 555 So. 2d at 468. The court adopted the "essentiality" test, which provides that certain employees deemed essential to public safety (for instance, police officers) would not be able to strike and that such strikes would continue to be enjoined by the courts.
dicta in the decision\(^4\) suggest public employees may have rights akin to those granted to private employees under federal law.\(^5\)

This casenote will briefly examine the history of public employee strikes in Louisiana and elsewhere, and the law in Louisiana prior to \textit{Davis}. It will also concentrate on the \textit{Davis} decision and the rationale set forth therein. The effects of \textit{Davis} on public sector strikes and public employee rights will be discussed, and finally, possible solutions to the problem of public employee strikes will be explored both within the confines of the \textit{Davis} decision and, as the preferred alternative, through a proposed legislative solution.

\section*{II. Historical Overview}

\subsection*{A. Public Employee Unions}

Prior to World War II, public employees were often treated better than their private sector counterparts. Public employees enjoyed comparable wages with greater job security and benefits.\(^6\) The balance shifted in favor of private sector employees after private sector unions were successful in procuring for their memberships increased wages and benefits.\(^7\) Collective bargaining was instrumental in improving the economic condition of the private sector work force, and public employees have long sought a similar system.

The first public employee unions were organized in the 1830's;\(^8\) however, it was not until the 1950's and 1960's that public unionization became a significant force.\(^9\) This increase in public employee union involvement was a direct result of the disproportionate economic gains

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4. 555 So. 2d at 464-65 ("We ... find under our law an intent to afford public employees a system of organizational rights which parallels that afforded to employees in the private sector.").


7. Bernstein, supra note 6, at 460.


9. Id. at 896 ("[F]rom 1956 to 1968, the proportion of public employees to total union membership had doubled."); Anderson, The Impact of Public Sector Bargaining, 1973 Wis. L. Rev. 986, 987 (1973) ("Between 1956 and 1968 the percentage of union members in the public sector more than doubled while union membership in the private sector increased by only six percent.").
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made by private employees as compared to their public counterparts.\(^{10}\) Public employees saw their economic position eroded as private sector wages and benefits surpassed those of the public sector. Likewise, increased recognition of employee unions by federal, state, and local governments, and the generally more militant attitude toward government during the 1960's facilitated growth in public employee union membership.\(^{11}\) Public employee unions continued to grow in the 1970's and 1980's.\(^{12}\) Because of large budget deficits at all levels of government and increasing political pressure for government to provide more services for less money, public employees are more likely than ever before to resort to self-help mechanisms to win more favorable benefits. The result of this adoption by the public sector of the adversarial labor relations system identified with the private sector has been more public employee strikes.\(^{13}\)

**B. Legal History**

In early American labor law, concerted activity by *any* group of employees, public or private, to injure or coerce an employer into complying with employee demands, was deemed criminal conspiracy and could also subject the participants to tort liability for interfering with the employer's business.\(^{14}\) These impediments were eventually removed. The legal bar to employee strikes first began eroding with a slight shift

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10. Bernstein, supra note 6, at 460; Shaw & Clark, supra note 6, at 867.
11. Bernstein, supra note 6, at 460; Kheel, Strikes and Public Employment, 67 Mich. L. Rev. 931 (1969); Project, supra note 8, at 887 (President Kennedy, who received heavy support from organized labor, signed Executive Order No. 10988, 27 Fed. Reg. 551 (1962), which provided a limited representative status for employee unions for most federal employees.).
12. From 1945 to 1984 the national workforce saw a union membership decline of an annual average of two percent per year; however, during the same period the number of public employees that became labor union members increased. Congressional Research Service Report on Implications for Economic Policy and Labor Legislation of Decline in Union Membership, Daily Labor Report No. 114, June 13, 1986 (In 1960 only 6% of all union members were public sector employees; by 1984, 29% of all union members were employees of the government. By 1985, 35.8% of governmental employees were unionized.).
13. The American labor system, under the National Labor Relations Act, is adversarial in nature; the act is designed to put management and labor on opposite sides and initiate bargaining at arm's length to a resolution. The most common manifestation of this adversarial system is 29 U.S.C. § 158(a)(2) of the Act. That section makes it an unfair labor practice for employers to interfere with, dominate, or even grant support to employee unions.
in judicial philosophy, but it was not until federal legislation began to protect the right to strike that employees were able to engage in concerted activity free from judicial injunctions and the threat of criminal and civil sanctions. Private sector labor law was totally revolutionized by the adoption of the National Labor Relations Act in 1935. The act granted employees the right to choose bargaining agents, the right to collectively bargain, and the right to engage in certain concerted activity free from employer disturbance. Yet these developments were of little avail to public employees.

In *United States v. United Mine Workers of America*, the United States Supreme Court held that the Norris-LaGuardia Act did not encompass federal employees. Similarly, public employees are specifically excluded from the National Labor Relations Act. These exclusions of public sector employees show a clear distinction between the rights of employees in the private and public sectors. Thus, courts have remained an effective weapon of public employers to stop public employee concerted activity, as public employees are not given the protection to

15. See *Duplex Printing Press Co.*, 254 U.S. at 479, 41 S. Ct. at 181 (Brandeis, J., dissenting); *Vegelahn*, 167 Mass. at 104, 44 N.E. at 1079 (Holmes, J., dissenting); it was in these early cases that two of America's most notable jurists began to question whether strikes by groups of workers were as wrongful as the courts of the time had labeled them. Instead, they asserted that strikes were necessary to equalize the positions of management and labor.

16. The development of the federal legislative protection of employees to organize and engage in concerted activity against their employer began with the passage of the Clayton Act in 1914, 29 U.S.C. §§ 52-53 (1982). This statute provided that it was not a violation of U.S. antitrust law for employees to combine or organize. The most significant strike protection legislation was the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115 (1982). This legislation was the first clear articulation by Congress that public policy favored employee freedom to join unions and participate in concerted activities to accomplish their goal without interference. Congress accomplished this policy objective in the Norris-LaGuardia Act by denying federal courts jurisdiction in labor dispute cases.

19. In 1946, pursuant to Executive Order 9728, President Truman directed the Secretary of the Interior to take control of the bituminous coal mines in the U.S. Labor unrest in the coal industry was thought to be a threat to the national economy during the fragile time when the country was shifting from a wartime to a peacetime economy. The Supreme Court in *Mine Workers* held that pursuant to the Presidential Order, the U.S. became the coal miners' employer, and as government employees they were not under the coverage of the anti-injunction statute. The court relied primarily on a statutory interpretation rule in reaching its holding, stating: "[t]here is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." 330 U.S. at 272, 67 S. Ct. at 686.
20. 29 U.S.C. § 152 (1982). Section 2 of the Act provides: ""employer" . . . shall not include the United States . . . or any State or political subdivision thereof . . . ."
organize or participate in the concerted activity guaranteed to their private sector counterparts under federal law.

III. WHAT STATES HAVE DONE

A. The Common Law Ban

With public employees excluded from the federal labor system, state governments are free to decide for themselves what collective bargaining and strike rights their public employees will enjoy. Generally, the common law has regarded public employee strikes as illegal "per se." 21 This "per se" rule is simple and harsh. Any concerted activity against a public employer to stop government services for the purpose of employee self gain will be enjoined, and violators are guilty of criminal contempt of court. Four common arguments have emerged from cases and commentary 22 addressing why public employees should be precluded from striking.

First, a strike against the government is said to be tantamount to a denial of governmental authority. Second, the terms of public employment are deemed not to be subject to bilateral collective bargaining because they are set by the legislative body. Third, since legislative bodies are responsible for public employment decision making, allowing strikes would grant public employees excessive bargaining leverage, resulting in a distortion of the political process. Fourth, public employees provide essential services which, if interrupted by employee strikes, would endanger the public welfare.

Because of the "per se" rule's harshness, it has been met with dissension and attack. One of the earliest and most notable challenges to the common law rule and rationale was Indiana Supreme Court Chief Justice DeBruler’s dissent in Anderson Federation of Teachers v. School City of Anderson 23. He questioned the "per se" rule, calling the majority opinion unjustified in holding every public employee strike to be un-


23. 252 Ind. at 564, 251 N.E.2d at 18.
lawful, regardless of how non-disruptive or peaceful the strike was. Chief Justice DeBruler thought the teachers’ strike at issue in Anderson was only minimally disruptive because the school system never had to close. He further believed that, in the interest of equalizing the bargaining power of both sides of the dispute, minor interruptions and peaceful strikes should be tolerated.

Similarly, in Timberlane Regional School District v. Timberlane Regional Education Association,24 the New Hampshire Supreme Court applied a rationale analogous to Chief Justice DeBruler’s, and refused to enjoin a teachers’ strike. At the time of the decision, New Hampshire was a state that recognized the common law ban on public employee strikes.25 The court refused, however, to enjoin the strike, primarily because the school district failed to show it was suffering irreparable harm, a requirement for the extraordinary remedy of injunction. The court additionally said that to grant such a remedy to a movant who had not fulfilled the requirements necessary for injunctive relief would be “detrimental to the smooth operation of the collective bargaining process . . . .”26

In County Sanitation District No. 2 v. L.A. County Employees Association,27 California judicially abolished the common law rule. The Louisiana Supreme Court employed the County Sanitation rationale in Davis. Other states, however, have steadfastly maintained the common law ban on public employee strikes. Most notably, two recent opinions rejected attempts to abolish the “per se” ban. In Jefferson County Board of Education v. Jefferson County Education Association28 and Martin v. Montezuma-Cortez School District RC-1,29 the West Virginia Supreme Court of Appeals and the Colorado Court of Appeals, respectively, rejected the County Sanitation abolition of the common law strike ban. Both courts reasoned that their states differ from California because California has a well developed public employee collective bargaining statute.30 In contrast, West Virginia and Colorado do not have a well developed statutory procedure for handling public employee col-

25. Id. at 248, 317 A.2d at 557 (“New Hampshire is no exception to this rule [of no public employee strikes], for this court held . . . that such strikes are illegal under the common law of this state . . . .”).
26. Id. at 251, 317 A.2d at 558.
30. The statute is referred to as the Meyers-Milies-Brown Act and is found in Cal. Gov’t Code §§ 3500-3515 (West 1991).
lective bargaining matters. The courts then refused to create such a system jurisprudentially.

B. Legislative Solutions

Many states have realized that the judiciary is ill suited to develop a system of public employee labor law. The need for stability, peace in the work force, and some degree of predictability from the viewpoint of labor and management led many state legislatures to craft mechanisms to deal with government employees. Two general types of public employee relations statutes have been adopted.

The first type of statute prohibits public employee strikes; however, the statutes provide some alternative dispute resolution machinery. These statutes are fashioned after the federal model. Under federal law, federal employees are unable to participate in strikes against their employer. Participation in strikes against the U.S. government will quickly be enjoined and future participants held in contempt for failing to comply with the injunction. As an alternative to strikes, the federal statute provides for and protects employee organizational rights, mandates collective bargaining, and provides for arbitration. The statutes employed by states using this type of employee relations system are customized variations of the federal statute, but each statutorily prohibits public employee strikes.

31. This concern was voiced in Jefferson Cty. Bd. of Educ. v. Educ. Ass'n, 393 S.E.2d 653, 658-59 (W.Va. 1990), when the West Virginia Supreme Court of Appeals refused to adopt a public labor law system by overruling the common law ban. The court stated:

We continue to emphasize, as other states have done, that these complex issues are best resolved in the legislative arena. As we stated almost ten years ago . . . "[i]t was the initial inability of the courts to judicially resolve the competing interests of private employees and private employers that led to federal legislation in the labor law field. Most if not all commentators in the labor law area agree that the complex issues in [the public employees] field are ill suited to any comprehensive judicial solution."

32. 5 U.S.C. § 7311 (1983) ("An individual may not accept or hold a position in the Government of the United States . . . if he . . . (3) participates in a strike, or asserts the right to strike, against the Government of the United States . . . .")


34. 5 U.S.C. § 7117 (1983) (provides a duty to collectively bargain with employees where "not inconsistent with any Federal Law or any Government-wide rule or regulation . . . ").


The second type of statute legislatively grants public employees the right to strike. Eleven states (Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin) currently have this system. The states that allow public sector strikes do so with some degree of control. Either by statute or by the courts’ equitable power, strikes are allowed only in some instances. The right to strike is limited to public employees whose absence from their jobs would not immediately endanger the public welfare.

Prior to Davis, Louisiana had no public employee relations system. Louisiana’s entire “system” of handling public employee demands consisted of a few broad statutory provisions and inconclusive, inconsistent case law. Public employees are at the mercy of the states to define their organizational rights and duties. The Louisiana policy prior to Davis was “hands off.”

IV. LOUISIANA LAW PRIOR TO DAVIS

A. The Right to Collectively Bargain

While Louisiana law prior to Davis allowed collective bargaining in the public sector, it imposed no affirmative duty on employers to bargain with their employees. Thus, the decision to collectively bargain was largely in the hands of employers. Without the right to strike, employees could not effectively compel employers to bargain. But in spite of the fact that the law did not grant employees the right to force bargaining, various statutory provisions and case law seemingly did contemplate public sector collective bargaining.

Article X, section 10(A)(3) of the Louisiana Constitution appears to recognize that some collective bargaining rights are available to employees or, at the least, does not preclude public entities from recognizing employee collective bargaining groups. The provision’s purpose is seem-

39. La. Const. art. X, § 10(A)(3) is under article X, which deals with civil service employees, and more specifically under the subsection entitled “Layoffs; Preference Employees.”
ingly to assert that membership in any employee organization should not be a factor in layoff preferences. However, the provision also states that it "shall not prohibit any state agency, department, or political subdivision from contracting with an employee organization ... not inconsistent with this constitution, a civil service law, or a valid rule or regulation ...." This language suggests that collective bargaining is permitted by the article as long as it does not interfere with other civil service laws, but it does not mandate that public bodies collectively bargain with their employees.

No statutory provision specifically allows or disallows all public employees the right to collectively bargain. The right is, however, specifically granted to certain sectors of the public employ. Some public transportation workers are provided with the right to collectively bargain under Louisiana Revised Statutes 23:890(D). Similarly, other statutes tangentially mention or recognize public employee collective bargaining, but no statute specifically gives that right to all public employees.

In the jurisprudence prior to Davis, the Louisiana courts recognized some collective bargaining rights, or at least did not prevent public bodies from recognizing collective bargaining representatives. In Zbozen v. Department of Highways, a group of employees sought to enjoin the implementation of a collective bargaining contract that the Department of Highways had entered into with several unions representing about one-third of the Department's employees. The petitioning employees were not members of the unions, had not chosen the unions as their representatives, and claimed they were not bound by the terms of the contract. The first circuit agreed that the plaintiff employees were not bound by the agreement; however, the court recognized that the agreement was valid as to employees who were represented by the unions. The court stated: "there is no provision of law that we are aware of

40. See infra text accompanying notes 85-86.
42. La. R.S. 23:890 (1985). This statute provides in pertinent part:
   D. Employees of such public transportation systems ... shall have the right
to self organization, to form, join or assist labor organizations, to bargain
collectively through representatives of their own choosing ....
This statute is, however, limited in scope, encompassing only transportation facilities
"hereafter acquire[d] and/or operat[ed]" by municipalities or transportation authorities.
It was promulgated to insure smooth transition of employees from the private to public
sectors when the employees had collective bargaining agreements in place.
43. See, e.g., La. R.S. 33:2213.1 (1989) (provides for police overtime pay with compensatory time off only in accordance with "[a]pplicable provisions of a collective bargaining agreement ... "); La. R.S. 42:6.1-6.2 (1990) (provides an exception to Louisiana's "open meeting" law where executive sessions closed to the public can be held for "strategy sessions or negotiations with respect to collective bargaining ... ").
44. 293 So. 2d 901 (La. App. 1st Cir. 1974).
which prohibits governmental agencies from recognizing collective bargaining agents of its employees. In the absence of positive law prohibiting recognition of such collective bargaining agents for union-member employees, there is no basis for enjoining such action.\textsuperscript{45}

Similarly, in \textit{Louisiana Teachers Association v. Orleans Parish School Board},\textsuperscript{46} a teachers' association sued to enjoin the school board from holding an election to choose an exclusive bargaining representative. The court held that the school board could recognize and collectively bargain with an agent selected by the employees. The court recognized that there was no positive legislation empowering the board to engage in collective bargaining, but likewise there was no statutory prohibition against such action.

Also consistent with statutory law, the Louisiana First Circuit Court of Appeal stated in dicta in \textit{Town of New Roads v. Dukes}\textsuperscript{47} that "[i]t would be an impairment of sovereign rights to hold that the State or its political subdivisions . . . submit to collective bargaining with its employees."\textsuperscript{48} Thus, it is clear that collective bargaining is not mandated by Louisiana law.

\textbf{B. The Right to Strike}

The answer to the question of whether Louisiana public employees had the right to strike was unclear prior to \textit{Davis}. Unlike the circumstances surrounding the right to collectively bargain, no bright-line rule emerged. As with collective bargaining, the legislature has been virtually silent on this matter. Other than Louisiana Revised Statutes 23:890, which grants transportation workers the right to "engage in other concerted activities,"\textsuperscript{49} no constitutional or statutory provisions specifically give or deny public employees the right to strike.

The "Little Norris-LaGuardia Act," the anti-injunction statute that prevents state courts from enjoining concerted acts "growing out of a labor dispute," was the primary source from which the supreme court in \textit{Davis} drew in finding that public employees were afforded the right to strike.\textsuperscript{50} However, prior interpretation of the statute had not been so favorable to public sector employees.

\textsuperscript{45} Id. at 903-04 (emphasis added).
\textsuperscript{46} 303 So. 2d 564 (La. App. 4th Cir. 1974).
\textsuperscript{47} 312 So. 2d 890 (La. App. 1st Cir. 1975).
\textsuperscript{48} Id. at 895.
The case of *Town of New Roads v. Dukes* \(^5\) addressed the issue of whether Louisiana's anti-injunction statute was applicable to the state or its political subdivisions. The court unequivocally answered the question in the negative. In *Dukes*, the town sued its employees and their union representative for injunctive relief to stop alleged illegal acts of picketing, work stoppages, and acts of violence. Two union supporters allegedly violated the terms of the lower court's injunction, and the town sought to cite the supporters for contempt. The defendants wanted to have the contempt charge tried before a jury, a labor organization protection device available under the anti-injunction statute. \(^2\) The court in *Dukes* rejected the defendants' argument that the anti-injunction statute was applicable to public employees, and held that the defendants therefore had no right to a jury trial, and that the injunction issued by the lower court was proper. \(^3\) The *Dukes* decision had common law

\(\text{La. R.S. 23:841} (1985).\)

The statute also provides:

\(\text{La. R.S. 23:844} (1985).\)

An exception is built into the statute allowing courts to enjoin certain concerted activities. The statute provides that concerted activity can be enjoined when the following facts are found: unlawful acts have been threatened or committed, substantial and irreparable harm will result, greater injury will be inflicted on complainant than on the defendants, complainant has no adequate remedy at law, or that public officers charged with the duty to protect complainant's property have failed to do so. Even with this exception, courts are still largely removed from the dispute.

This statute is broad in coverage and includes activities "growing out of a labor dispute." \(^4\) Id. This includes any controversy between "employers" and "employees" concerning terms of employment. \(^4\) Id. at § 821. No exceptions are granted to state or local governments to exempt them from the purview of the statute.

51. 312 So. 2d 890 (La. App. 1st Cir. 1975).

52. La. R.S. 23:848(3) (1985). The anti-injunction statute has a protective device providing that when a person is charged with contempt of court for violating an injunction granted under the statutory exception, he or she has certain rights. Among them is the right to a jury trial, an option not normally available in contempt of court violations.

The provision stems from organized labor's historical distrust of the judicial system, and allows an accused to be tried by a jury of his peers, rather than (as early labor organizers believed) a judge that sided with management.

53. The court in *Dukes* reasoned that although the statutory language of the "Little
"per se" strike ban overtones. The implication from Dukes was clear, the legislative silence on whether public employees could strike would be interpreted pursuant to the common law, rendering strikes by public employees illegal in Louisiana. Without the limitations of an anti-injunction statute, a court would have much more leeway to stop all or at least the most effective public employee strikes.

Of course, certain sectors of the public work force have been specifically denied the right to strike. In City of New Orleans v. Police Association of Louisiana the court held that police strikes were illegal in Louisiana. The court cited the general common law rule that "in the absence of a statute governing public employee strikes, public employees have no right to strike or engage in work stoppages," but qualified its holding by stating that it was not deciding the broader question of whether all public employees fell under the common law rule. The reasoning was obvious: to allow such strikes would so greatly endanger the public health and welfare that the risk to society outweighed the police officers' right to strike. The narrow holding of City of New Orleans offered little help in resolving the larger question of whether public employees in general are afforded the right to strike. Even in jurisdictions where public employees do have the right to strike, police, firefighters, and prison guards are usually not given the right because of the severe risk to the public.

Other pre-Davis cases did not specifically address the right of public employees to engage in strikes but mentioned it as a side issue. For example, in Charbonnet v. Gerace the Louisiana Supreme Court granted certiorari to decide if air traffic controllers formerly employed by the Federal Aviation Administration and members of PATCO were pre-

Norris-LaGuardia Act was broad enough to include governmental employers, it will instead rely on the reasoning set forth in United States v. United Mine Workers of America, 330 U.S. 258, 67 S. Ct. 677 (1947). The Dukes court stated that statutes that divest rights are not applicable to the sovereign unless the text of the statutes clearly so provides. Additionally, the court relied on the declaration of the policy behind the "Little Norris-LaGuardia Act" and reasoned that government is not an "employer" within the meaning of the statute. The policy statement of the statute provides that government has allowed business to aggregate capital. To equalize that power granted by government, employee organizations should be allowed the right to organize and aggregate labor. From this statement, the court reasoned that government is not a contemplated employer since the "government permitted" language indicates that the statute was intended to apply to private business.

54. 369 So. 2d 188 (La. App. 4th Cir. 1979).
55. Id. at 188.
56. Id. at 189.
58. 457 So. 2d 676 (La. 1984).
59. PATCO refers to Professional Air Traffic Controllers Organization, a labor union.
cluded under Louisiana law from receiving unemployment compensation benefits. The air traffic controllers were denied benefits by the Louisiana Department of Employment Security for "willful misconduct" in participating in a strike against the federal government. The supreme court held that the Federal Aviation Administration had failed to prove that the employees did not reasonably believe they had a right to strike. Interestingly, however, Justice Lemmon in a footnote stated, "[s]trikes against state, parochial and municipal governments are not statutorily prohibited in Louisiana. Indeed, Louisiana Revised Statutes 23:841 arguably provides unqualified protection of the right to strike."\(^{60}\)

In another case which mentioned the right to strike, *St. John the Baptist Parish Association of Educators v. St. John the Baptist Parish School Board*,\(^{61}\) the primary issue involved an alleged breach of a collective bargaining contract. Several teachers were laid off from their jobs when they returned to work after a teachers' strike. The employees alleged the layoffs violated a contract between the employees and the school board that provided, among other things, that the school board would not take reprisals against employees who went on strike. The court held that the "super-seniority status" granted to employees that did not strike violated the terms of the agreement. Although the case did not specifically address the legality of the strike, in dicta the court stated that the employees were "engaged in a lawful strike and work stoppage against the Board."\(^{62}\)

To summarize, the pre-*Davis* law on the issue of whether public employees have the right to strike was, in the absence of legislation, in the hands of the judiciary. Under the *Dukes* interpretation of the anti-injunction statute, public sector employees were not included; therefore, the courts were free to decide each case under their equitable power to grant or deny injunctions, with the guidance of whatever policy considerations they felt were most important. Certain public safety sensitive employees (policemen, for example) were specifically prohibited from striking. This deafening silence by the legislature, coupled with the mixed signals coming out of the various court decisions, set the stage for the Louisiana Supreme Court in *Davis*.

V. **Davis v. Henry**

A. **The Factual Setting**

The facts that gave rise to the dispute in *Davis* began when the school board of Terrebonne Parish refused to collectively bargain with

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60. 457 So. 2d at 678 n.2 (emphasis added).
61. 494 So. 2d 553 (La. App. 5th Cir. 1986).
62. Id. at 555.
its employees over various employee concerns. On October 18, 1989, only two months into the school year, approximately 750 teachers and 250 members of the support staff went out on strike and began picketing the Terrebonne Parish School Board's property. The strike lasted longer than any other in Louisiana history, extending eighty-six days until the employees returned to work on January 3, 1990 after a new collective bargaining agreement was reached. The school board managed to keep its schools open; however, the strike caused a drop in attendance from the normal rate of 94-96% to 29-63%. The school board, in response to the successful strike, promulgated a resolution providing that no punitive action would be taken if the employees returned to work immediately. The school employees immediately thereafter filed suit seeking to enjoin the board from taking any measures in reprisal. The school board reconvened, seeking a declaration that the strike was illegal and a judicial injunction.

The trial court ordered mediation in an attempt to amicably settle the dispute. The parties remained deadlocked, and the trial court denied both parties' requests. The court found that, in the absence of any statutory provision precluding the employees from striking, the strike was legal. Therefore, the court refused to enjoin the strike. The court also refused to enjoin the school board from taking punitive actions against the employees because the school board denied having any intention of firing the employees.

Thereafter, the school board appealed the trial court’s refusal to enjoin the strike to the Louisiana First Circuit Court of Appeal. The first circuit reversed and held that Louisiana's anti-injunction statute did not apply to public employees. The court did not decide, however,
whether the strike was "legal" because the court could issue an injunction to stop the strike upon a showing of irreparable harm even if the strike was "legal." Due to the lack of any meaningful instruction at parish schools as a result of the strike, and the monetary losses to the parish to "make-up" the time, the court felt irreparable injury was occurring and therefore held the injunction to be proper. Against this background, the Louisiana Supreme Court faced Davis.

B. The Supreme Court's Decision

The narrow issue before the supreme court was whether the anti-injunction statute covered public employee strikes. The court held that the statute was applicable to public employees, and thus state courts could not interfere with public employee strikes. In dicta, the court also suggested that public employees may have the same rights as private employees to collectively bargain and strike. The court stated:

A review of the jurisprudence, statutes and constitution shows Louisiana public policy favors the organization of and collective bargaining for both public and private employees. Concomitant with these protected rights is the right to engage in peaceful picketing, work stoppage and other concerted activities.69

This "protected rights" language, while dicta, suggests that the decision may not be merely limited to application of the anti-injunction statute or removing courts as a participant of labor disputes. A "protected right" implies a much broader affirmative right to strike and suggests that concerted activity is protected from employer interference or reprisal.

Similarly, the court supported this broader reading by stating, "[w]e find under our law an intent to afford public employees a system of organizational rights which parallels that afforded to employees in the private sector." Parallel may mean similar, but substantially less, organizational and strike rights than the private sector; however, the court leaves open the question of exactly what organizational rights public employees do have.

C. Analysis

The end sought to be accomplished by the court, that of putting public employees in an equal bargaining stance with their employers and political subdivisions were not "employers" within the meaning of the "Little Norris-LaGuardia" statute; therefore, these public entities were not covered by the statute. Also, the court used the rule articulated in United Mine Workers, stating that statutes that divest preexisting rights will not be applied to the sovereign.

68. 555 So. 2d at 488.
70. Id. at 464-65.
thereby insuring a fair, truly effective collective bargaining system, is the correct one. Such a result, with checks and balances to insure truly equal bargaining, should increase the long term productivity of the public work force to the benefit of all. The reasoning put forth by the court, however, is not wholly justifiable under current legislation.

The court's analysis of the anti-injunction statute was largely based on the "clear legislative intent" of the statute to protect the individual worker's right of organization set forth in the policy statement of the statute. The court reasoned that the statute was adopted to effectuate the policy of employee freedom to organize by removing the possible abuse of the injunctive remedy, which is a recognized hindrance. Therefore the statute, by not specifically excluding public sector employees, intended to include them. This rationale overlooks several important points.

First, the language of the anti-injunction statute's policy statement that the court felt "shows a clear legislative intent to protect all employees" is not so unequivocal. It also contains language to the effect that the purpose of the statute was to allow employees' concerted activity only against private employers. As was reasoned in United Mineworkers and Dukes, the policy statement in the anti-injunction statute seems to be directed toward private employers rather than toward government itself. This is illustrated by the language of the statute, which provides in pertinent part:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employee. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor . . . .

This language suggests that the employers to whom the statute is addressed are private employers who have been permitted to organize capital by the government, not the government itself. This language is largely copied from the federal Norris-LaGuardia Act; therefore, it may be a poor indicator of state legislative intent. But at the same time, it does not show a "clear legislative intent" to include all employers within its purview.

71. Id. at 460.
72. Id.
74. See 29 U.S.C. § 102 (1982) ("Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract . . . .").
No legislative history is available concerning the intended coverage of the anti-injunction statute; however, when it was adopted in 1934, the major concern was not the plight of the public sector. Instead, the focus of the labor movement was on the concerns facing the industrialized private sector. This circumstance raises doubt as to whether the statute should reach as far as the public sector.

One point omitted by the court in Davis is that statutory provisions exist in state law which seem to draw a distinction between the private and public sector. One such statute is Louisiana Revised Statutes 23:890, which specifically gives public transportation workers rights similar to those granted the private sector, including: "the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This statute would be unnecessary if all public employees were afforded these rights. By specifically granting the right to self organize and engage in concerted activity to a certain group of public employees, the legislation implies that the remainder of the public sector is not afforded the same protection. The statute is reconcilable with the omission of public sector employees from the anti-injunction statute if section 890 is read to "protect" concerted activity from employer reprisals, not just to bar court injunctions as the anti-injunction statute provides. However, the statute would seem to rebut any "protected rights" language of the Davis court. The statute would be a redundant restatement of the law if all public employees were already "protected" to freely engage in concerted activity.

The supreme court in Davis also found support for the application of the anti-injunction statute and of the protected rights dicta in other constitutional and statutory provisions, namely Louisiana Constitution article X, section 10(3) and Louisiana's "Right to Work" law. However, article X, section 10(A)(3) was misapplied by the supreme court in Davis. It provides:

No rule, regulation, or practice of the commission, of any agency or department, or of any official of the state or any political subdivision shall favor or discriminate against any applicant or employee because of his membership or non-membership in any private organization; but this shall not prohibit any state agency, department, or political subdivision from contracting with an employee organization with respect to wages, hours, grievances,

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76. La. R.S. 23:981-987 (1985) (Enacted in 1976, the Right to Work law allows all persons to join or refrain from joining and participating in labor unions.).
working conditions, or other conditions of employment *in a manner not inconsistent with this constitution, a civil service law, or a valid rule or regulation of a commission.*77

The court relied on this provision, stating: "with the passage of this provision, public employees became constitutionally entitled to the same right to engage in collective bargaining as held by their counterparts in the private sector."78 This reading extends the provision far beyond its intended scope.

This provision is located in section 10(3) of article X, which deals with layoffs and, particularly, the preference or order in which employees are to be laid off when positions are abolished. Reading the non-discriminatory language with the entire provision limits the non-discrimination clause to the context of preference of layoffs. Membership in labor organizations is not to be a factor in determining which employees are laid off when positions are cut. This provision seems only to allow public employers to recognize collective bargaining, not to require the government to do so. The language reads "shall not prohibit . . . from contracting," not "shall contract," as the court's interpretation would phrase it.

The legislative history of the provision also supports the proposition that the article is very limited in scope. The provision that became section 10(3) of article X began as an amendment to the original draft of article X which was proposed by its proponent "to provide that a person's affiliations with a private organization—and I'm particularly thinking here of unions—could not be a reason for favoring or discriminating against [an employee]."79 The last clause of the provision80 was inserted at the request of organized labor, to insure that the "no discrimination" language did not preclude collective bargaining by rendering an exclusive bargaining agent representing a bargaining unit discriminatory toward members of the bargaining unit not favoring that exclusive agent.81 The clause was only inserted to guarantee that the non-discrimination language would not prohibit collective bargaining agreements entirely.82 Likewise, nothing in the provision mandates col-

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80. "[B]ut this shall not prohibit any state agency, department, or political subdivision from contracting with an employee organization with respect to wages, hours, grievances, working conditions, or other conditions of employment . . . ." La. Const. art. X, § 10(A)(3).
81. See Records, supra note 79, at 2720-22.
82. Id.
lective bargaining or gives public employees the same collective bargaining rights as private employees.

Article X, section 10(A)(3) also has its own qualifying provision. The section permissively allows collective bargaining but only "in a manner not inconsistent with this constitution, a civil service law, or a valid rule or regulation of a commission." Given this qualifying statement, section 10(A)(3) has no independent force and grants no constitutionally guaranteed collective bargaining right to anyone, as the right can be easily abrogated by legislation or administrative regulation. The language in section 10 is only a statement to insure that the preference rules in the provision are not read to preclude public bodies from collectively bargaining with their employees. It surely does not mandate such an obligation, and any reliance on the article to support it is misplaced.

The strongest statement in Louisiana law that allows public employees to participate in some organizational activities is Louisiana's "Right to Work" law. The statute provides: "It is hereby declared to be the public policy of Louisiana that all persons shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities."

The statute employs a broader "all persons" coverage, distinguishable from the "employer" and "employee" language of the anti-injunction statute. The statute seems to grant to all persons the right to join and assist labor organizations, or to refrain from doing so, without reprisal from employers, but the statute does nothing to advance to public employees the right to collectively bargain or engage in strikes.

The legislation and jurisprudence cited by the supreme court in Davis really adds little in resolving the question of what rights public employees have against their employer. The central focus in determining what rights public employees should be afforded, in the absence of positive law, is public policy. This important factor seemed more implicit in the Davis decision than explicit, with the court choosing to rely on vague and inapplicable legislation.

The supreme court in Davis struck down the common law rule and rationale of not allowing public employee strikes, relying heavily on the 1985 decision of County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association, the first case where

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86. 38 Cal. 3d 564, 214 Cal. Rptr. 424, 699 P.2d 835 (1985). The California Supreme Court held that the policy reasons for the old "per se" strike ban were no longer valid.
the common law "per se" strike ban was eliminated by a state court. The *Davis* court rejected the common law rule in this case, analogizing it to tort immunity, which has been abrogated in Louisiana, 87 but the court avoided the hard questions posed by the various competing interests: should public employees be permitted to strike at all, and if so, with what restraints? The remainder of this note will focus on these questions, the effect the *Davis* decision has on them, and an alternative solution.

VI. PUBLIC EMPLOYEE STRIKES: THE CONFLICTING PUBLIC POLICIES

The conflicting policies at issue in determining what organizational and strike rights should be afforded to public employees are more complex than those affecting the private sector. The fair treatment of labor as opposed to management's right to entrepreneurial autonomy free of interference are not the only issues in a public labor dispute; the rights and interests of the public are also triggered. Private labor disputes certainly affect the general population; a strike by the pilots of a private airline forces people to choose another airline or an alternative form of transportation, perhaps at great hardship. However, many government services have no market alternatives at all. This lack of alternatives puts concern for the public welfare into the center of any public labor controversy. Thus, the public policy inquiry, at a bare minimum, must balance the rights of public employees to engage in concerted activity against the rights of the public which depends on the services those public employees provide. This examination of how the balance should be struck will begin with a look at the implications of an employee right to strike.

The right to strike is the ultimate employee weapon in a collective bargaining system. Absent the right to strike, collective bargaining becomes illusory, with the employer able to unilaterally set the terms of any agreement. 88 Strikes are the "motive power for agreement" 89 and the real means for forcing the desired end, i.e., a labor agreement fair to both sides. However, strikes are not the only weapon available to

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89. Comment, supra note 88, at 937.
employees. Public employees can use the same political process that their strikes are accused of manipulating to affect their own ends. Public employee groups certainly have a strong collective political voice. Also, while very expensive, public employees can urge popular support through the media and other grass-roots efforts. The employees can also support and assist candidates who are sympathetic to their cause in political elections.

While public employees without the right to strike have historically lagged behind the private sector in wage and benefit growth, this may be attributable to poor lobbying efforts and the fact that the public work force is split into many “special interest” groups. A well organized, massive political lobbying effort may produce better results. From a practical standpoint, however, strikes are much quicker, cheaper, and in areas without an adequate substitute work force, more effective.

As a result of employment terms unilaterally set by public employers, who are forced to stretch limited tax dollars to provide the services required, public sector employees will logically be paid lower wages and receive fewer benefits than private sector workers. This may operate to limit government services over the long term. It is here that the long and short term interests of society clash.

Over the long term, a collective bargaining contract gained through the strike threat may increase the benefits package of a local school system to the point where competition for those jobs increases, thereby increasing the caliber of the public education work force. The long term result is a better educational system. However, the short term interests of society are somewhat anti-strike. Public employee strikes do cause interruption in services to many people who have no direct means of solving employee problems. Public employee strikes are sometimes too effective. For example, while the people of Terrebonne Parish may benefit as a result of the three month teachers’ strike, it was accomplished at some cost to the school children who were denied an education during that time period.

Even if employees are denied the right to strike, it is questionable whether strikes can be stopped from a practical viewpoint. If the penalty for engaging in strike activity is harsh enough, some deterrence is going to result, but practically speaking, problems arise when employees use creative alternatives to strikes to slow government’s function and circumvent the ban. For example, “mass resignations” have been used by disgruntled school teachers. Each teacher personally fills out and delivers a resignation to his or her respective employer. If the resignations are truly individualized, this action cannot really be termed a “strike,” and even the threat of such mass resignations can coerce employers into meeting employee demands. While this method runs the risk of being

90. Comment, supra note 22, at 160-63.
enjoined if the resignations are not truly individualized, it is sometimes used to circumvent a no-strike ban.

Likewise, even if strikes are illegal, they will still occur. Some employees will disregard the illegality of strikes. Simply fining or jailing participants for contempt of court may not solve the problem but may cause even more friction, extend the strike, or cause sympathy strikes by other employees not involved in the present conflict. It also serves as a method of making martyrs of those punished. As stated by the California Supreme Court in *City and County of San Francisco v. Cooper*, "experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages." In other words, making illegal something that is so widely accepted by the public as a reasonable means of gaining fair treatment has little deterrent effect.

Strikes are very difficult to stop; however, anti-strike legislation would be more effective if a fair alternative to economic warfare is provided, such as arbitration. For example, if the Terrebonne Parish School Board would have been required by law to bargain with its employees, and upon an impasse submit to arbitration, the strike probably would not have occurred. This alternative provides the employee an interim solution or at least a fair hearing. Their demands receive immediate attention, and they obtain the time to use more cumbersome processes such as political channels to achieve their goals. It is where no alternatives are provided that law-abiding employees are more likely to disregard anti-strike legislation.

Finally, prohibiting public employee strikes while the law so strongly protects private employee strikes promotes an inherent unfairness. In effect it relegates public employees to a lower status in our society. No matter how strong the rationale for the differences in rights afforded public employees as opposed to the private sector, this unfairness will always cause some dissension.

The countervailing policies of not allowing public employee strikes are equally weighty. The supreme court in *Davis* rejected in wholesale

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91. See generally Bernstein, supra note 6, at 462-63.
92. Id.
94. Id. at 917, 120 Cal. Rptr. at 719, 534 P.2d at 415.
95. An analogy may be drawn from the tort and criminal law systems. Tort victims and victims of crime are provided with a "legal" means to restore the harm done to them. With legal means available, they are less likely to violate the law and seek reprisal, even if the recovery or sentence does not meet their expectations. While there are exceptions, if a just "legal" remedy or a fair hearing is provided, the anti-strike statute is likely to be more effective.
96. Baird, supra note 22, at 4-6.
fashion the common law ban on public employee strikes and the policy reasons behind the rule. The court simply cited article III, section 15(B) of the Louisiana Constitution which provides: "[n]o system or code of laws shall be adopted by general reference to it," and relying on this language stated: "Louisiana is not a common law jurisdiction, and common law jurisprudence is not binding in this state." This "reason" avoids the central issue—whether or not public employees can be given the right to strike. Two reasons cited by common law courts why public employees should not be allowed to strike remain valid; those are: 1) that the right to strike distorts the political process by allowing employees to reallocate government resources against popular will, and 2) that the right to strike disrupts essential government services, endangering the public welfare.

Public employee strikes do alter the political process to some degree. Public tax money is allocated, and public programs are formed, dissolved, financed, and amended by legislation. When the citizens of a state want more money allocated to education, more money to public housing, less to public transportation, and so on, they can choose to do so through their elected officials, or if he or she refuses, by selecting another representative who will abide by their preference. By allowing employees of these various departments to mandate their departments' budget by their demands, employees distort and alter this process. Their demands reallocate money possibly against popular will, or necessitate tax increases which the public may not want to endure.

The government competes for human, natural, and monetary resources along with private industry. A distinction can be drawn, however, between labor and other resources used by government. Public employee compensation amounts to over 70% of state and local budgets; thus, labor cost fluctuation is of the highest concern to these entities. The effect of market fluctuation of non-labor expenses can be minimized by the use of long term contracts to stabilize government budgets. Increases in costs projected over a longer term allows time for the political process to adjust. For example, if the U.S. military projects its fuel costs will rise in five years when its current contracts with private industry expire, the issue can more easily be resolved by the popular vote. Voters can choose to raise taxes, buy less military fuel, or move resources from less popular or less important programs. Labor disputes, coupled with the right to strike, remove that time buffer. Government itself must make the reallocation choice, possibly against popular will.

From a practical viewpoint, though granting public employees the right to strike can affect the political process, it does not disrupt the balance between government and its employees to the point that it distorts

the political process in all cases. For example, if the School Board of Terrebonne Parish is forced to give in to employee demands because of a significant strike threat, the result is not unbearable. First of all, the strike threat used merely to gain the right to collectively bargain does little to the political process. To meet and simply discuss employee demands costs the public very little (only a slight increase in administrative expenses), and an indirect decline in the control of all aspects of the school system. Also, collective bargaining may lead to a net savings to the public treasury and enhancement of the school system. For example, teacher bargaining demands may include streamlining of administrative procedures, implementation of new, more successful teaching methods, and other suggestions that would improve education and result in a better, more efficient system.

A distortion of the political process would result only in situations where employee demands were unreasonable, or where monetary benefits demanded by employees exceeded the resources available. It is in these instances that government would need to reallocate its resources. This possibility, even if remote, raises significant concerns about granting public employees the unfettered right to strike.

The other reason commonly advanced by common law courts why public employees should not be afforded the right to strike is the disruption of essential services. This is perhaps the most persuasive reason to ban public employee strikes. The supreme court in Davis recognized that all public employees would not be afforded the right to strike because of the "essentiality" of the services provided: "[w]e do not suggest in this opinion that the right to strike is unlimited or unqualified."100 In so doing the court adopted the "essentiality" analysis101 of the California Supreme Court in County Sanitation102—a case by case analysis to determine how essential the service is to the public welfare.103 Should the service be deemed "essential" (for example, police or fire department services), the strike would still be enjoined.

The distinction of essential versus non-essential services, however, is often oversimplified.104 In City of New Orleans v. Police Association

100. Id. at 467.
101. Id. at 468.
103. The standard adopted by the California Supreme Court to determine which services are essential was articulated by the court as follows: "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." Id. at 586, 214 Cal. Rptr. at 439, 699 P.2d at 850.
of Louisiana,\textsuperscript{105} the court stated: "[i]n respect to their threat to society's existence, for example, the difference between strikes by police and by museum employees is obvious."\textsuperscript{106} At this level of comparison, the standard is very easy to apply. However, most services will fall in the middle of the "essential"/"non-essential" range. For example, are nurses at public charity hospitals essential or non-essential? Are social welfare employees, who remove children from abusive parents to protect them from bodily harm, essential or non-essential? The same problems arise in relation to the length of the strike. If the Terrebonne Parish teachers' strike had lasted the entire year, would their services have become essential? Our society has placed in the hands of our government services that are essential to some segment of the population, and the courts are not the place to decide what services can and cannot be disrupted. If the public decides that a program is important enough to finance and maintain, the courts should give deference to that decision and characterize all these services as "essential."

The countervailing policies at issue here are the long term benefits of allowing public employee strikes. Perhaps some short term inconvenience should be endured to provide for a greater long term good. However, if an alternative system can be constructed that can accomplish the long term goals sought without the high costs to society, then that system should be preferred.

Irreparable harm can result to large segments of the state population by allowing public sector strikes; therefore, the interim costs should not be overlooked. For instance, if the public schools in Terrebonne Parish were forced to close for an entire year, the students affected would be forced to attend school for an additional year. This would delay the start of their college education or careers. High school seniors would not graduate and could lose scholarships. Extended strikes by other segments of government employees, for example, board of health or environmental inspection personnel, could cause significant threats to public health that could not be easily undone, and would far outlast the temporary inconveniences.

The conflicting public interests that arise in examining whether public employees should have the right to strike are at the core of a Davis-type dispute. The long term societal needs of a stable, competent, and dedicated public sector work force oppose the short term needs of the recipients of the services this work force supplies. A system of managing employee demands must be sensitive to both of these needs. However, one can fashion a remedy to maximize positive policy considerations

\textsuperscript{105} 369 So. 2d 188 (La. App. 4th Cir. 1979).
\textsuperscript{106} Id. at 189-90.
and minimize those of a negative nature. It is to this end we now turn our focus.

VII. THE EFFECTS OF DAVIS

Davis can be interpreted in two ways with differing effects. It can be read narrowly as merely applying the “Little Norris-LaGuardia Act” to the public sector, or broadly to create a judicially protected right to strike. Both readings substantially change prior law; however, the strike management strategies that each side in a labor dispute will utilize are different for each reading.

A. Application of the Anti-Injunction Statute

If the Davis decision is construed narrowly, to merely apply the “Little Norris-LaGuardia Act” to public employee disputes, this is a small step in the right direction. In the absence of the legislature granting any collective bargaining or strike rights to the public employees, the Davis court’s removal of the “per se” ban should give public employees a weapon to secure the right to collectively bargain. Since collective bargaining is not the equivalent of employer concessions, but is the only right to meet, confer, and bargain as a group with the employer, the only real cost to the taxpaying public is a slight increase in administrative cost. It seems unlikely, therefore, that collective bargaining by public employees would violate any public policy concern. Thus, employees would gain a very effective mechanism to secure for themselves the right to collectively bargain.107

Nevertheless, limiting the application of Davis to the anti-injunction statute leaves open the possibility of various employer self-help mechanisms to defeat any employee strike. The judicial injunction was certainly one of the cheapest, quickest, and most effective weapons available to the employer; however, alternatives do exist. First, while fairly cumbersome in the public employee arena, the employer may resort to disciplinary action.

Article 10, section 8 of the Louisiana Constitution provides for removal of “classified” civil service employees, providing that “[n]o

107. The court in Davis made it clear that some strikes involving “essential” services will continue to be enjoined. The balance of interests may tip in favor of employees in conjunction with marginally “essential” services given the minimal disruption to public interest.

108. See La. Const. art. X, § 2 (Louisiana state and city civil service is divided into “classified” and “unclassified” employees; “unclassified” workers include: elected officials, heads of each executive department, city attorneys, registrars of voters, private secretaries of the presidents of universities and colleges, teaching and professional staffs employed by schools, colleges and universities and others.).
person . . . shall be subjected to disciplinary action except for cause expressed in writing.'

Similarly, civil service rules provide for the same type of disciplinary action, providing that an employee can be removed, suspended, demoted, or have his or her pay reduced for cause. Teachers are governed by similar disciplinary rules. Under Louisiana's teacher tenure laws, a permanent teacher "shall not be removed from office except upon written and signed charges of willful neglect of duty, or incompetency or dishonesty . . . ." Under these provisions and similar local provisions, public employers could discipline employees willfully participating in strikes as being absent without leave, since such an infraction is "cause" for disciplinary action.

Practically, however, this employer weapon would be an administrative nightmare. First, if a large number of employees were participating in the strike, firing those employees would probably not be a viable option. The cost of finding, interviewing, hiring, and training new personnel may render this self-help remedy impractical. Only if the number of employees participating is relatively few will this type of disciplinary action be a preferable alternative. Secondly, employees who are terminated are afforded due process rights to appeal their grievances. For instance, fired teachers have the right under Louisiana law to appear before the parish school board for a hearing of the offenses. Likewise, civil service employees are entitled to a grievance procedure under civil service regulations for mistreatment, including permanent removal for cause. Discharging large numbers of employees may create such a great administrative backlog that the cost will limit the remedy.

Less severe disciplinary actions are also available to employers. Under civil service regulations, suspension, reduction of pay, and demotion are possible alternative disciplinary actions. While these measures may also lead to administrative appeal problems, the mere ability to threaten such action may give public bodies some leverage. While administratively burdensome, with these measures the employer is not faced with the dual problem of mass administrative appeals or litigation and replacing an entire workforce. The administrative procedures given to employees

111. La. R.S. 17:442 (1982) (A teacher becomes "permanent" after successfully completing a 3 year probationary period.).
113. See, e.g., Wilson v. Department of Public Works, 528 So. 2d 1060 (La. App. 5th Cir. 1988); Morrell v. Department of Welfare, 266 So. 2d 559 (La. App. 4th Cir. 1972). It should be noted that a court relying on the "protected rights" language of Davis could define "cause" as not including strikes.
to appeal disciplinary decisions act as a balancing device in the labor dispute context. The discharge of employees for participating in strikes against their employer is a very severe reaction, but with the administrative costs it will impose on the employer, the likelihood of its use is greatly reduced.

Another self-help remedy that may be available to public employers is a suit against employees and/or their union representatives for civil damages proximately caused by the strike. Such civil suits are either brought by the public employer himself, or on occasion by the member or members of the public injured by the strike. Various legal theories have been advanced to achieve recovery in these types of actions including breach of contract, intentional interference with contract, intentional tort, prima facie tort, public nuisance and even negotiorum gestio in a common law jurisdiction.

The most common type of civil action for damages is a suit by the public entity employer for injuries sustained in dealing with the strike. In a Davis-type scenario, if the school board was forced to hire re-


118. See, e.g., City of Fairmont v. Retail, Wholesale, Etc., 283 S.E.2d 589, 595 (W.Va. 1980); see also Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977) (overruled by City and County of San Francisco v. Local 38, 42 Cal. 3d 810, 230 Cal. Rptr. 856, 726 P.2d 538 (1986)).


120. Kansas City Firefighters Local 42, 672 S.W.2d at 124-25.


122. See, e.g., Fulenwider v. Firefighters Ass'n Local 1784, 649 S.W.2d 268 (Tenn. 1982).

123. See State Ex. Inf. Danforth v. Kansas City, Etc., 585 S.W.2d 94 (Mo. Ct. App. 1979). Negotiorum gestio is a civil law concept developed from early Roman law. It is codified in Louisiana in La. Civ. Code arts. 2295-2300 under Chapter 1—Of Quasi Contracts of Book III of the Louisiana Civil Code. The doctrine, which governs reimbursement for the management of the affairs of another, was unsuccessfully argued in Danforth. The court said that in a recovery under common law "quasi contract," an essential element of such recovery is that the person seeking to recover expected reimbursement for the services rendered, an element lacking in the plaintiff's case. 585 S.W.2d at 97.
placement teachers, extend the school year to make up lost days, and incur additional administrative costs resulting from the strike, these arguably would all be civil damages. Such lawsuits have been met with judicial hostility in most cases. Where states have anti-strike legislation, courts are particularly reluctant to enter into this sensitive area of the law and usually limit recovery to remedies expressed in legislation.\(^1\)

Also, the remedy has been rejected as prolonging labor unrest,\(^2\) or as being too effective by tipping the balance of power between employer and employee too far in the employer's favor.\(^3\)

Cases that do allow recovery are sparse. One such case, Pasadena Unified School District v. Pasadena Federation of Teachers,\(^4\) later overruled by the California Supreme Court,\(^5\) allowed recovery on a tortious interference with contract theory. The tortious interference with contract doctrine is not well developed in Louisiana, and is very limited in scope—so limited that an employee union acting on behalf of its members would not trigger the cause of action.\(^6\)

Recovery was also allowed on an intentional tort theory in the case of State v. Kansas City Firefighters Local 42\(^7\) by the state of Missouri for expenses incurred by activating the state national guard to cover striking firemen participating in an illegal work stoppage. The court carefully pointed out, however, that it was not the strike per se that triggered recovery; but the employees and their union representative persuaded other nearby firefighters to refuse to go into the area, and the striking employees left their equipment in a sabotaged condition. This prompted the court to find intent on the part of the employees to injure the city, not just to advance their own cause.\(^8\) This decision

\(^1\) E.g., Lamphere Sch. v. Lamphere Fed. of Teachers, 400 Mich. 104, 107, 252 N.W.2d 818, 819 (1977) (holding that the Michigan Public Employment Relations Act was intended to occupy the field, and provides the exclusive remedy).

\(^2\) City and County of San Francisco v. Local 38, 42 Cal. 3d 810, 816-17, 230 Cal. Rptr. 856, 860, 726 P.2d 538, 542 (1986).

\(^3\) 400 Mich. at 130, 252 N.W.2d at 830 (school board had disciplinary remedies available).


\(^5\) City and County of San Francisco v. Local 38, 42 Cal. 3d 810, 812, 230 Cal. Rptr. 856, 856-57, 726 P.2d 538, 539 (1986).

\(^6\) See 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989). The court abolished the longstanding ban on the cause of action for intentional interference with contract. However, the decision limits the cause of action to claims against corporate officers who intentionally act to the detriment of their principal entities. Id. at 234. Such a limited doctrine seemingly would have no application to a union seeking to interfere with the employment contracts of its members, if the interference was aimed at increasing members' benefits.

\(^7\) State v. Kansas City Firefighters Local 42, 672 S.W.2d 99 (Mo. Ct. App. 1984).

\(^8\) Id. at 112, 116.
may have limited application outside the scope of clearly intolerable strikes, e.g., those by firefighters and police.

Practically, civil suits for damages are not well suited to many types of public employee disputes. No mechanism is in place to elect or provide for sole, exclusive bargaining agents in the public sector in Louisiana. Public employees often belong to different organizations, each seeking recognition for its membership. Should members of the various organizations strike without a sole, exclusive agent, a difficult causal connection problem arises. The philosophy of the various representative organizations vary. For example, the Louisiana Association of Educators advocates alternatives to strikes to resolve employee disputes. It would be virtually impossible to causally connect a strike by members of the organization when the organization is not the exclusive agent of the members of the unit striking and the organization itself is opposed to the strike. To say such an organization “intended” to damage the school board simply because some of its members participated in a strike not sanctioned by the representative is to strain credulity.

The likelihood of success of any civil suit against a public employee representative would appear to be low. The remedy has not been rejected in Louisiana, however, and given the absence of legislation and the fact-sensitive nature of such a remedy, the cause of action is a viable alternative for employers.

The public employer may have other extrajudicial methods to coerce employees back to work in the absence of the injunction. Public employers can always compete with employees for public sentiment. Public pressure can be a significant force working against employee interests, should the public seek to amend or reduce already depressed benefits. Similarly, public employers in certain areas of public service can turn to privatization. While largely impossible with institutions such as our educational system, many public services can be turned over to private companies. Garbage collection, public transit, social work, highway maintenance, and many other government services can be effectively performed by the private sector. This is a viable alternative to rebut employee demands in the absence of judicial injunctions.

In summary, the elimination of the judicial injunction has placed public employees and employers on more even ground. A potential strike is very risky to both sides. The employees risk disciplinary action, possible tort liability, or the loss of their jobs to privatization. The

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132. For example, in a teachers' strike scenario, teachers may belong to the Louisiana Association of Educators or the Louisiana Federation of Teachers, an A.F.L. - C.I.O. affiliate. These two organizations are two of the largest, most prominent teacher representative groups in the state.

133. See generally, Collective Bargaining for Us, brochure of LAE-NEA.
employer risks a failure of services, additional costs of administering the programs, and self-help remedies that are slow, administratively burdensome, and politically unattractive. The high stakes on each side of a potential strike should do much to make strikes a last resort and facilitate fruitful bargaining.

B. Protecting the Right to Strike

As stated earlier, the "protected rights" dicta in the *Davis* decision suggests that *Davis* may extend beyond applying the anti-injunction statute to public labor disputes. *Davis* could be interpreted to grant public employees an affirmative right to strike. Courts should refrain from extending *Davis* in this manner and judicially creating employee protections not provided for legislatively because such an extension would have many adverse effects.

First, protecting the right to strike without countervailing protections for employers is ill advised. The National Labor Relations Act\(^\text{134}\) provides protections to the employer as well as to the employee. For example, the act regulates picketing,\(^\text{135}\) mandates good faith bargaining on the part of the union representative,\(^\text{136}\) provides election mechanisms of the exclusive bargaining agent,\(^\text{137}\) and grants many other protections. The system provides protection to both sides to insure fair and quick resolutions to labor unrest. Granting "protections" to only one side would seemingly be a disincentive for quick resolution and would largely disarm the employer.

Protecting the right to strike may prohibit employer disciplinary action and remove the possibility of civil damages. Both of these are acts of reprisal by employers for employee participation in their protected right. This protection may also prevent the employer from privatizing the system, since a job loss caused by protected activity would result.\(^\text{138}\)

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134. See 29 U.S.C. §§ 157-58 (1982) (employees are granted certain rights of "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. . .") under § 157, and employees' free exercise of these rights are "protected" from interference, restraint, or coercion by their employers).


136. Id. at § 158(b)(3).

137. Id. at § 159.

138. In the private sector, employers often subcontract out portions of their work due to the increased costs stemming from unionization and collective bargaining. The decision to subcontract, however, must be driven by economic concerns and not motivated by anti-union animus. See, e.g., National Labor Relations Board v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955). If the same rationale was applied to public employers, even if the right to strike or collectively bargain is protected, that may not prevent public employers from turning to privatization of public services if economically motivated. However, it is not clear whether the same rules would be applied to the public sector.
Employers could still use political or public appeal as bargaining leverage; however, public employees have for years been very ineffective in bargaining with employers with only political weapons in their arsenal. Thus, limiting employers to this one inadequate remedy largely disarms them.

If employee demands were always reasonable, this situation would not lead to adverse consequences, but the opportunity for abuse is present. A well organized group could significantly alter the political process under the judicial protection provided.

A second reason why Davis should not be read to grant an affirmative protected right to strike is because to do so would require judicial development of a public labor law system. Courts can, through common law methods, fashion a truly equitable labor system. However, the inadequacies of such a system are what prompted the enactment of the National Labor Relations Act and similar legislative systems adopted by the federal and many state governments to deal with public employees. Predictability in a labor system is of paramount importance. Employees are risking their very livelihood by participating in concerted acts. Likewise, employers are risking potential damage claims, back pay awards, and significant political backlash should they err in handling future conflicts. Judicial expansion and contraction of rights is very likely and may hinge on variables which neither side is able to predict. While limiting the Davis decision to application of the anti-injunction statute still leaves employees with a considerable risk in certain circumstances (e.g., where they can be easily replaced), the risk can be measured beforehand. The risk created by reliance on some malleable, judicially implied “protected right” is certainly greater.

Louisiana desperately needs a Public Employee Relations Statute to deal with the issues of public employee collective bargaining and strikes. Government is under more pressure than ever to squeeze more services from less tax money. As public employees continue to lose economic ground, and the likelihood of labor unrest increases, a “hands off” public labor policy must be reexamined.

VIII. PROPOSED LEGISLATIVE RESOLUTION

Most public employee relations statutes are of two types.139 They are either patterned after the federal statute and do not allow public employee strikes providing for other means of dispute resolution, or they specifically allow certain types of employee strikes. However, the statutes that specifically allow strikes also provide alternative means of

dispute resolution in an attempt to avoid public employee strikes. Each state must customize any proposed public employee relation statute to comply with its own needs and its own law. Prior commentators have exhaustively covered this area and provided potential drafts of such legislation for this state. This section of this note only seeks to provide generally what an effective public labor relations statute should include.

First, the act should provide public employees with the right and impose on public employers the duty to collectively bargain. Collective bargaining puts free market competition into the labor system. It allows more valuable employees to be paid accordingly; conversely, if government can provide the service more cheaply and effectively by private contracts, then the employer should be able to refuse employee demands and seek these more reasonable alternatives.

The act should also provide protection of employee organizational activities and union membership. The right to join or refuse to join, to support or not to support employee unions should be specifically granted to public employees. Louisiana’s Right to Work Statute provides some protection; however, the statute is too ambiguous to insure such protection to the public sector. While the statute does not exclude public employees, it also does not clearly include them.

An effective public labor relations statute should also provide exactly which acts employees are allowed to use as bargaining leverage and which are prohibited. Whether the statute allows strikes by certain segments of the public employ and not others or prohibits strikes to all employees, the statute should forthrightly define what rights are granted and to whom. A general no-strike clause, similar to the federal statute, would be preferable. The statute, by mandating collective bargaining, would eliminate the need to strike to force collective bargaining. Economic strikes should also be prohibited, and some alternative dispute resolution machinery used. The goal of a successful labor system is to provide both sides the opportunity to confer, bargain, and preferably to allow each to make fair concessions to achieve a peaceful, fair result. Employers and employees reach agreement in a bargaining process by one of two ways. Either each side grants to the other some concessions, or the economically strongest party unilaterally dictates the terms. Removal of the right to strike from the employee arsenal does eliminate the possibility for employees to win an outright economic battle; however, mandatory arbitration would reach the same result without the need for disruption of government services if the employee demands are fair and well founded.

Arbitration would also protect employees in certain instances. For example, if a public employer was seeking to resolve an impasse by contracting out the work, and such a result was truly beneficial to the public, arbitration should permit that result. However, if the decision to privatize is based purely on anti-union motivations, the arbitrator should not allow such a result.

Arbitration has been criticized, and it is not without some shortcomings. Some areas of employee and employer concern may not be well suited to arbitration. For example, employers need to retain the power to make decisions on policy and to implement work procedures that have been legislatively mandated. However, this criticism seems to be directed at the quality of the arbitrator, which is not a fatal defect in the arbitration system. Arbitrators, whether government officials or private citizens, can refuse jurisdiction over areas crossing into legislative policymaking or executive administrative areas. Also, some employee input into the policy decisions of their employers may be positive. For example, teachers are trained in the most effective way to administer their teaching methods. School boards, on the other hand, are composed of elected officials who often have no background in educational practices and methods. Allowing teachers to collectively bargain and then submit certain areas of professional concern to arbitration, such as instructional policy and class size, may be very beneficial to the state’s educational system.

The most effective impasse resolution device in the absence of the right to strike would be a two-tiered system, consisting of mediation followed by arbitration if the deadlock is not broken. This system should provide that if the parties bargain to an impasse, the parties themselves can agree on an independent mediator; if they cannot agree, a mediator will be chosen for them. This first tier allows the parties to resolve their differences between themselves. If this method yields no result, the parties are then referred to an independent arbitrator. This arbitrator would act as a fact finder, and, with all the objective data he can collect, he would assimilate both parties’ offers and make a recommendation binding on both of them. As an added precaution, the statute may include appellate review of the arbitrator’s decision to an administrative board, commission, or court. While the possibilities of

143. Kheel, supra note 11, at 938-41.
144. A similar system was briefly adopted in Indiana. See Ind. Code Ann. § 22-6-4-11 (West 1981) (repealed by Acts 1982, P.L.3, Sec.1). The statute was repealed by the Indiana legislature after it was held to be unconstitutional. In Ind. Ed. Employment v. Benton Community Sch., 266 Ind. 491, 365 N.E.2d 752 (1977), the Indiana Supreme Court held that the public employment relations statute violated Ind. Const. Art. I, § 12, by prohibiting judicial review of administrative determinations of representational units. The statute was so short lived, however, that its effectiveness is undeterminable.
the dispute resolution mechanisms are endless, the purpose of the machinery is what is important; the quicker the parties can reach a compromise, the sooner the conflict will end.

In light of the rights guaranteed to employees under the statute, the legislation should make illegal certain "unfair labor practices" for both employers and employee organizations. Such practices are prohibited by the National Labor Relations Act\(^\text{145}\) and violations include: interfering with employees' free exercise of their right to organize and to choose a representative, refusal to collectively bargain, engaging in discriminatory practices against those who are members of labor organizations, and engaging in other practices that diminish the employees' rights under the act.\(^\text{146}\) Employee organization violations are largely the same, including: interfering with employees' rights to join or not to join employee organizations, discrimination, refusal to bargain in good faith, and participating in or calling a strike if such a strike is illegal.\(^\text{147}\)

Finally, the statute should provide for administrative machinery to apply and enforce the law. The federal public employee relations statute provides for the establishment of the Federal Labor Relations Authority.\(^\text{148}\) States have established similar boards or agencies charged with the duty of carrying out the policies of the act or, to avoid duplication, have charged already existing personnel boards with the task.\(^\text{149}\) Other states merely have mediation or arbitration commissions.\(^\text{150}\) To render any employee rights granted under a public employee relations act effective, some enforcement commission or board is necessary to expeditiously handle complaints. Otherwise, the violation could only be enforced in state courts, causing delays that would make the act ineffective. For example, if an employee was fired by a parish school board for his or her membership in a labor organization, a one or two year delay in the court system would tend to diminish the act's effectiveness, since an employee may not be willing to take the chance of union participation if he faces long term unemployment.

Since Louisiana in its constitution has mostly placed public employee related matters with its Civil Service Commission,\(^\text{151}\) any such employee

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\(^{151}\) La. Const. art. X, §§ 1, 2, 4, 10, 14, 15.
relations hearings may have to be done through the Commission to withstand state constitutional challenge. The Commission seems best suited for the task anyway, since it is already responsible for administering public employee grievance procedures.

IX. CONCLUSION

As government deficits mount, taxpayers refuse to bear a heavier tax burden than the one they already carry. Meanwhile, public pressure for better education, safer streets, and more social programs increases. As a result, public employees are likely to continue to decline in economic status. Thus, there will be more public labor unrest in the future with employees turning to self-help mechanisms to improve their condition.

The Louisiana Supreme Court in *Davis* removed the absolute ban on public sector strikes, but what that means to employees and employers in the years to come is uncertain. There is still no duty imposed on public employers to collectively bargain with their employees, but employees do have a mechanism to force such recognition. Without legislative intervention, however, only through future litigation will the rights and duties of both labor and management be clearly defined. There is a clear need in Louisiana for a comprehensive legislative system for handling public employee collective bargaining demands and strikes. The impact of public labor unrest affects too many people to allow the judiciary to resolve case-by-case the basic issues of employee rights of self-organization resolved in the private sector over fifty years ago.

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