ITEM 10

TEST CLAIM
FINAL STAFF ANALYSIS

Code of Civil Procedure Sections 1281.1, 1299, 1299.2, 1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9
Statutes 2000, Chapter 906

Binding Arbitration
(01-TC-07)

City of Palos Verdes Estates, Claimant

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Binding Arbitration

(01-TC-07)

City of Palos Verdes Estates, Claimant

EXECUTIVE SUMMARY

Background

This test claim involves legislation regarding labor relations between local agencies and their law enforcement officers and firefighters, and provides that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

The test claim statute was effective on January 1, 2001, but was declared unconstitutional by the California Supreme Court on April 21, 2003, as violating "home rule" provisions of the California Constitution. The staff analysis addresses whether the statute while it was believed to be constitutional created a reimbursable state-mandated local program. The effect of an unconstitutional test claim statute is an issue of first impression for the Commission.

The test claim presents the following issues:

- Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?
- Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Staff Analysis

The purpose of article XIII B, section 6, is to prevent the state from forcing programs on local governments without the state paying for them. Applying the court's ruling that the test claim legislation is unconstitutional retroactively to the original effective date of the legislation could have the effect of forcing programs and costs on local governments without the state paying for them during the time the test claim legislation was presumed constitutional (from January 1, 2001, through April 20, 2003). Because binding rights or obligations in the form of reimbursable mandates *could have been created* while the test claim legislation was presumed to be constitutional, an analysis on the merits should proceed in order to determine whether the

test claim legislation did in fact mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

However, staff finds that the test claim legislation does not constitute a new program or higher level of service. The test claim legislation requires the local agency to engage in a process that the claimant contends results in increased employee compensation or benefits. The cases have consistently held that additional costs for increased employee benefits, in the absence of some increase in the actual level or quality of governmental services *provided to the public*, do not constitute an "enhanced service to the public" and therefore do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution. Since strikes by law enforcement officers and fire services personnel are prohibited by law, no successful argument can be made that the test claim legislation affects law enforcement or firefighting service *to the public.*

Conclusion

Based on the purpose of article XIII B, section 6, staff finds that legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

However, the test claim legislation does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and, thus reimbursement is not required.

Recommendation

Staff recommends that the Commission adopt this analysis and deny this test claim.

STAFF ANALYSIS

Claimant

City of Palos Verdes Estates

Chronology

10/24/01	City of Palos Verdes Estates filed test claim with the Commission
01/10/02	The Department of Finance submitted comments on test claim with the Commission
05/22/02	City of Palos Verdes Estates filed reply to Department of Finance comments
03/23/06	Commission staff issued draft staff analysis
04/13/06	City of Palos Verdes Estates filed comments on the draft staff analysis
05/15/06	Commission staff issued final staff analysis

Background

This test claim addresses legislation involving labor relations between local agencies and their law enforcement officers and firefighters, and provides that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

Since 1968, local agency labor relations have been governed by the Meyers-Milias-Brown Act.[1] The act requires local agencies to grant employees the right to self-organization, to form, join or assist labor organizations, and to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body. The California Supreme Court has recognized that it is not unlawful for public employees to strike unless it has been determined that the work stoppage poses an imminent threat to public health or safety.[2] Employees of fire departments and fire services, however, are specifically denied the right to strike or to recognize a picket line of a labor organization while in the course of the performance of their official duties.[3] Additionally, the Fourth District Court of Appeal has held that police work stoppages are per se illegal.[4]

Under the Meyers-Milias-Brown Act, the local employer establishes rules and regulations regarding employer-employee relations, in consultation with employee organizations.[5] The local agency employer is obligated to meet and confer in good faith with representatives of

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[1] Government Code sections 3500 et seq.; Statutes 1968, chapter 1390.

[2] *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564.

[3] Labor Code section 1962.

[4] *City of Santa Ana v. Santa Ana Police Benevolent Association* (1989) 207 Cal.App.3d 1568.

[5] Government Code section 3507.

employee bargaining units on matters within the scope of representation.[6] If agreement is reached between the employer and the employee representatives, that agreement is memorialized in a memorandum of understanding which becomes binding once the local governing body adopts it.[7]

Test Claim Statute

The test claim statute[8] added several sections to the Code of Civil Procedure providing new, detailed procedures that could be invoked by the employee organization in the event an impasse in negotiations has been declared. Section 1299 stated the following legislative intent:

> The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern, are a predictable consequence of labor strife and poor morale that is often the outgrowth of substandard wages and benefits, and are not in the public interest. The Legislature further finds and declares that the dispute resolution procedures contained in this title provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers.
>
> It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers. It is further the intent of the Legislature that, in order to effectuate its predominant purpose, this title be construed to apply broadly to all public employers, including, but not limited to, charter cities, counties, and cities and counties in this state.
>
> It is not the intent of the Legislature to alter the scope of issues subject to collective bargaining between public employers and employee organizations representing firefighters or law enforcement officers.
>
> The provisions of this title are intended by the Legislature to govern the resolution of impasses reached in collective bargaining between public employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests...

The statute provided that if an impasse was declared after the parties exhausted their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties were unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties was unable to effect settlement of a dispute between the parties, the employee organization could, by written notification to the employer, request that their differences be submitted to an

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[6] Government Code section 3505.

[7] Government Code section 3505.1.

[8] Statutes 2000, chapter 906 (Sen. Bill No. 402).

arbitration panel.[9] Within three days after receipt of written notification, each party was required to designate one member of the panel, and those two members, within five days thereafter, were required to designate an additional impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.[10]

The arbitration panel was required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon.[11] The panel was authorized to make inquiries and investigations, hold hearings, and take any other action, including further mediation, that the panel deemed appropriate.[12] Five days prior to the commencement of the arbitration panel's hearings, each of the parties was required to submit a last best offer of settlement on the disputed issues.[13] The panel decided the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complied with specified factors.[14]

The panel then delivered a copy of its decision to the parties, but the decision could not be publicly disclosed for five days.[15] The decision was not binding during that period, and the parties could meet privately to resolve their differences and, by mutual agreement, modify the panel's decision.[16] At the end of the five-day period, the decision as it may have been modified by the parties was publicly disclosed and binding on the parties.[17]

Code of Civil Procedure section 1299.9, subdivision (b), provided that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, would be borne by the employee organization.

Test Claim Statute Declared Unconstitutional

The test claim statute in its entirety was declared unconstitutional by the California Supreme Court under *County of Riverside v. Superior Court of Riverside County* on April 21, 2003, as violating portions of article XI of the California Constitution.[18] The basis for the decision is that the statute: 1) deprives the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and 2) delegates to a private

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[9] Code of Civil Procedure section 1299.4, subdivision (a).

[10] Code of Civil Procedure section 1299.4, subdivision (b).

[11] Code of Civil Procedure section 1299.5, subdivision (a).

[12] *Ibid.*

[13] Code of Civil Procedure section 1299.6, subdivision (a).

[14] *Ibid.*

[15] Code of Civil Procedure section 1299.7, subdivision (a).

[16] *Ibid.*

[17] Code of Civil Procedure section 1299.7, subdivision (b).

[18] *County of Riverside v. Superior Court of Riverside County* (2003) 30 Cal.4th 278 (*County of Riverside*).

body the power to interfere with local agency financial affairs and to perform a municipal function, as prohibited in article XI, section 11, subdivision (a).[19]

Claimant's Position

The claimant contends that the test claim statute constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

- Litigation costs until such time as there is a final judgment on the constitutionality of Senate Bill No. (SB) 402, including actions for declaratory relief, opposition petitions to compel arbitration, and resultant appeals.
- Costs for training agency management, counsel, staff and members of governing bodies regarding SB 402 as well as the intricacies thereof.
- Costs incident to restructuring bargaining units that include employees that are covered by S.B. 402 and those which are not covered by SB 402.
- Increased staff time in preparing for negotiations in order to collect and compile comparability data specified in Code of Civil Procedure, section 1299.4.
- Increased time of agency negotiators, including staff, consultants, and attorneys, in handling two track negotiations: those economic issues which are subject to SB 402 arbitration and those issues which are not subject to arbitration.
- Time to prepare for and consult with the governing board regarding the last best and final offer to be submitted to the arbitration panel.
- Time to prepare for and participate in any mediation process.
- Consulting time of negotiators, staff and counsel in selecting the agency panel member.
- Time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator.
- Time of the agency negotiators, staff and counsel in briefing the agency panel member.
- Time of the agency negotiators, staff and counsel in preparing for the arbitration hearing.
- Time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses.
- Time of the agency panel member and attorney in pre-arbitration meetings of the panel.
- Staff and attorney time involved in discovery pursuant to Code of Civil Procedure, sections 1281.1, 1281.2 and 1299.8.
- Staff, attorney, witness and agency panel member time for the hearings.
- Attorney time in preparing the closing brief.
- Agency panel member time in consulting in closed sessions with the panel.
- Time of the attorney, negotiators, and staff consulting with the agency panel member prior to the issuance of the award.
- Time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators.

[19] *County of Riverside, supra,* 30 Cal.4th 278, 282.

- Time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.
- Costs of implementing the award above those that would have been incurred under the agency's last best and final offer.
- Costs of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous, including the fact that the act covers "all other forms of remuneration," and covers employees performing "any related duties" to firefighting and investigating.
- An additional intangible cost element at the last best offer phase of negotiations, involving "enhancements" to compensation packages that may be added when the local agency perceives possible vulnerabilities in its negotiating position, estimated to be an overall 3% to 5% increase based on the most recent negotiations with the Palos Verdes Estates Police Officers' Association.

Claimant argues, in its April 13, 2006 comments on the draft staff analysis, that "[a]s of January 1, 2001, local government officials had no alternative other than to enforce the provisions of this statute until it was declared unconstitutional, otherwise they would be subject to a writ of mandate to compel binding arbitration." Claimant further states that "[i]n fact, it was because the County of Riverside refused to engage in binding arbitration that the writ of mandate action was commenced against it, resulting in the decision of the Supreme Court which made this test claim statute invalid as being unconstitutional." Claimant believes the cases cited by Commission staff in the analysis are not on point.

Claimant also points out that as legislation goes through the process of being adopted "there are a plethora of committee hearings and analyses performed" and "if there is any risk for a statute being declared unconstitutional, it should be borne by the State, which has the resources for a full and complete analysis of pending legislation prior to enactment." Claimant concludes that "[l]ocal authorities have no alternative than to assume that legislation is valid until such time as it is declared unconstitutional by the courts of the State of California." Therefore, the Commission should find that Binding Arbitration was a reimbursable, mandated program from its effective date until it was declared unconstitutional.

Department of Finance Position

Department of Finance submitted comments on the test claim concluding that the administrative and compensation costs claimed in the test claim are not reimbursable costs pursuant to article XIII B, section 6 of the California Constitution, based on various court decisions and the provisions of the test claim statute. Specifically, the Department asserts that:

1) the test claim statute does not create a new program or higher level of service in an existing program, and the costs alleged do not stem from the performance of a requirement unique to local government;

2) alleged higher costs for compensating the claimant's employees are not reimbursable, since compensation of employees in general is a cost that all employers must pay; furthermore, allowing reimbursement for any such costs could "undermine an employer's incentive to collectively bargain in good faith;"

3) alleged cost for increased compensation is not unique to local government; even though claimant may argue that compensation of firefighters and law enforcement

officers is unique to local government, the "focus must be on the hardly unique function of compensating employees in general;" and

4) Code of Civil Procedure section 1299.9, subdivision (b), provides that costs of the arbitration proceeding and expenses of the arbitration panel, except those of the employer representative, are to be borne by the employee organization; in the test claim statute, the Legislature specifically found that the duties of the local agency employer representatives are substantially similar to the duties required under the current collective bargaining procedures and therefore the costs incurred in performing those duties are not reimbursable state mandated costs; and thus, during the course of arbitration proceedings, "there are not any net costs that the employers would have to incur that would not have been incurred in good faith bargaining or that are not covered by the employee organizations."

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[20] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[21] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[22] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[23] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[24]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a

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[20] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[21] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[22] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[23] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[24] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (San Diego Unified School Dist.); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

state policy, but does not apply generally to all residents and entities in the state.[25] To determine if the program is new or imposes a higher level of service, the test claim statute must be compared with the legal requirements in effect immediately before the enactment of the test claim statute.[26] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[27]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[28]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[29] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[30]

This test claim presents the following issues:

- Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?
- Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?

On April 21, 2003, the California Supreme Court issued its decision in the *County of Riverside* case and found that the test claim statutes violated the home rule provisions of article XI of the California Constitution as follows: "It deprives the county of its authority to provide for the compensation of its employees (§ 1, subd. (b)) and delegates to a private body the power to interfere with county financial affairs and to perform a municipal function (§ 11, subd.(a))."[31]

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[25] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.).

[26] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[27] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878.

[28] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[29] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[30] *County of Sonoma v. Commission on State Mandates,* 84 Cal.App.4th 1264, 1280 (*County of Sonoma*), citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[31] *County of Riverside, supra,* (2003) 30 Cal.4th 278, 282.

Since the test claim statutes were found unconstitutional on April 21, 2003, local agencies are no longer subject to binding arbitration, when requested by law enforcement and firefighter employees, where an impasse in labor negotiations has been declared.

Nevertheless, the claimant requests reimbursement from the effective date of the legislation (January 1, 2001) until the court determined the legislation unconstitutional on April 21, 2003. The claimant argues that reimbursement should be allowed since local agencies are not authorized to declare a statute unconstitutional and generally cannot refuse to enforce a statute on the basis that it is unconstitutional pursuant to article III, section 3.5 of the California Constitution. The claimant states that local agencies had no alternative other than to "enforce the provisions of this legislation; otherwise they would be subject to a writ of mandate to compel binding arbitration."[32] Relying on the case of *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, claimant states:

> The court concluded: "As we shall explain, we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional." *Lockyear* (sic), *supra.*[33, 34]

Thus, the question is whether there can be a reimbursable state-mandated program from the effective date of the legislation until the date the legislation was deemed unconstitutional by the court (from January 1, 2001, through April 20, 2003), or whether the court's holding that the legislation is unconstitutional retroactively applies to the original effective date of the legislation. Although courts sometimes clarify whether the decision retroactively applies in

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[32] Comments on Draft Staff Analysis by City of Palos Verdes Estates, April 13, 2006, page 2.

[33] *Id.*, page 4.

[34] Notwithstanding this rule cited in *Lockyer*, staff notes that the *Lockyer* case also specifically distinguished the *County of Riverside* case — the case in which this test claim statute was declared unconstitutional — as an exception to that general rule.[34] Under the exception, the court cited examples where a local agency refuses to comply with the statute, forcing a lawsuit to challenge the constitutionality of the statute. The County of Riverside, in refusing to comply with the test claim statute, acted in accordance with the exception articulated in *Lockyer.*

In addition, while the *County of Riverside* case was under review, there were two other cases pending review regarding the constitutionality of Chapter 906, the test claim legislation: 1) *Ventura County v. Ventura County Deputy Sheriffs' Association* (Second District Court of Appeal, Case No. B153806); and 2) *City of Redding v. Superior Court Local Union 1934, Real Party in Interest* (Third District Court of Appeal, Case No. C03950). Had claimant found itself in the position of being forced into binding arbitration as a result of the test claim statute, it could have refused, as the County of Riverside and the other local agencies did, and waited to be sued by the labor union. Presumably, any such lawsuit would have either been consolidated with and/or had the same result as *County of Riverside.* Thus, the *Lockyer* case does not support claimant's contention that it had no alternative but to comply with the test claim statute.

the opinion declaring the statute unconstitutional, the Supreme Court did not do so in the *County of Riverside* case. In addition, no court cases regarding the effect of an unconstitutional statute in the context of California mandates law exist. Therefore, this issue is one of first impression for the Commission.

For the reasons below, staff finds, based on the purpose of article XIII B, section 6, legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

The effect of an unconstitutional statute is a complex area of law, and no general rule can be cited with regard to the effectiveness of a statute while it was presumed constitutional. Oliver P. Field, in his treatise "The Effect of an Unconstitutional Statute," has stated:

> There are several rules or views, not just one, as to the effect of an unconstitutional statute. All courts have applied them all at various times and in differing situations. Not all courts agree, however, upon the applicability of any particular rule to a specific case. It is this lack of agreement that causes the confusion in the case law on the subject.[35]

The traditional approach was that an unconstitutional statute is "void ab initio," that is, "[a]n unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[36] Under the traditional approach, no reimbursement would be required for this test claim. This approach has been criticized in later decisions, however, and the trend nationwide has been toward a more *equity*-oriented view that binding rights and obligations may be based on a statute that is subsequently declared unconstitutional, and that not every declaration of unconstitutionality is retroactive in its effect.[37]

In the draft staff analysis, California cases on the issue of the effect of an unconstitutional statute were cited where: 1) payments were made or costs were incurred under a statute that was subsequently deemed unconstitutional; 2) plaintiff sought monetary recovery based on the equitable remedy of restitution;[38] and 3) recovery of the payments was denied. Those cited cases generally deny recovery of payments where money is paid voluntarily with full knowledge of the facts but made under a mistake of law,[39] i.e., all parties were mistaken as to

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[35] Oliver P. Field, The Effect of an Unconstitutional Statute (1935), pages 2-3.

[36] *Norton v. Shelby County* (1886) 118 U.S. 425.

[37] *Chicot County Drainage District v. Baxter State Bank* (1940) 308 U.S. 371.

[38] "The word 'restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another." (See 55 California Jurisprudence Third (1998), Restitution, section 1, page 398.)

[39] "mistake of law" is defined as: a mistake about the legal effect of a known fact or situation. (See Black's Law. Dict. (7th ed., 1999) p. 1017, col. 2.)

the fact that the law was unconstitutional.[40] This result is based on the notion that parties are presumed to know the law in effect at the time the payments were made or the costs were incurred. Claimant argues in its comments on the draft staff analysis that the cited cases regarding recovery of payments made under a mistake of law are distinguishable from the situation at issue in this test claim.

Upon further consideration, staff finds the cited rule of those cases is inapplicable for purposes of this analysis. Under these cases, both parties to the transaction are deemed to have given effect to the statute while it was presumed constitutional. The court rulings maintained the status quo; in other words, the courts did not overturn or modify any actions taken, costs incurred or payments made. Thus, the meaning of "recovery of payments" in these cases is different from the meaning of "reimbursement" in a mandates context, and reimbursement for purposes of this analysis must necessarily be governed by well-settled mandates law.

Under California state mandates law, the determination as to whether a mandate exists is a question of law.[41] As stated in *County of Sonoma*, the Commission must strictly construe article XIII B, section 6 and not apply it as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.[42, 43] Nevertheless, the purpose of article XIII B, section 6, as revealed in the ballot measure adopting it, was to prevent the state from forcing programs on local governments without the state paying for them. In 2004, the California Supreme Court in the *San Diego Unified School Dist.* case reaffirmed the purpose of article XIII B, section 6, as follows:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: 'Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.' (citations omitted) (italics added.)[44]

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[40] *Wingerter v. City and County of San Francisco* (1901) 134 Cal. 547; *Campbell v. Rainey* (1932) 127 Cal.App. 747.

[41] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1279, citing *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[42] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280; see also *City of San Jose v. State of California (City of San Jose)* (1996) 45 Cal.App.4th 1802, 1816-1817, citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.

[43] The doctrine of equity in this sense means the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances..." Equity is based on a system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict. (See Black's Law Dict. (7th ed., 1999) p. 561, col. 1.)

[44] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 875.

Applying the court's ruling that the test claim legislation is unconstitutional retroactively to the original effective date of the legislation could have the effect of forcing programs and costs on local governments without the state paying for them. Because binding rights or obligations in the form of reimbursable mandates *could have been created* while the test claim legislation was presumed to be constitutional, an analysis on the merits should proceed in order to determine whether the test claim legislation did in fact mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

Therefore, staff finds, based on the purpose of article XIII B, section 6, that legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

Issue 2: Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

A. Does the Test Claim Legislation Constitute a State-Mandated Program?

In order for the test claim statute to impose a reimbursable state-mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.[45] Further, courts have held that the term "program" within the meaning of article XIII B, section 6 means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[46]

The claimant is requesting reimbursement for litigation costs until the time the court determined the test claim legislation unconstitutional, costs to engage in binding arbitration, and a 3% to 5% increase in the benefits provided to the employees as a result of the legislation.

Staff finds that litigation costs *do not* constitute state-mandated activities or programs. Claimant states in its comments that costs to litigate the test claim legislation were "considerable" for the 27 months between the time the law became effective and the Supreme Court decision finding it to be unconstitutional.[47] Any such costs, however, were not mandated by the test claim statute. Moreover, the Code of Civil Procedure[48] and the California Rules of Court,[49] establish a process for prevailing parties to recover litigation costs and attorneys fees by filing a motion with the court. Thus, litigation costs are not reimbursable pursuant to article XIII B, section 6.

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[45] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783 *(City of Merced).*

[46] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles).*

[47] Comments on Draft Staff Analysis by City of Palos Verdes Estates, April 13, 2006, page 8.

[48] Code of Civil Procedure, sections 1032, 1033.5, and 1034.

[49] California Rules of Court, rule 870.2.

Staff further finds that the test claim legislation requires local agencies to engage in binding arbitration if, during employer-employee labor negotiations, the parties have reached an impasse and the employee organization notifies the agency it wishes to engage binding arbitration. The test claim legislation specifically requires local agencies to designate an arbitration panel member, submit a "last best settlement offer" on disputed issues, and participate in the arbitration hearings. These activities constitute a "program" subject to article XIII B, section 6 because they mandate a task or activity, and impose unique requirements on local governments that do not "apply generally to all residents and entities in the state." Thus, the analysis must continue to determine if these activities impose a new program or higher level of service.

B. Does the Test Claim Legislation Constitute a "New Program" or "Higher Level of Service?"

The courts have held that even though local agencies can show they have incurred increased costs as a result of test claim legislation, increased costs alone, without a showing that the costs were incurred as a result of a mandated new program or higher level of service, do not require reimbursement under article XIII B, section 6.[50] Test claim legislation imposes a "new program" or "higher level of service" when: a) the requirements are new in comparison with the preexisting scheme; *and* b) the requirements were intended to provide an enhanced service to the public.[51]

The test claim legislation requires local agencies to engage in binding arbitration if, during employer-employee labor negotiations, the parties have reached an impasse and the employee organization notifies the agency it wishes to engage binding arbitration. The test claim legislation specifically requires local agencies to designate an arbitration panel member, submit a "last best settlement offer" on disputed issues, and participate in the arbitration hearings. According to the claimant, the test claim legislation has resulted in a 3%-5% increase in costs for the compensation packages to their law enforcement and firefighting employees. The law in effect prior to the enactment of the test claim statute did not require local agencies to engage in binding arbitration, thus the requirement is new in comparison with the preexisting scheme.

The new requirements, however, do not provide an enhanced service to the public as explained in the following analysis.

The cases have consistently held that additional costs for increased employee benefits, in the absence of some increase in the actual level or quality of governmental services provided to the public, do not constitute an "enhanced service to the public" and therefore do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution. The court in *City of Richmond*, for example, held that even though increased employee benefits may generate a higher quality of local safety officers, the legislation did not constitute a new program or higher level of service.

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[50] *County of Los Angeles, supra,* 43 Cal.3d at 56; *Lucia Mar Unified School Dist., supra,* 44 Cal.3d at 835.

[51] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

> Increasing the cost of providing services cannot be equated with requiring an increased level of service under a[n] [article XIII B,] section 6 analysis. A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.[52]

The California Supreme Court reaffirmed and clarified what constitutes an "enhanced service to the public" in the *San Diego Unified School District* case. The court, in reviewing several mandates cases, stated that the cases "illustrate the circumstance that simply because a state law or order may increase the costs borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514" (emphasis in original).[53]

The Supreme Court went on to describe what *would* constitute a new program or higher level of service, as "not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided [to the public]. In *Carmel Valley Fire Protection Dist. v. State of California* [citations omitted], for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. The safety clothing and equipment were new requirements mandated by the state. In addition, the court determined that the protective clothing and safety equipment were designed to result in more effective fire protection and, thus, did provide an enhanced level of service to the public.[54]

The test claim legislation at issue here requires the local agency to engage in a process that may result in increased employee compensation or benefits. Since strikes by law enforcement officers and fire services personnel are prohibited by law,[55] no successful argument can be made that the test claim legislation affects law enforcement or firefighting service to the public.

Therefore, staff finds that the test claim legislation does not impose a new program or higher level of service and, thus, reimbursement is not required pursuant to article XIII B, section 6.

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[52] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App4th 1190, 1195-1196. See also, *City of Anaheim v. State of California* (1987) 189 Cal.App.3rd 1478, 1484, where the court determined that a temporary increase in PERS benefits to retired employees, resulting in higher contribution rates for local government, did not constitute a new program or higher level of service to the public; and *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67, where the California Supreme Court determined that providing unemployment compensation protection to a city's own employees was not a service to the public.

[53] *San Diego Unified School District, supra,* 33 Cal.4th 859, 877.

[54] *Ibid.*

[55] See footnotes 3 and 4.

Conclusion

Based on the purpose of article XIII B, section 6, staff finds that legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

However, the test claim legislation does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and, thus reimbursement is not required.

Recommendation

Staff recommends that the Commission adopt this analysis and deny this test claim.

EXHIBIT A

State of California
COMMISSION ON STATE MANDATES
1300 I Street, Suite 950
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

TEST CLAIM FORM

For Official Use Only

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COMMISSION ON STATE MANDATES

Claim No. 01-TC-07

Local Agency or School District Submitting Claim

City of Palos Vedes Estates

Contact Person

Allan Burdick (MAXIMUS, Inc.)

Telephone No.

(916) 485-8102
Fax (916) 485-0111

Address

4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Representative Organization to be Notified

League of California Cities

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

Chapter 906, Statutes of 2000 (S.B. 402)

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

James B. Hendrickson, City Manager

Telephone No.

(310) 378-0383

Signature of Authorized Representative

Date

10-18-01

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
City of Palos Verdes Estates

Binding Arbitration

Chapter 906, Statutes of 2000
(S.B. 402)

STATEMENT OF THE CLAIM

A. MANDATE SUMMARY

The subject legislation, enacted in 2000, dramatically changed the public sector labor relations landscape when enacted. This legislation mandates binding interest arbitration for the method of resolving impasse in labor relations negotiations for all public safety employees, including all classes of positions related to firefighting and law enforcement in all California public agencies. The only entities which are excluded from coverage by this legislation are the State of California and those charter agencies which had adopted interest arbitration procedures prior to January 1, 2001. (*See* Code of Civil Procedure, sections 1299.3(c) and 1299.9(a).

Labor relations for all local government employees has abeen governed by the Meyers-Milias-Brown Act (hereinafter "MMBA"), California Government Code, Sections 3500 *et seq.* The MMBA has allowed each local employer to establish its own rules and regulations governing employment relations in consultation with its employee organizations. The law mandated agencies to grant employees the right to organize and collectively bargain. Thus, under the MMBA, the local agency employer was obligated to meet and confer in good faith with the exclusive representatives of employee bargaining units on matters within the scope of representation.

Under the MMBA, the scope of representation was defined as:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include

consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.[1]

Bargaining representatives and the public employer are required, under the MMBA to meet and confer in good faith. That requirement has been codified as follows:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.[2]

Under the MMBA, if agreement is reached between the employer and the designated employee representatives, same is memorialized in an memorandum of understanding (MOU), which is binding when adopted by the governing body. *See* Government Code, Section 3505.1.

Where the test claim legislation makes a substantial change to preexisting law is when the employer and recognized employee representative cannot agree on an MOU and reach impasse.

Under prior existing law, the MMBA, the governing board reviewed the positions of the parties, and then made a final determination on the issues at impasse:

[1] Government Code, Section 3504.
[2] Government Code, Section 3505.

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.[3]

The enactment of the subject test claim legislation establishes an entirely new quasi-judicial process that imposes a final determination on the governing board and organizational representation.[4]

Once impasse has been declared, and that impasse was not resolved through voluntary mediation, only the recognized employee organization has the right to request interest arbitration.[5] The organization, being in control, is able to prepare for and position itself for the arbitration it will have planned for as it embarked on the negotiations. As a result, the agency must undertake to prepare for the possibility of arbitration as it goes into the negotiations with the employee organization.[6]

The test claim legislation sets up a tripartite arbitration panel, where both the employer and union each select one arbitrator, who together select the third "neutral" arbitrator to serve as the panel's chair. Once the two arbitrators have been selected, the "neutral" arbitrator is to be named within five days. If the two arbitrators cannot agree upon a third, a list of seven arbitrators will be requested from the American Arbitration Association or the California Mediation and Conciliation Service, and they will agree upon an arbitrator, or in the alternative, each strike potential arbitrators until only one is remaining.[7]

Generally, in an arbitration, the parties will routinely request a meeting with the arbitrator prior to the arbitration itself in order to resolve preliminary matters. The meeting is important, because it allows the parties to agree upon the disputed issues that will be referred to arbitration, stipulations regarding experts and exhibits, as well as other organizational matters.

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[3] Government Code, Section 3505.4.
[4] Code of Civil procedure, Section 1299.
[5] Code of Civil Procedure, Section 1299.4(a).
[6] Code of Civil Procedure, Section 1299.4(a).
[7] Code of Civil Procedure, Section 1299(c).

Under the test claim legislation, within ten days after the formation of the panel, or any additional periods to which the parties agree, the panel must meet with the parties, make "inquiries and investigations", hold hearings, and take other actions, including further mediation, that the panel deems appropriate.[8] This places the public agency at a substantial disadvantage. While the union could know substantially in advance that it is proceeding to arbitration and preparing therefore even during the "meet and confer" process, the employer could be forced into a full hearing within one month from the time that the union has requested arbitration. The result is that during the "meet and confer" process, a well prepared employer must be preparing contemporaneously for the eventuality of an arbitration proceeding. The alternative if the public employer is not prepared in advance, is that the rapid pace of proceedings could result in the employer having insufficient time to arrange for expert witnesses, prepare exhibits and witnesses, conduct other surveys and undertake research, and undertake the myriad of activities to prepare for presenting the complex issues that commonly are part of the arbitration process.

The scope of arbitration under the test claim legislation is limited to "economic issues, including salaries, wages and overtime pay, health and pension benefits, vacation and other leave, reimbursements, incentives, differentials, and **all other forms of remuneration**. From the ambiguity in the term "other forms of remuneration", it can be anticipated that the unions will assert that almost anything within the scope of bargaining is an "economic issue" subject to arbitration and/or local agencies will be faced with the costs of court proceedings to resolve these disputes.

The arbitration panel is required to base its decisions upon "those factors traditionally taken into consideration in the determination of those matters within the scope of arbitration, including but not limited to the following factors, as applicable:

(1) The stipulations of the parties.

(2) The interest and welfare of the public.

(3) The financial condition of the employer and its ability to meet the costs of the award.

(4) The availability and sources of funds to defray the cost of any changes in matters within the scope of arbitration.

(5) Comparison of matters within the scope of arbitration of other employees performing similar services in corresponding fire or law enforcement employment.

(6) The average consumer prices for goods and services, commonly known as the Consumer Price Index.

(7) The peculiarity of requirements of employment, including, but not limited to, mental, physical, and educational qualifications; job training and skills; and hazards of employment.

(8) Changes in any of the foregoing that are traditionally taken into consideration in the determination of matters within the scope of arbitration."[9]

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[8] Code of Civil Procedure, Section 1299.5(a).

[9] Code of Civil Procedure, Section 1299.6(c).

The arbitration panel is not required to consider such key factors as the relative market place, compensation of other employees of the employer, the wage relationships between job classifications, the need for prudent budgetary reserves, as well as competing budgetary considerations.

Discovery activities are facilitated in that the arbitration panel has the power to subpoena witnesses and documents, books or other records relating to the issues in dispute.[10]

Usually, in arbitration hearings, disputed issues are adjudicated either on an issue-by-issue basis, or a total package. If there is an issue-by-issue adjudication, the arbitration panel has the ability to select the last best offer of either management or the union on each disputed issue. The total package basis is less common, and requires the panel to select either the entire union or entire management package. The test claim legislation adopts a hybrid approach which requires the parties to submit their proposals on an issue-by-issue basis, unless they mutually agree to submit their proposals as a package.[11]

The test claim legislation requires each party to submit its last, best and final offer on disputed issues to the panel not later than five days prior to the commencement of the arbitration hearing.[12] Thus, under the statutory language it will be impossible for a party to change its final offer in response to unexpected or persuasive exhibits or testimony.

After the hearing, the arbitration panel is required to make its ruling on the disputed issues within 30 days of the conclusion of the arbitration hearing, unless the parties agree to extend that time period.[13] This time period could well be extended if the parties wish to submit briefs summarizing the evidence and arguing their position. Furthermore, if the hearing is lengthy, 30 days might not be enough time for the reporter to complete the transcript, the panel to study the record, and to issue findings.

The panel is required to deliver its rulings to the parties, and not reveal same to the public for a period of five days, or longer if the parties so agree, in order that the parties may make a last attempt to reach an agreement.[14] However, as the arbitration is binding, there is little incentive for the "winning" party to negotiate away benefits received.

S.B. 402 provides that the union pays for the arbitration hearing costs, with the exception of the agency's panel member. However, it is the experience of the charter agencies that have utilized interest arbitration that the costs the agencies incur in preparing and presenting an interest arbitration are substantial six figure amounts. The activities for which the governmental employer will have to pay include:

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[10] Code of Civil Procedure, Section 1299.5(b).
[11] Code of Civil Procedure, Section 1299.6(a)(b).
[12] Code of Civil Procedure, Section 1299.6(a).
[13] Code of Civil Procedure, Section 1299.6(a).
[14] Code of Civil Procedure, Section 1299.7.

- Litigation costs until such time as there is a final judgment on the constitutionality of S.B. 402, including actions for declaratory relief, opposition petitions to compel arbitration, and resultant appeals.
- Costs for training agency management, counsel, staff and members of governing bodies regarding S.B. 402 as well as the intricacies thereof.
- Costs incident to restructuring bargaining units that include employees that are covered by S.B. 402, and those which are not covered by S.B. 402.
- Increased staff time in preparing for negotiations in order to collect and compile comparability data specified in Code of Civil Procedure, Section 1299.4.
- Increased time of agency negotiators, including staff, consultants and attorneys, in handling two track negotiations: those economic issues which are subject to S.B. 402 arbitration, and those issues which are not subject to arbitration.
- Time to prepare for and consult with the governing board regarding the last best and final offer to be submitted to the arbitration panel.
- Time to prepare for and participate in any mediation process.
- Consulting time of negotiators, staff and counsel in selecting the agency panel member.
- Time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator.
- Time of the agency negotiators, staff and counsel in briefing the agency panel member.
- Time of the agency negotiators, staff and counsel in preparing for the arbitration hearing.
- Time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses.
- Time of the agency panel member and attorney in pre-arbitration meetings of the panel.
- Staff and attorney time involved in discovery. (*See* Code of Civil Procedure, Sections 1281.1, 1281.2 and 1299.8.)
- Staff, attorney, witness and agency panel member time for the hearings.
- Attorney time in preparing the closing brief.
- Agency panel member time in consulting in closed sessions with the panel.
- Time of the attorney, negotiators, and staff in consulting with the agency panel member prior to the issuance of the award.
- Time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators.
- Time of the agency negotiators to negotiate with the union's negotiating representatives based upon the award.
- Costs of implementing the award above those that would have been incurred under the agency's last best and final offer.[15]

[15] Note that under the MMBA, the agency could impose its last best and final offer after impasse was reached. *See* Government Code, Section 3505.4.

- Costs of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous, including: the act covers "all other forms of remuneration", and covers employees performing "any related duties" to firefighting and investigating.

S.B. 402 injects yet another additional cost element into the last best offer phase of negotiations. It is an intangible one that is difficult to quantify, but a very real one nevertheless. Under the procedure provided under S.B. 402, the parties will submit their last best proposals on an issue by issue basis. The agency will commonly recognize its possible vulnerability on one or two or a few of the issues in relation to its comparison agencies, even though overall its compensation position may be quite competitive. The agency will invariably tend to enhance its offers on those issues over what it otherwise would have done. It is my best estimate that the spectre of an S.B. 402 arbitration caused the City Council to enhance the four year wage package it recently concluded with the Palos Verdes Estates Police Officers' Association by 3% to 5% because of that reality.

It should be further noted that this is not the first time that the legislature considered the enactment of binding arbitration law in the public sector arena. This issue was previously considered by the legislature in S.B. 888 in the 1980's. As a result, the Legislative Counsel issued an opinion on January 21, 1980 to the Honorable John W. Holmdahl, regarding the issue of the reimbursable costs which would be imposed were the legislation to pass. A true and correct copy of this opinion is attached hereto as Exhibit "1" and incorporated herein by reference. As will be noted, the extent of reimbursable costs was stated as follows:

> "If the cost disclaimer in Section 10 of S.B. 888 is deleted, the amount of the state's reimbursement should include the procedural costs of implementing compulsory and binding arbitration, and the amount of the salary increases which were imposed on the local agency by arbitration which such local agency did not consent to."

Accordingly, it must be assumed that the legislature which passed S.B. 402 had knowledge of the previous opinion by the Legislative Counsel, and took into consideration the costs that would be mandated upon the state if this legislation were in fact enacted.

From the foregoing it is evident that the test claim legislation has resulted in a new program and higher level of service which constitutes a reimbursable state mandate.

B. LEGISLATIVE HISTORY PRIOR TO 1975

There was no requirement prior to 1975, nor in any of the intervening years, until the passage of Chapter 906, Statutes of 2000, to mandate binding arbitration on governmental agencies for binding arbitration of all remuneration issues for employees in law enforcement and fire fighting.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

As related above, the mandated activities are contained in the Code of Civil Procedure, Sections 1281.1, 1299, 1299.2, 1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8 and 1299.9.

D. COST ESTIMATES

The activities necessary to comply with the mandated activities cost well in excess of $200.00 per year, and involve the department, negotiators, attorneys and other personnel in the employ of or contracted by the governmental entity.

E. REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by the City of Palos Verdes States as a result of the statute which is the subject of the test claim are all reimbursable costs as such costs are "costs mandated by the State" under Article XIII B (6) of the California Constitution, and Section 17500 *et seq.* of the Government Code. Section 17514 of the Government Code defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975."

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

F. MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by these three statutes clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The statutory scheme set forth above imposes a unique requirement on local government. Only local government employs law enforcement and fire fighter personnel, and only local government negotiates for their wages, benefits, terms and conditions of employment. Although the state does have law enforcement and fire fighter personnel amongst its employees, the state has specifically exempted itself from the application of this law. Furthermore, police and fire protection are two of the most essential and basic functions of local government.[16]

Mandate Carries Out a State Policy

From the legislation, and particularly the legislative findings in Code of Civil Procedure, Section 1299, the legislature has declared in great detail how the test claim legislation carries out state policy:

> The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern, are a predictable consequence of labor strife and poor morale that is often the outgrowth of substandard wages and benefits, and are not in the public interest. The Legislature further finds and declares that the dispute resolution procedures contained in this title provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers.
>
> It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers. It is further the intent of the Legislature that, in order to effectuate its predominant purpose, this title be construed to apply broadly to all public employers, including, but not limited to, charter cities, counties, and cities and counties in the state.
>
> It is not the intent of the Legislature to alter the scope of issues subject to collective bargaining between public employers and employee organizations representing firefighters or law enforcement officers.

[16] *Carmel Valley Fire Protection District* v. *State of California* (1987) 190 Cxal.App.3d 521, 537; *Verreos* v. *City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107.

> The provisions of this title are intended by the Legislature to govern the resolution of impasses reached in collective bargaining between public employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests. However, the provisions of this title are not intended by the Legislature to be used as a procedure to determine the rights of any firefighter or law enforcement officer in any grievance initiated as a result of a disciplinary action taken by any public employer. The Legislature further intends that this title shall not apply to any law enforcement policy that pertains to how law enforcement officers interact with members of the public or pertains to police-community relations, such as policies on the use of police powers, enforcement priorities and practices, or supervision, oversight, and accountability covering officer behavior toward members of the public, to any community-oriented policing policy or to any process employed by an employer to investigate firefighter or law enforcement officer behavior that could lead to discipline against any firefighter or law enforcement officer, nor to contravene any provision of a charter that governs an employer that is a city, county, or city and county, which provision prescribes a procedure for the imposition of any disciplinary action taken against a firefighter or law enforcement officer.

In summary, the City of Palos Verdes Estates believes that the test claim legislation creating the process for binding interest arbitration for law enforcement and firefighter personnel satisfies the constitutional requirements for a mandate.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code, Section 17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code, Section 17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the above disclaimers have any application to the City of Palos Verdes Estate's test claim.

CONCLUSION

As seen from the foregoing, the enactment of Chapter 906, Statutes of 2000 (S.B. 402) has created binding interest arbitration for economic issues for local government after it has reached impasse with its law enforcement and firefighter personnel. The mandated program meets all of the criteria and tests for the Commission on State Mandates to find a reimbursable state mandated program. None of the so-called disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement have any application to this claim.

G. CLAIM REQUIREMENTS

The following elements of this test claim are provided pursuant to Section 1183, Title 2, of the California Code of Regulations:

Exhibit 2: Chapter 906, Statutes of 2000

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 18th day of October, 2001, at Palos Verdes Estates, California, by:

James B. Hendrickson
City Manager
City of Palos Verdes Estates

DECLARATION OF JAMES B. HENDRICKSON

Test Claim of:
City of Palos Verdes Estates

Chapter 906, Statutes of 2000
(S.B. 402)

JAMES B. HENDRICKSON makes the following declarations and statements under oath:

I am the City Manager of the City of Palos Verdes Estates. As a result, I am the responsible individual for the City of Palos Verdes Estates to implement the mandate commonly known as Binding Arbitration. As a result, I have direct knowledge of the City of Palos Verdes Estates' costs to comply with the state mandate, for which Palos Verdes Estates has not been reimbursed by any federal, state or local government Agency, and for which it cannot otherwise obtain reimbursement. The cost estimate information presented in this test claim is a fair and accurate estimate of the costs incurred by Palos Verdes Estates.

The foregoing facts are known to me personally, and if so required, I could and would testify competently to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of October, 2001, at Palos Verdes Estates, California.

James B. Hendrickson
City Manager

OWEN K. KUNS
RAY H. WHITAKER
CHIEF DEPUTIES

KENT L. DECHAMBEAU
STANLEY M. LOURIMORE
EDWARD F. NOWAK
EDWARD K. PURCELL
JOHN T. STUDEBAKER

JERRY L. BASSETT
HARVEY J. FOSTER
ROBERT D. GRONKE
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DEPUTIES

Sacramento, California
January 21, 1980

Honorable John W. Holmdahl
Senate Chamber

Local Safety Employees (S.B. 888) - #805

Dear Senator Holmdahl:

You have referred us to Senate Bill No. 888, as amended May 14, 1979, (hereafter S.B. 888), and have asked the following questions with regard thereto.

QUESTION NO. 1

If the cost disclaimer in Section 10 of S.B. 888 is deleted, what costs of local agencies would be reimbursable by the state?

OPINION NO. 1

If the cost disclaimer in Section 10 of S.B. 888 is deleted, the amount of the state's reimbursement should include the procedural costs of implementing compulsory and binding arbitration, and the amount of the salary increases which were imposed on the local agency by arbitration which such local agency did not consent to.

ANALYSIS NO. 1

S.B. 888 would, among other things, revise provisions of existing law with respect to the employer-employee relations of firefighters and peace officers employed by a local agency.

Such bill would provide that in situations where a mediator is unable to affect settlement of a controversy between an employer and a representative of such employees, or if the parties are unable to agree to appointment of a mediator under existing law, either party may, pursuant to specified procedures, have their differences submitted to binding arbitration.

An arbitration panel appointed pursuant to S.B. 888 would be required to meet with the parties or their representatives within 10 days after its establishment, to make various inquiries, investigations, and hold hearings.

The arbitration panel would be required to make findings and recommendations based on certain criteria considered by the panel pursuant to procedures in the bill. There would then be a waiting period of 10 days prior to public disclosure, or a longer period if agreed to, during which the parties could mutually amend the award. At the end of such period, the amended agreement or the panel's decision would be disclosed, and would be binding upon the parties.

In addition, Section 10 of S.B. 888 provides that no appropriation is made nor any obligation created by the bill to reimburse local agencies for state-mandated costs, and provides that the other remedies and procedures for providing such reimbursement shall have no application to the bill. However, you have asked us to assume that Section 10 is deleted from S.B. 888 for purposes of this opinion.

Subdivision (a) of Section 2231 of the Revenue and Taxation Code provides that the state shall reimburse each local agency for all "costs mandated by the state," as defined in Section 2207 of the Revenue and Taxation Code.

Section 2207 of the Revenue and Taxation Code, in turn, provides, in applicable part, that "costs mandated by the state" means any increased costs which a local agency is required to incur as a result of any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program.

The general rule is that statutes should be interpreted according to the intent of the Legislature as indicated on the face of the enactment (City and County of San Francisco v. Mooney, 106 Cal. 586, 588).

In other words, if the Legislature required local agencies to follow specified collective bargaining procedures but allowed such local agencies ultimate discretion to establish salaries, we think Section 2231 of the Revenue and Taxation Code would require that the state pay for the procedural costs but not for the amount of any additional wages approved by such boards.

On the other hand, if such discretion were taken away from such boards--such as by the provisions of S.B. 888 requiring that salary increases be submitted to binding arbitration--it is our opinion that the state is imposing a "requirement" on local agencies over which they have no control. In such case, if the provisions of Section 2231 of the Revenue and Taxation Code are followed, we think the amount of the state's reimbursement should include the amount of the salary increases which the local agencies were "required" to pay--i.e., that portion of the amount imposed on a local agency by arbitration which such local agency did not consent to.

Therefore, if the cost disclaimer in Section 10 of S.B. 888 is deleted, the amount of the state's reimbursement should include the procedural costs of implementing compulsory and binding arbitration, and the amount of the salary increases which were imposed on the local agency by arbitration which such local agency did not consent to.

QUESTION NO. 2

If the salary costs imposed on a local agency by arbitration under S.B. 888 exceed the amount which the local agency consented to, and the state does not provide reimbursement for such costs, what alternatives does the local agency have with regard to obtaining such reimbursement?

OPINION AND ANALYSIS NO. 2

A new initiative constitutional amendment, the so-called "Gann Initiative," was placed upon the ballot as Proposition 4 of the November 6, 1979, special election (see Ch. 193, Stats. 1979). Proposition 4 was adopted by the people, and adds an Article XIII B to the California Constitution, which, with certain exceptions, prohibits the annual appropriations subject to limitation of any governmental entity from exceeding the appropriations limit of such entity of government for the prior year adjusted for changes in cost of living and population.

Section 10 of Article XIII B provides that the article is to become effective commencing with the first day of the fiscal year following its adoption. Hence, Article XIII B will become effective July 1, 1980.

Section 6 of Article XIII B will require, with certain exceptions, that "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service ... ."

This constitutional mandate is somewhat similar to the present statutory mandate provided by Section 2231 of the Revenue and Taxation Code. Section 2231 also requires that the state reimburse each local agency for all "costs mandated by the state" and provides for such reimbursement by the State Controller. If a local agency believes that it has not been fully reimbursed for costs imposed by a chaptered bill, a procedure for making and determining a claim for reimbursement is provided by Article 3.5 (commencing with Section 2250) of Chapter 3 of Part 4 of Division 1 of the Revenue and Taxation Code.

The initial determination regarding such a claim is made by the State Board of Control (Sec. 2253.2, R.& T.C.). If either the claimant or the state is dissatisfied by such determination, it may apply for judicial review of the determination pursuant to Section 1094.5 of the Code of Civil Procedure (administrative mandamus) (see Sec. 2253.5, R.& T.C.). If the court finds that the decision of the board is not supported by substantial evidence, it may order the board to hold another hearing, as directed (Sec. 2253.5, R.& T.C.; see also subd. (e), Sec. 1094.5, C.C.P.). If under this procedure, it is finally determined that a claim should be allowed, in whole or in part, the board is required to so report to the Legislature, which, in turn, is directed to introduce legislation to provide for an appropriation sufficient to pay the claims allowed (Sec. 2255, R.& T.C.).

The Legislature would, we think, be permitted to continue to provide a similar procedure to implement the constitutional requirements of Section 6 of Article XIII B. The primary difference will be that the requirement of reimbursement (on and after July 1, 1980) will now be a constitutional mandate, and the Legislature will be limited in its ability to modify this mandate by subsequent legislation.

We pointed out above that Section 2253.5 of the Revenue and Taxation Code expressly authorizes a claimant who is dissatisfied by the Board of Control determination regarding a claim for reimbursement to apply for judicial review of this determination. We also think that if, after a claim is allowed, the Legislature fails to provide an appropriation for such claim as required by Section 6 of Article XIII B, further judicial relief could be obtained.

However, pursuant to Section 10 of S.B. 888, the Board of Control would be expressly prohibited by statute from considering the local entity's claim for reimbursement by the statute which created the alleged mandates. In these circumstances, it would be unreasonable to require the local entity to perform the futile act of filing a claim for reimbursement which the Board of Control is expressly prohibited from considering.

In these circumstances, we think that the local entity would be permitted to file an action for judicial relief without first pursuing this administrative remedy.

We think that in such an action the court could either fix the amount of costs to be reimbursed or, more likely, simply hold that the provision denying administrative relief is unconstitutional and thereby require the local entity to pursue such relief and require the Board of Control to consider the claim filed notwithstanding the disclaimer.

In this regard, however, it is a well-established principle of constitutional law that the commanding of specific legislative action is beyond the power of the courts. The rule was stated recently in California State Employees' Assn. v. State of California, 32 Cal. App. 3d 103, 108-109, as follows:

> "... [T]he courts have no authority to compel a separate and equal branch of state government to make appropriation of funds. At the time of the filing of this action, section 1 of article III of the state Constitution provided: 'The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.' [Now Sec. 3, Art. III, Cal. Const.] As stated in Myers v. English, ... [9 Cal. 341, 349]: 'We think the power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the Legislature. It is a very delicate and responsible trust, and if not used properly by the Legislature at one session, the people will be certain to send to the next more discreet and faithful servants.

> "'It is within the legitimate power of the judiciary, to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of non-action. The Legislature being the creative element in the system, its action cannot be quickened by the other departments. Therefore, when the Legislature fails to make an appropriation, we cannot remedy that evil. It is a discretion specially confided by the Constitution to the body possessing the power of taxation. There may arise exigencies, in the progress of human affairs, when the first moneys in the treasury would be required for more pressing emergencies, and when it would be absolutely necessary to delay the ordinary appropriations for salaries. We must trust to the good faith and integrity of all the departments. Power must be placed somewhere, and confidence reposed in some one.' . . ." (emphasis in original; citations and footnote omitted.)

Stated more succinctly, if the Legislature fails to provide reimbursement as required by Section 6 of Article XIII B, a court could declare the statute mandating the new program or higher level of services to be unconstitutional, but the court would not be able to compel the Legislature to appropriate funds to pay for such mandated costs.

The remedy of holding the legislative mandate unconstitutional is, however, more drastic than may be required. It has been held that a public officer is not required to expend funds in excess of the amount which is available to him or her (see Cache Valley General Hospital v. Cache County (Utah), 67 P. 2d 639). Applying such a

rule here, a court could hold that the application of a particular mandate was conditioned upon the appropriation of funds by the state for reimbursement of the costs resulting from such mandate. Under this alternative, the mandate would not be unconstitutional, but simply inoperative, and performance of the mandate would be excused until reimbursement was provided.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By Verne L. Oliver
Verne L. Oliver
Deputy Legislative Counsel

VLO:jp

Two copies to Honorable David A. Roberti, pursuant to Joint Rule 34.

Senate Bill No. 402

CHAPTER 906

An act to add Section 1281.1 to, and to add Title 9.5 (commencing with Section 1299) to Part 3 of, the Code of Civil Procedure, relating to public employment relations.

[Approved by Governor September 29, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 402, Burton. Employer-employee relations: law enforcement officers and firefighters.

Existing law provides that employees of the fire departments and fire services of the counties, cities, cities and counties, districts, and other political subdivisions of the state have the right to self-organization, to form, join, or assist labor organizations, and to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body, but do not have the right to strike or to recognize a picket line of a labor organization while in the course of the performance of their official duties.

This bill would provide that if an impasse has been declared after the representatives of an employer and firefighters or law enforcement officers have exhausted their mutual efforts to reach agreement over economic issues as defined within the scope of arbitration, and the parties are unable to agree to the appointment of a mediator, or if a mediator is unable to effect settlement of a dispute between the parties, the employee organization may request, by written notification to the employer, that their differences be submitted to an arbitration panel. Each party would designate one member of the panel, and those members would designate the chairperson of the panel pursuant to specified procedures.

The arbitration panel would meet with the parties within 10 days after its establishment or any additional periods to which the parties agree, make inquiries and investigations, hold hearings, and take any other action, including further mediation, that the panel deems appropriate. Five days prior to the commencement of the arbitration panel's hearings, each of the parties would be required to submit a last best offer of settlement on the disputed issues as a package. The panel would decide the disputed issues separately, or, if mutually agreed, by selecting the last best offer package that most nearly complies with specified factors. There would then be a waiting period of 5 days prior to public disclosure, or a longer period if agreed to, during which the parties could mutually amend the decision. At the

end of that period, the arbitration panel's decision, as amended by the parties, would be disclosed, and would be binding upon the parties.

This bill would provide that unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.

The bill would define employer to include any entity, except the State of California, acting as an agent of a local agency.

The people of the State of California do enact as follows:

SECTION 1. Section 1281.1 is added to the Code of Civil Procedure, to read:

1281.1. For the purposes of this article, any request to arbitrate made pursuant to subdivision (a) of Section 1299.4 shall be considered as made pursuant to a written agreement to submit a controversy to arbitration.

SEC. 2. Title 9.5 (commencing with Section 1299) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 9.5. ARBITRATION OF FIREFIGHTER AND LAW ENFORCEMENT OFFICER LABOR DISPUTES

1299. The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern, are a predictable consequence of labor strife and poor morale that is often the outgrowth of substandard wages and benefits, and are not in the public interest. The Legislature further finds and declares that the dispute resolution procedures contained in this title provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers.

It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers. It is further the intent of the Legislature that, in order to effectuate its predominant purpose, this title be construed to apply broadly to all public employers, including, but not limited to, charter cities, counties, and cities and counties in this state.

It is not the intent of the Legislature to alter the scope of issues subject to collective bargaining between public employers and employee organizations representing firefighters or law enforcement officers.

The provisions of this title are intended by the Legislature to govern the resolution of impasses reached in collective bargaining

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between public employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests. However, the provisions of this title are not intended by the Legislature to be used as a procedure to determine the rights of any firefighter or law enforcement officer in any grievance initiated as a result of a disciplinary action taken by any public employer. The Legislature further intends that this title shall not apply to any law enforcement policy that pertains to how law enforcement officers interact with members of the public or pertains to police-community relations, such as policies on the use of police powers, enforcement priorities and practices, or supervision, oversight, and accountability covering officer behavior toward members of the public, to any community-oriented policing policy or to any process employed by an employer to investigate firefighter or law enforcement officer behavior that could lead to discipline against any firefighter or law enforcement officer, nor to contravene any provision of a charter that governs an employer that is a city, county, or city and county, which provision prescribes a procedure for the imposition of any disciplinary action taken against a firefighter or law enforcement officer.

1299.2. This title shall apply to all employers of firefighters and law enforcement officers.

1299.3. As used in this title:

(a) "Employee" means any firefighter or law enforcement officer represented by an employee organization defined in subdivision (b).

(b) "Employee organization" means any organization recognized by the employer for the purpose of representing firefighters or law enforcement officers in matters relating to wages, hours, and other terms and conditions of employment within the scope of arbitration.

(c) "Employer" means any local agency employing employees, as defined in subdivision (a), or any entity, except the State of California, acting as an agent of any local agency, either directly or indirectly.

(d) "Firefighter" means any person who is employed to perform firefighting, fire prevention, fire training, hazardous materials response, emergency medical services, fire or arson investigation, or any related duties, without respect to the rank, job title, or job assignment of that person.

(e) "Law enforcement officer" means any person who is a peace officer as defined in Section 830.1 of, subdivisions (b) and (d) of Section 830.31 of, subdivisions (a), (b), and (c) of Section 830.32 of, subdivisions (a), (b), and (d) of Section 830.33 of, subdivisions (a) and (b) of Section 830.35 of, subdivision (a) of Section 830.5 of, and subdivision (a) of Section 830.55 of, the Penal Code, without respect to the rank, job title, or job assignment of that person.

(f) "Local agency" means any governmental subdivision, district, public and quasi-public corporation, joint powers agency, public agency or public service corporation, town, city, county, city and county, or municipal corporation, whether incorporated or not or whether chartered or not.

(g) "Scope of arbitration" means economic issues, including salaries, wages and overtime pay, health and pension benefits, vacation and other leave, reimbursements, incentives, differentials, and all other forms of remuneration. The scope of arbitration shall not include any issue that is protected by what is commonly referred to as the "management rights" clause contained in Section 3504 of the Government Code. Notwithstanding the foregoing, any employer subject to this title that is not exempt under Section 1299.9 may supersede this subdivision by adoption of an ordinance that establishes a broader definition of "scope of arbitration."

1299.4. (a) If an impasse has been declared after the parties have exhausted their mutual efforts to reach agreement over matters within the scope of arbitration, and the parties are unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties is unable to effect settlement of a dispute between the parties after his or her appointment, the employee organization may, by written notification to the employer, request that their differences be submitted to an arbitration panel.

(b) Within three days after receipt of the written notification, each party shall designate a person to serve as its member of an arbitration panel. Within five days thereafter, or within additional periods to which they mutually agree, the two members of the arbitration panel appointed by the parties shall designate an impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.

(c) In the event that the parties are unable or unwilling to agree upon a third person to serve as chairperson, the two members of the arbitration panel shall jointly request from the American Arbitration Association a list of seven impartial and experienced persons who are familiar with matters of employer-employee relations. The two panel members may as an alternative, jointly request a list of seven names from the California State Mediation and Conciliation Service, or a list from either entity containing more or less than seven names, so long as the number requested is an odd number. If after five days of receipt of the list, the two panel members cannot agree on which of the listed persons shall serve as chairperson, they shall, within two days, alternately strike names from the list, with the first panel member to strike names being determined by lot. The last person whose name remains on the list shall be chairperson.

(d) Employees as defined by this chapter shall not be permitted to engage in strikes that endanger public safety.

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(e) No employer shall interfere with, intimidate, restrain, coerce, or discriminate against an employee organization or employee because of an exercise of rights under this title.

(f) No employer shall refuse to meet and confer or condition agreement upon a memorandum of understanding based upon an employee organization's exercise of rights under this title.

1299.5. (a) The arbitration panel shall, within 10 days after its establishment or any additional periods to which the parties agree, meet with the parties or their representatives, either jointly or separately, make inquiries and investigations, hold hearings, and take any other action including further mediation, that the arbitration panel deems appropriate.

(b) For the purpose of its hearings, investigations, or inquiries, the arbitration panel may subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel.

1299.6. (a) The arbitration panel shall direct that five days prior to the commencement of its hearings, each of the parties shall submit the last best offer of settlement as to each of the issues within the scope of arbitration, as defined in this title, made in bargaining as a proposal or counterproposal and not previously agreed to by the parties prior to any arbitration request made pursuant to subdivision (a) of Section 1299.4. The arbitration panel, within 30 days after the conclusion of the hearing, or any additional period to which the parties agree, shall separately decide on each of the disputed issues submitted by selecting, without modification, the last best offer that most nearly complies with the applicable factors described in subdivision (c). This subdivision shall be applicable except as otherwise provided in subdivision (b).

(b) Notwithstanding the terms of subdivision (a), the parties by mutual agreement may elect to submit as a package the last best offer of settlement made in bargaining as a proposal or counterproposal on those issues within the scope of arbitration, as defined in this title, not previously agreed to by the parties prior to any arbitration request made pursuant to subdivision (a) of Section 1299.4. The arbitration panel, within 30 days after the conclusion of the hearing, or any additional period to which the parties agree, shall decide on the disputed issues submitted by selecting, without modification, the last best offer package that most nearly complies with the applicable factors described in subdivision (c).

(c) The arbitration panel, unless otherwise agreed to by the parties, shall limit its findings to issues within the scope of arbitration and shall base its findings, opinions, and decisions upon those factors traditionally taken into consideration in the determination of those

matters within the scope of arbitration, including but not limited to the following factors, as applicable:

(1) The stipulations of the parties.

(2) The interest and welfare of the public.

(3) The financial condition of the employer and its ability to meet the costs of the award.

(4) The availability and sources of funds to defray the cost of any changes in matters within the scope of arbitration.

(5) Comparison of matters within the scope of arbitration of other employees performing similar services in corresponding fire or law enforcement employment.

(6) The average consumer prices for goods and services, commonly known as the Consumer Price Index.

(7) The peculiarity of requirements of employment, including, but not limited to, mental, physical, and educational qualifications; job training and skills; and hazards of employment.

(8) Changes in any of the foregoing that are traditionally taken into consideration in the determination of matters within the scope of arbitration.

1299.7. (a) The arbitration panel shall mail or otherwise deliver a copy of the decision to the parties. However, the decision of the arbitration panel shall not be publicly disclosed, and shall not be binding, for a period of five days after service to the parties. During that five-day period, the parties may meet privately, attempt to resolve their differences and, by mutual agreement, amend or modify the decision of the arbitration panel.

(b) At the conclusion of the five-day period, which may be extended by the parties, the arbitration panel's decision, as may be amended or modified by the parties pursuant to subdivision (a), shall be publicly disclosed and shall be binding on all parties, and, if specified by the arbitration panel, be incorporated into and made a part of any existing memorandum of understanding as defined in Section 3505.1 of the Government Code.

1299.8. Unless otherwise provided in this title, Title 9 (commencing with Section 1280) shall be applicable to any arbitration proceeding undertaken pursuant to this title.

1299.9. (a) The provisions of this title shall not apply to any employer that is a city, county, or city and county, governed by a charter that was amended prior to January 1, 2001, to incorporate a procedure requiring the submission of all unresolved disputes relating to wages, hours, and other terms and conditions of employment within the scope of arbitration to an impartial and experienced neutral person or panel for final and binding determination, provided however that the charter amendment is not subsequently repealed or amended in a form that would no longer require the submission of all unresolved disputes relating to wages, hours, and other terms and conditions of employment within the

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scope of arbitration to an impartial and experienced neutral person or panel, for final and binding determination.

(b) Unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.

SEC. 3. The Legislature finds and declares that the duties of local agency employer representatives under this act are substantially similar to the duties required under present collective bargaining procedures and therefore the costs incurred by the local agency employer representatives in performing those duties are not reimbursable as state-mandated costs.

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EXHIBIT B

DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

January 10, 2002

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of November 5, 2001, the Department of Finance (Finance) has reviewed the test claim submitted by the City of Palos Verdes Estates (Claimant) asking the Commission on State Mandates (Commission) to determine whether specified costs incurred under Chapter 906, Statutes of 2000, (SB 402, Burton), are reimbursable State-mandated costs (Claim Number CSM-01-TC-07, "Binding Arbitration").

Commencing with Page 6, of the test claim, the Claimant has identified various administrative and compensation costs, which it asserts are reimbursable State mandates. Based on various court decisions and the provisions of this Chapter, we have concluded that these administrative and compensation costs are not a reimbursable State mandate as defined by Article XIII B, Section 6 of the California Constitution.

For example, in County of Los Angeles v. State of California, 43 Cal. 3d 46 (hereafter County of Los Angeles), the California Supreme Court established that, in order for costs to be considered reimbursable, local entities must incur these costs through (a) the provision to the public, of a new or higher level of service via a new or an existing program, or (b) the performance of unique requirements that do not apply generally to all residents or entities in the state. Finance asserts that the provisions of the Chapter do not create a new program or a higher level of service in an existing program and that the costs alleged by the Claimant do not stem from the performance of a requirement unique to local government. Therefore, Finance believes that these costs are not a reimbursable State mandate.

The Claimant has identified compensation costs in excess of the employer's last, best, and final offer as reimbursable State-mandated costs. In City of Anaheim v. State of California, 189 Cal. App. 3d 1478, the Court stated: "Moreover, the goals of Article XIII B of the California Constitution 'were to protect residents from excessive taxation and government spending...[and] preclud[e] a shift of financial responsibility from carrying out governmental functions from the state to local agencies...Bearing the costs of the salaries, unemployment insurance, and workers' compensation coverage costs – which all employers must bear neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.' (County of Los Angeles, supra, at p. 61.) Similarly, City is faced with a higher cost of compensation to its employees. This is not the

same as a higher cost of providing services to the public." Since compensation of employees in general is a cost that all employers must pay, Finance believes this cost is not a reimbursable State mandate. Further, if these compensation costs were found to be a reimbursable mandate, such a conclusion could undermine an employer's incentive to collectively bargain in good faith.

In City of Richmond v. Commission on State Mandates, 64 Cal. App. 4th 1190, Richmond argued that legislation requiring city payment of benefits under both CalPERS and workers' compensation to survivors of a police officer killed in the line of duty imposed a requirement unique to local government. The Court concluded that the required action was not unique to local government. Similarly here, compensation of employees in general is not unique to local government. While the Claimant may argue that compensation of firefighters and law enforcement officers is unique to local government, the focus must be on the hardly unique function of compensating employees in general. Therefore increased compensation specified by the claimant is not a reimbursable State mandate as defined by Article XIII B, Section 6 of the California Constitution.

Additionally, Section 2 of this Chapter added Code of Civil Procedure Section 1299.9 paragraph (b) providing that "the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization." Under this Chapter, the Legislature finds that "duties of the local agency employer representatives under this act are substantially similar to the duties required under present collective bargaining procedures and therefore the costs incurred by the local agency employer representatives in performing those duties are not reimbursable as state mandated costs." Moreover, during the course of the arbitration proceedings, there are not any net costs that the employers would have to incur that would not have been incurred in good-faith bargaining or that are not covered by the employee organizations. Therefore, as a result of these provisions, Finance concludes that any administrative costs resulting from the arbitration process established under this Chapter are not reimbursable as State-mandated costs.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your November 5, 2001, letter have been provided with copies of this letter via either United States Mail or, in the case of other State agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact either John Hiber, Principal Program Budget Analyst at (916) 445-3274 or Thomas Lutzenberger, State Mandates Claims Coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Carl Rogers

Carl Rogers
Program Budget Manager

Attachments

DECLARATION OF JOHN HIBER
DEPARTMENT OF FINANCE
CLAIM Number CSM-01-TC-07

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter 906, Statutes of 2000, (SB 402, Burton) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

1-10-02
at Sacramento, CA

John Hiber

PROOF OF SERVICE

Test Claim Name: "Binding Arbitration"
Test Claim Number: Number CSM-01-TC-07

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 6th Floor, Sacramento, CA 95814.

On January 10, 2002, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and non-State agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to State agencies in the normal pickup location at 915 L Street, 6th Floor, for Interagency Mail Service, addressed as follows:

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Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
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B-8
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Division of Accounting & Reporting
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B-29
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Wellhouse and Associates
Attention: David Wellhouse
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Sacramento, CA 95826

Palos Verdes Estates
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 10, 2002, at Sacramento, California.

Felicia Molle

RESPONSE TO DEPARTMENT OF FINANCE

Binding Arbitration
Chapter 906, Statutes of 2000
CSM-01-TC-07
City of Palos Verdes Estates, Claimant

This submittal is in response to the letter of the Department of Finance to Paula Higashi, dated January 10, 2002.

The California Supreme Court decision in *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46 required, prior to there being a finding of a reimbursable state mandate, that a test claim meet two criteria: that the mandate is unique to local government, and that the mandate carries out a state policy.

The Department of Finance has asserted that Binding Interest Arbitration does not create a new program or a higher level of service in an existing program. The Department also asserts that the criteria that the mandate be unique to local government is not present because "the costs alleged by the Claimant do not stem from the performance of a requirement unique to local government".

The City of Palos Verdes Estates respectfully disagrees.

THE MANDATE IS UNIQUE TO LOCAL GOVERNMENT

The courts of this state have explicitly recognized that police and fire protection services are unique to local government – indeed, are two of the most essential and basic functions of local government. *Carmel Valley Fire Protection District* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *County of Sacramento* v. *Superior Court* (1972) 8 Cal.3d 479, 481; and *Verreos* v. *City and County of San Francisco*(1976) 63 Cal.App.3d 86, 107. The Department of Finance has failed to state any facts supporting its conclusion that the administration of police and fire services are not unique to local government.

THE MANDATE CREATES A NEW PROGRAM OR A HIGHER LEVEL OF SERVICE IN AN EXISTING PROGRAM

The Department of Finance, again without any statement of facts, concludes that the provisions of the test claim legislation do not create a new program or higher level of service. The Department of Finance however, did not dispute that prior to the enactment of the test claim legislation, the resolution of bargaining issues for police and fire departments was within the exclusive province of local government pursuant to the Meyers-Milias-Brown Act (hereinafter "MMBA"), California Government Code, Sections 3500 *et seq.*

Under the MMBA local agencies are required, upon request, to bargain with employee organizations recognized pursuant to local rules. If the representatives of a local agency

and the recognized employee organization are unable to reach an agreement, then, in accordance with local rule, the impasse is submitted to the governing body for determination. **There is no third party involvement of any sort, nor any administrative proceeding, mandated under the MMBA.**

Under the test claim legislation, codified in nine sections of the California Code of Civil Procedure (CCP Secs. 1299 through 1299.9), local governments are mandated, upon request of recognized employee organizations representing law enforcement and fire protection employees, to submit all economic issues that are at impasse for determination by a labor arbitrator.

Binding Interest Arbitration is a complex, time consuming and costly process that is totally new and alien to all general law and most charter local governments because nothing like it has been part of the meet and confer process under the MMBA.

The Department of Finance references a provision in the test claim legislation codified as a part of CCP Sec. 1299.9, which provides:

> *Unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.*

Without exception, the experience of the charter agencies that provide for Binding Interest Arbitration under their charters is that the costs incurred by the agencies that are directly related to the arbitration proceeding – not including the cost of the arbitrator and other mutually incurred costs – have run into substantial six figure amounts. Every claimed element of agency costs itemized on page 6 of the Test Claim is a cost incurred as a direct result of the Interest Arbitration program mandated by the test claim legislation.

The only one of the claimed cost items specifically addressed by the Department of Finance is the last one appearing on page 6: the costs of implementing the arbitrator's award above those that would have been incurred under the agency's last best and final offer. That this is a cost that can be expected to result from binding interest arbitration is reflected by an opinion of the Legislative Counsel (a true and correct copy of which is attached hereto as Exhibit 1) addressing earlier proposed legislation similar to the test claim legislation. That opinion finds that the amount of the salary increases which were imposed on the local agency by arbitration which such local agency did not consent to would be a reimbursable state mandate.

Finance asserts that if the additional compensation costs are found to be a reimbursable mandate, there is no impetus for local government to bargain in good faith. To the contrary, employers must always bargain in good faith, lest they be found liable for engaging in an unfair labor practice. Additionally, the fact that the ultimate costs may be reimbursable does not obviate the fact that often it is years before a public entity is

actually reimbursed for its costs of providing service. Given that with many cities public safety consumes a major part of the city's budget, and the time lag between the time that costs are incurred and reimbursement is had, cities cannot fail to negotiate in good faith in an effort to restrain public safety compensation.

When the Legislature mandated a collective bargaining system for California's public schools, costs incident to that legislation were found to be reimbursable. Specifically, the costs of the impasse mechanisms of mediation and fact-finding, *i.e.* advisory interest arbitration, were held reimbursable. (See pages 5 and 6 of the Parameters and Guidelines for *Collective Bargaining,* a true and correct copy of which is attached hereto as Exhibit 2).

The Department of Finance has cited the *City of Anaheim* v. *State of California* (1987) 198 Cal.App.3d 1478 case for the proposition that the costs of salaries, unemployment insurance and workers' compensation coverage costs, which all employers bear, neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental service. However, *Anaheim* bears little, if any, relationship to the test claim legislation. In *Anaheim,* the city contracted with PERS for the provision of retirement benefits to its employees. Pursuant to state statute, PERS transferred funds out of PERS' reserve for deficiencies, which caused a reduction in the interest credited to Anaheim's account, and thus the contribution rates increased for the City. The Court held that there was no reimbursable mandate, because PERS was merely complying with state statute, and the incidental increase in contribution rates did not require the city to perform any actions at all.

The Department of Finance asserts that *City of Richmond* v. *Commission on State Mandates* (1998) 64 Cal.App.4th 1190 is applicable, and on that basis the test claim must be denied. Again, *City of Richmond* is not applicable here. In that matter, the legislature had eliminated an exemption applicable to public employers of safety members for a workers' compensation death benefit. Prior to that legislation, being Chapter 468, Statutes of 1977, only the PERS death benefit was applicable. With the new legislation, both the workers' compensation death benefit as well as the PERS death benefit was now applicable. In finding that there was no reimbursable mandate, the court focused on the fact that Article XIIIB, Section 6 was promulgated to prevent the state from forcing programs on local government. What program preempts local control more than eliminating control over the compensation of public safety employees?

Finance relies, in part, on the Legislative finding that the "duties of the local agency employer representatives under this act are substantially similar to the duties required under present collective bargaining procedures and therefore the costs incurred by the local agency employer representatives in performing those duties are not reimbursable as a state mandated program."

Legislative findings and declarations concerning whether legislation does, or does not, constitute a reimbursable state mandate has no effect on the determination as to whether a program is, in fact, reimbursable. In *Carmel Valley Fire Protection District* v. *State of*

California (1987) 190 Cal.App.3d 521, the court examined legislative disclaimers and budget control language and found they are no defense to reimbursement:

> "As a general defense against the order to reimburse, State insists that the Legislature has itself concluded that the claimed costs are not reimbursable. This determination took the combined form of disclaimers, findings and budget control language. State interprets this self-serving legislation, as well as the legislative and gubernatorial deletions, as forever sweeping away State's obligation to reimburse the state-mandated costs at issue. Consequently, any order that ignores these restrictions on payment would amount to a court-ordered appropriation. As we shall conclude, these efforts are merely transparent attempts to do indirectly that which cannot lawfully be done directly." *Id.* at 541.

Just as any legislative finding that a program does not constitute a reimbursable state mandate, so too any legislative statements that the program is reimbursable is not binding. As the legislature has created the Commission on State Mandates as the sole and exclusive body to so determine, any legislative findings are irrelevant to the determination of the issue as to whether a state mandated program does, in fact, exist. *County of Los Angeles* v. *Commission on State Mandates* (1995) 32 Cal.App.4th 805, 819.

Thus, it is the actual activities for administration of this new program that must be examined in order to determine the nature and extent to which reimbursement is appropriate.

CONCLUSION

It is respectfully submitted that, as a matter of fact, the State's imposition of Binding Interest Arbitration on local government constitutes a new program that provides a higher level of service in the administration of public safety employment - one that is unique to local government. Accordingly, as a matter of law, the test claim meets the requisite standards for the finding of a reimbursable state mandate.

CERTIFICATION

I certify by my signature below that that the statements made herein are true and correct of my own knowledge, or as to all other matters, I believe them to be true and correct based upon my information and belief.

Executed this 20th day of May at Palos Verdes Estates, California.

James Hendrickson, City Manager

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DEPUTIES

Sacramento, California
January 21, 1980

Honorable John W. Holmdahl
Senate Chamber

Local Safety Employees (S.B. 888) - #805

Dear Senator Holmdahl:

You have referred us to Senate Bill No. 888, as amended May 14, 1979, (hereafter S.B. 888), and have asked the following questions with regard thereto.

QUESTION NO. 1

If the cost disclaimer in Section 10 of S.B. 888 is deleted, what costs of local agencies would be reimbursable by the state?

OPINION NO. 1

If the cost disclaimer in Section 10 of S.B. 888 is deleted, the amount of the state's reimbursement should include the procedural costs of implementing compulsory and binding arbitration, and the amount of the salary increases which were imposed on the local agency by arbitration which such local agency did not consent to.

ANALYSIS NO. 1

S.B. 888 would, among other things, revise provisions of existing law with respect to the employer-employee relations of firefighters and peace officers employed by a local agency.

Such bill would provide that in situations where a mediator is unable to affect settlement of a controversy between an employer and a representative of such employees, or if the parties are unable to agree to appointment of a mediator under existing law, either party may, pursuant to specified procedures, have their differences submitted to binding arbitration.

An arbitration panel appointed pursuant to S.B. 888 would be required to meet with the parties or their representatives within 10 days after its establishment, to make various inquiries, investigations, and hold hearings.

The arbitration panel would be required to make findings and recommendations based on certain criteria considered by the panel pursuant to procedures in the bill. There would then be a waiting period of 10 days prior to public disclosure, or a longer period if agreed to, during which the parties could mutually amend the award. At the end of such period, the amended agreement or the panel's decision would be disclosed, and would be binding upon the parties.

In addition, Section 10 of S.B. 888 provides that no appropriation is made nor any obligation created by the bill to reimburse local agencies for state-mandated costs, and provides that the other remedies and procedures for providing such reimbursement shall have no application to the bill. However, you have asked us to assume that Section 10 is deleted from S.B. 888 for purposes of this opinion.

Subdivision (a) of Section 2231 of the Revenue and Taxation Code provides that the state shall reimburse each local agency for all "costs mandated by the state," as defined in Section 2207 of the Revenue and Taxation Code.

Section 2207 of the Revenue and Taxation Code, in turn, provides, in applicable part, that "costs mandated by the state" means any increased costs which a local agency is required to incur as a result of any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program.

The general rule is that statutes should be interpreted according to the intent of the Legislature as indicated on the face of the enactment (City and County of San Francisco v. Mooney, 106 Cal. 586, 588).

In other words, if the Legislature required local agencies to follow specified collective bargaining procedures but allowed such local agencies ultimate discretion to establish salaries, we think Section 2231 of the Revenue and Taxation Code would require that the state pay for the procedural costs but not for the amount of any additional wages approved by such boards.

On the other hand, if such discretion were taken away from such boards--such as by the provisions of S.B. 888 requiring that salary increases be submitted to binding arbitration--it is our opinion that the state is imposing a "requirement" on local agencies over which they have no control. In such case, if the provisions of Section 2231 of the Revenue and Taxation Code are followed, we think the amount of the state's reimbursement should include the amount of the salary increases which the local agencies were "required" to pay--i.e., that portion of the amount imposed on a local agency by arbitration which such local agency did not consent to.

Therefore, if the cost disclaimer in Section 10 of S.B. 888 is deleted, the amount of the state's reimbursement should include the procedural costs of implementing compulsory and binding arbitration, and the amount of the salary increases which were imposed on the local agency by arbitration which such local agency did not consent to.

QUESTION NO. 2

If the salary costs imposed on a local agency by arbitration under S.B. 888 exceed the amount which the local agency consented to, and the state does not provide reimbursement for such costs, what alternatives does the local agency have with regard to obtaining such reimbursement?

OPINION AND ANALYSIS NO. 2

A new initiative constitutional amendment, the so-called "Gann Initiative," was placed upon the ballot as Proposition 4 of the November 6, 1979, special election (see Ch. 193, Stats. 1979). Proposition 4 was adopted by the people, and adds an Article XIII B to the California Constitution, which, with certain exceptions, prohibits the annual appropriations subject to limitation of any governmental entity from exceeding the appropriations limit of such entity of government for the prior year adjusted for changes in cost of living and population.

Section 10 of Article XIII B provides that the article is to become effective commencing with the first day of the fiscal year following its adoption. Hence, Article XIII B will become effective July 1, 1980.

Section 6 of Article XIII B will require, with certain exceptions, that "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service ... ."

This constitutional mandate is somewhat similar to the present statutory mandate provided by Section 2231 of the Revenue and Taxation Code. Section 2231 also requires that the state reimburse each local agency for all "costs mandated by the state" and provides for such reimbursement by the State Controller. If a local agency believes that it has not been fully reimbursed for costs imposed by a chaptered bill, a procedure for making and determining a claim for reimbursement is provided by Article 3.5 (commencing with Section 2250) of Chapter 3 of Part 4 of Division 1 of the Revenue and Taxation Code.

The initial determination regarding such a claim is made by the State Board of Control (Sec. 2253.2, R.& T.C.). If either the claimant or the state is dissatisfied by such determination, it may apply for judicial review of the determination pursuant to Section 1094.5 of the Code of Civil Procedure (administrative mandamus) (see Sec. 2253.5, R.& T.C.). If the court finds that the decision of the board is not supported by substantial evidence, it may order the board to hold another hearing, as directed (Sec. 2253.5, R.& T.C.; see also subd. (e), Sec. 1094.5, C.C.P.). If under this procedure, it is finally determined that a claim should be allowed, in whole or in part, the board is required to so report to the Legislature, which, in turn, is directed to introduce legislation to provide for an appropriation sufficient to pay the claims allowed (Sec. 2255, R.& T.C.).

The Legislature would, we think, be permitted to continue to provide a similar procedure to implement the constitutional requirements of Section 6 of Article XIII B. The primary difference will be that the requirement of reimbursement (on and after July 1, 1980) will now be a constitutional mandate, and the Legislature will be limited in its ability to modify this mandate by subsequent legislation.

We pointed out above that Section 2253.5 of the Revenue and Taxation Code expressly authorizes a claimant who is dissatisfied by the Board of Control determination regarding a claim for reimbursement to apply for judicial review of this determination. We also think that if, after a claim is allowed, the Legislature fails to provide an appropriation for such claim as required by Section 6 of Article XIII B, further judicial relief could be obtained.

However, pursuant to Section 10 of S.B. 888, the Board of Control would be expressly prohibited by statute from considering the local entity's claim for reimbursement by the statute which created the alleged mandates. In these circumstances, it would be unreasonable to require the local entity to perform the futile act of filing a claim for reimbursement which the Board of Control is expressly prohibited from considering.

In these circumstances, we think that the local entity would be permitted to file an action for judicial relief without first pursuing this administrative remedy.

We think that in such an action the court could either fix the amount of costs to be reimbursed or, more likely, simply hold that the provision denying administrative relief is unconstitutional and thereby require the local entity to pursue such relief and require the Board of Control to consider the claim filed notwithstanding the disclaimer.

In this regard, however, it is a well-established principle of constitutional law that the commanding of specific legislative action is beyond the power of the courts. The rule was stated recently in California State Employees' Assn. v. State of California, 32 Cal. App. 3d 103, 108-109, as follows:

> "... [T]he courts have no authority to compel a separate and equal branch of state government to make appropriation of funds. At the time of the filing of this action, section 1 of article III of the state Constitution provided: 'The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.' [Now Sec. 3, Art. III, Cal. Const.] As stated in Myers v. English, ... [9 Cal. 341, 349]: 'We think the power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the Legislature. It is a very delicate and responsible trust, and if not used properly by the Legislature at one session, the people will be certain to send to the next more discreet and faithful servants.

> "'It is within the legitimate power of the judiciary, to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of non-action. The Legislature being the creative element in the system, its action cannot be quickened by the other departments. Therefore, when the Legislature fails to make an appropriation, we cannot remedy that evil. It is a discretion specially confided by the Constitution to the body possessing the power of taxation. There may arise exigencies, in the progress of human affairs, when the first moneys in the treasury would be required for more pressing emergencies, and when it would be absolutely necessary to delay the ordinary appropriations for salaries. We must trust to the good faith and integrity of all the departments. Power must be placed somewhere, and confidence reposed in some one.' . . ." (emphasis in original; citations and footnote omitted.)

Stated more succinctly, if the Legislature fails to provide reimbursement as required by Section 6 of Article XIII B, a court could declare the statute mandating the new program or higher level of services to be unconstitutional, but the court would not be able to compel the Legislature to appropriate funds to pay for such mandated costs.

The remedy of holding the legislative mandate unconstitutional is, however, more drastic than may be required. It has been held that a public officer is not required to expend funds in excess of the amount which is available to him or her (see Cache Valley General Hospital v. Cache County (Utah), 67 P. 2d 639). Applying such a

rule here, a court could hold that the application of a particular mandate was conditioned upon the appropriation of funds by the state for reimbursement of the costs resulting from such mandate. Under this alternative, the mandate would not be unconstitutional, but simply inoperative, and performance of the mandate would be excused until reimbursement was provided.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By Verne L. Oliver
Verne L. Oliver
Deputy Legislative Counsel

VLO:jp

Two copies to Honorable David A. Roberti, pursuant to Joint Rule 34.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. CSM 97-TC-08
Government Code Section 3540 et seq., as added by Chapter 961, Statutes of 1975 et al Government Code Section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	*Consolidation of Collective Bargaining and Collective Bargaining Agreement Disclosure* ADOPTION OF AMENDED PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTIONS 1183.12 AND 1183.2. (Adopted on August 20, 1998)

DECISION

The attached *amended* Parameters and Guidelines of the Commission on State Mandates were hereby adopted in the above-entitled matter.

This Decision shall become effective on August 25, 1998.

Paula Higashi

PAULA HIGASHI, Executive Director

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Adopted: October 22, 1980
Amendments Adopted: 8/19/81
(Amendments applicable only to claims for costs incurred after June 30, 1981)
Amended: 3/17/83
Amended: 9/29/83
Amended: 12/15/83
Amended: 6/27/85
Amended: 10/20/88
Amended: 7/22/93
Amended: 8/20/98
Document Date: August 21, 1998

CLAIMANT'S PROPOSED CONSOLIDATED PARAMETERS AND GUIDELINES, AS MODIFIED BY STAFF

Chapter 961, Statutes of 1975
Chapter 1213, Statutes of 1991

Collective Bargaining
and
Collective Bargaining Agreement Disclosure

An act to repeal Article 5 (commencing with Section 13080) of Chapter 1 of Division 10 of the Education Code, and to add Chapter 10.7 (commencing with Section 3540) to Division 4 of Title 1 of the Government Code, relating to public educational employment relations, and making an appropriation. This bill, which was operative July 1, 1976, repealed the Winton Act and enacted provisions to meet and negotiate, thereby creating a collective bargaining atmosphere for public school employers. Chapter 1213, Statutes of 1991 added section 3547.5 to the Government Code. Government Code section 3547.5 requires school districts to publicly disclose major provisions of a collective bargaining agreement after negotiations, but before the agreement becomes binding.

A. Operative Date of Mandate

The provisions relating to the creation, certain duties of, and appropriations for the Public Employment Relations Board were operative on January 1, 1976. The provisions relating to the organizational rights of employees, the representational rights of employee organizations, the recognition of exclusive representatives, and related procedures were operative on April 1, 1976. The balance of the added provisions were operative on July 1, 1976.

The provisions relating to Collective Bargaining Agreement Disclosure added by Chapter 1213, Statutes of 1991 were operative on January 1, 1992. The California Department of Education issued Management Advisory 92-01 dated May 15, 1992, to establish the

public disclosure format for school district compliance with the test claim statute.

B. Period of Claim

Only costs incurred after January 1, 1978 may be claimed. The initial claim should have included all costs incurred for that portion of the fiscal year from January 1, 1978, to June 30, 1978.

Pursuant to language included in the 1980-81 budget, claims shall no longer be accepted for this period. All subsequent fiscal year claims should be filed with the State Controller's Office for processing.

The test claim on Chapter 1213, Statutes of 1991 was filed with the Commission on December 29, 1997. Accordingly, the period of reimbursement for the provisions relating to disclosure begins July 1, 1996. Only disclosure costs incurred after July 1, 1996 may be claimed.

C. Mandated Cost

Public school employers have incurred costs by complying with the requirements of Section 3540 through 3549.1 established by Chapter 961, Statutes of 1975. In addition, some costs have been incurred as a result of compliance with regulations promulgated by the Public Employment Relations Board (PERB). Since these activity costs (referred to collectively as "Rodda Act" activities and costs in this document), in many respects, simply implement the original legislation, it is intended that these parameters and guidelines have embodied those regulations or actions taken by PERB prior to December 31, 1978.

D. County Superintendent of Schools Filing

If the County Superintendent of Schools files a claim on behalf of more than one school district, the costs of the individual school district must be shown separately.

E. Governing Authority

The costs for salaries and expenses of the governing authority, for example the School Superintendent and Governing Board, are not reimbursable. These are costs of general government as described by the federal guideline entitled "Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," ASMB C-10.

F. Certification

The following certification must accompany all claims:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claim for funds with the State of California.

_____ Signature of Authorized Representative

Date

_____ Title

Telephone Number

_____

G. Claim Components (Reimbursable Costs)

Reimbursable activities mandated by Chapter 961, Statutes of 1975 and Chapter 1213, Statutes of 1991 are grouped into seven components, G1 through G7. The cost of activities grouped in components G1, G2, and G3 are subject to offset by the historic cost of similar Winton Act activities as described in H2.

1. Determination of appropriate bargaining units for representation and determination of the exclusive representatives.

   a. Unit Determination: Explain the process for determining the composition of the certificated employee council under the Winton Act, and the process for determining appropriate bargaining units including the determination of management, supervisory and confidential employees, under Chapter 961, Statutes of 1975, if such activities were performed during the fiscal year being claimed.

   b. Determination of the Exclusive Representative: Costs may include receipt and posting of the representation and decertification notices and, if necessary, adjudication of such matters before the PERB.

c. Show the actual increased costs including salaries and benefits for employer representatives and/or necessary costs for contracted services for the following functions:

(1) Development of proposed lists for unit determination hearings if done during the fiscal year being claimed. Salaries and benefits must be shown as described in Item H3.

(2) Representation of the public school employer at PERB hearings to determine bargaining units and the exclusive representative. Actual preparation time will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(3) If contracted services are used for either (a) or (b) above, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

(4) Indicate the cost of substitutes for release time for employer and exclusive bargaining unit witnesses who testify at PERB hearings. The job classification of the witnesses and the date they were absent must also be submitted. Release time for employee witnesses asked to attend the PERB hearing by bargaining units will not be reimbursed.

(5) Identify the travel costs for employer representatives to any PERB hearing. Reimbursement shall reflect the rate specified by the regulations governing employees of the local public school employer.

(6) Cost of preparation for one transcript per PERB hearing will be reimbursed.

2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.

a. Submit with your claim any Public Employment Relations Board agreements or orders which state how the election must be held.

b. If a precinct voting list was required by PERB, indicate the cost of its development. Salaries and benefits must be shown as described in Item H3.

c. The salary and benefits of a school employer representative, if required by PERB for time spent observing the counting of ballots, will be

reimbursed. The representatives' salary must be shown as described in Item H3.

3. Negotiations: Reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.

a. Show the costs of salaries and benefits for employer representatives participating in negotiations. Contracted services will be reimbursed. Costs for maximum of five public school employer representatives per unit, per negotiation session will be reimbursed. Salaries and benefits must be shown as described on Page 7, Item H3.

b. Show the costs of salaries and benefits for employer representatives and employees participating in negotiation planning sessions. Contracted services for employer representatives will be reimbursed. Salaries and benefits must be shown as described in Item H3.

c. Indicate the cost of substitutes for release time of exclusive bargaining unit representatives during negotiations. Give the job classification of the bargaining unit representative that required a substitute and dates the substitute worked. Substitute costs for a maximum of five representatives per unit, per negotiation session will be reimbursed. The salaries of union representatives are not reimbursable.

d. Reasonable costs of reproduction for a copy of the initial contract proposal and final contract, which is applicable and distributed to each employer representative (i.e. supervisory, management, confidential) and a reasonable number of copies for public information will be reimbursed. Provide detail of costs and/or include invoices. Costs for copies of a final contract provided to collective bargaining unit members are not reimbursable.

e. If contract services are used for a. and/or b. above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

f. A list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted.

4. Impasse Proceedings

a. Mediation

(1) Costs for salaries and benefits for employer representative personnel are reimbursable. Contracted services will be reimbursed. Costs for a maximum of five public school employer representatives per mediation session will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Indicate the costs of substitutes for the release time of exclusive bargaining unit representatives during impasse proceedings. The job classification of the employee witnesses and the date they were absent shall be indicated. Costs for a maximum of five representatives per mediation session will be reimbursed.

(3) Renting of facilities will be reimbursed.

(4) Costs of the mediator will not be reimbursed.

(5) If contract services are used under 1, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

b. Fact-finding publication of the findings of the fact-finding panel. (To the extent fact-finding was required under the Winton Act during the 1974-75 fiscal year, costs are not reimbursable.)

(1) All costs of the school employer panel representative shall be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Fifty percent of the costs mutually incurred by the fact-finding panel shall be reimbursed. This may include substitutes for release time of witnesses during fact-finding proceedings, and the rental of facilities required by the panel.

(3) Special costs imposed on the public school employer for the development of unique data required by a fact-finding panel will be reimbursed. Describe the special costs and explain why this data would not have been required by a fact-finding panel under the Winton Act. Salaries and benefits must be shown as described in Item H3.

5. Collective Bargaining Agreement Disclosure

Disclosure of collective bargaining agreement *after* negotiation and *before* adoption by governing body; as required by Government Code section 3547.5 and California State Department of Education Management Advisory 92-01 (or subsequent replacement), attached to the amended Parameters and Guidelines. Procedures or formats which exceed those or which duplicate activities required under any other statute or executive order are not reimbursable under this item.

a. Prepare the disclosure forms and documents, as specified.

b. Distribute a copy of the disclosure forms and documents, to board members, along with a copy of the proposed agreement, as specified.

c. Make a copy of the disclosure forms and documents and of the proposed agreement available to the public, prior to the day of the public meeting, as specified.

d. Training employer's personnel on preparation of the disclosure forms and documents, as specified.

e. Supplies and materials necessary to prepare the disclosure forms and documents, as specified.

For 5. a., b., and c., list the date(s) of the public hearing(s) at which the major provisions of the agreement were disclosed in accordance with the requirements of Government Code section 3547.5 and Department of Education Advisory 92-01 (or subsequent replacement).

6. Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.

a. Salaries and benefits of employer personnel involved in adjudication of contract disputes. Contracted services will be reimbursed. Salaries and benefits must be shown as described in Item H3.

b. Indicate substitutes necessary for release time of the representatives of an exclusive bargaining unit during adjudication of contract disputes. The job classification of the employee witnesses and the dates they were absent shall also be indicated.

c. Reasonable costs incurred for a reasonable number of training sessions held for supervisory and management personnel on contract administration/interpretation of the negotiated contract are reimbursable. Contract interpretations at staff meetings are not reimbursable. Personal development and informational programs, i.e., classes, conferences, seminars, workshops, and time spent by employees attending such meetings are not reimbursable. Similarly, purchases of books and subscriptions for personal development and information

purposes are not reimbursable. Salaries and benefits must be shown as described in Item H3.

d. The cost of one transcript per hearing will be reimbursed.

e. Reasonable public school employer costs associated with a contract dispute which is litigated are reimbursable, as follows:

1. Reasonable public school employer costs associated with issues of contract disputes which are presented before PERB are reimbursable.

2. Reasonable public school employer cost of litigation as a defendant in the court suit involving contract disputes may be reimbursable.

3. Where the public school employer is the plaintiff in a court suit to appeal a PERB ruling, costs are reimbursable only if the public school employer is the prevailing party (after all appeals, final judgment).

4. No reimbursement is allowed where the public school employer has filed action directly with the courts without first submitting the dispute to PERB, if required.

5. No reimbursement shall be provided for filing of amicus curiae briefs.

f. Expert witness fees will be reimbursed if the witness is called by the public school employer.

g. Reasonable reproduction costs for copies of a new contract which is required as a result of a dispute will be reimbursed.

h. If contract services are used under "a" above, copies of contract invoices must be submitted with your claim. Contract costs must be shown as described in Item H5.

i. Public school employer's portion of arbitrators' fees for adjudicating grievances, representing 50% of costs, will be reimbursed.

7. Unfair labor practice adjudication process and public notice complaints.

a. Show the actual costs for salaries and benefits of employer representatives. Services contracted by the public school employer are reimbursable. Salaries and benefits must be shown as described in Item

H3.

b. Indicate cost of substitutes for release time for representatives of exclusive bargaining units during adjudication of unfair practice charges.

c. The cost of one transcript per PERB hearing will be reimbursed.

d. Reasonable reproduction costs will be reimbursed.

e. Expert witness fees will be reimbursed if the witness is called by the public school employer.

f. If contract services are used under "a" above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

g. No reimbursement for an appeal of an unfair labor practice decision shall be allowed where the Public Employee Relations Board is the prevailing party.

h. No reimbursement for filing of amicus curiae briefs shall be allowed.

H. Supporting Data for Claims--Report Format for Submission of Claim.

1. Description of the Activity: Follow the outline of the claim components. Cost must be shown separately by component activity. Supply workload data requested as part of the description to support the level of costs claimed. The selection of appropriate statistics is the responsibility of the claimant.

2. Quantify "Increased" Costs: Public school employers will be reimbursed for the "increased costs" incurred as a result of compliance with the mandate.

a. For component activities G1, G2, and G3:

1. Determination of the "increased costs" for each of these three components requires the costs of current year Rodda Act activities to be offset [reduced] by the cost of the base-year Winton Act activities. The Winton Act base-year is generally fiscal year 1974-75.

Winton Act base-year costs are adjusted by the Implicit Price Deflator prior to offset against the current year Rodda Act costs for these three components. The Implicit Price Deflator shall be listed in the annual claiming instructions of the State Controller.

2. The cost of a claimant's current year Rodda Act activities are offset [reduced] by the cost of the base-year Winton Act activities either: by matching each component, when claimants can provide sufficient

documentation to segregate each component of the Winton Act base-year activity costs; or, by combining all three components when claimants cannot satisfactorily segregate each component of Winton Act base-year costs.

b. For component activities G4, G6, and G7:

All allowable activity costs for these three Rodda Act components are "increased costs" since there were no similar activities required by the Winton Act; therefore, there is no Winton Act base-year offset to be calculated.

BASE-YEAR	ADJUSTMENT
1974-1975	1.490 1979-80 FY
"	1.560 1980-81 FY
"	1.697 1981-82 FY
"	1.777 1982-83 FY
"	1.884 1983-84 FY

3. Salary and Employees' Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.

4. Services and Supplies: Only expenditures which can be identified as a direct cost as a result of the mandate can be claimed.

5. Professional and Consultant Services: Separately show the name of professionals or consultants, specify the functions the consultants performed relative to the mandate, length of appointment, and the itemized costs for such services. Invoices must be submitted as supporting documentation with your claim. The maximum reimbursable fee for contracted services is $100 per hour. Annual retainer fees shall be no greater than $100 per hour. Reasonable expenses will also be paid as identified on the monthly billings of consultants. However, travel expenses for consultants and experts (including attorneys) hired by the claimant shall not be reimbursed in an amount higher than that received by State employees, as established under Title 2, Div. 2, Section 700ff, CAC.

6. Allowable Overhead Cost: School districts must use the Form J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

County Offices of Education must use the Form J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

Community College Districts must use one of the following three alternatives:

- A Federally-approved rate based on OMB Circular A-21;
- The State Controller's FAM-29C which uses the CCFS-311; or
- Seven percent (7%).

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On May 21, 2002 I served the Response to Department of Finance, Binding Arbitration, CSM-01-TC-07, by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied State mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 21st day of May, 2002 at Sacramento, California.

Cynthia Post

Declarant

Ms. Susan Geanacou, Senior Staff Attorney
Department of Finance
915 L Street, Suite 1190
Sacramento, CA 95814

Ms. Glenn Haas, Bureau Chief
State Controller's Office
Division of Accounting & Reporting
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Mr. Leonard Kaye
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Auditor-Controller's Office
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STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, *Governor*

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March 23, 2006

Mr. Allan Burdick
DMG-Maximus
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Binding Arbitration (01-TC-07)
City of Palos Verdes Estates, Claimant
Code of Civil Procedure, Sections 1281.1, 1299, 1299.2, 1299.3
1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9
Statutes of 2000, Chapter 906

Dear Mr. Burdick:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments
Any party or interested person may file written comments on the draft staff analysis by Thursday, **April 13, 2006.** You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing
This test claim is set for hearing on **Thursday, May 25, 2006** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about May 11, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 322-4230 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

MAILED: _____ FAXED: _____
DATE: 2/23/09 INITIAL: LD
CHRON: _____ FILE: 7
WORKING BINDER: _____

ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Code of Civil Procedure Sections 1281.1, 1299, 1299.2, 1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9
Statutes 2000, Chapter 906

Binding Arbitration
(01-TC-07)

City of Palos Verdes Estates, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

STAFF ANALYSIS

Claimant

City of Palos Verdes Estates

Chronology

10/24/01	City of Palos Verdes Estates filed test claim with the Commission
01/10/02	The Department of Finance submitted comments on test claim with the Commission
05/22/02	City of Palos Verdes Estates filed reply to Department of Finance comments
03/20/06	Commission staff issued draft staff analysis

Background

This test claim addresses legislation involving labor relations between local agencies and their law enforcement officers and firefighters, and provides that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

Since 1968, local agency labor relations have been governed by the Meyers-Milias-Brown Act.[1] The act requires local agencies to grant employees the right to self-organization, to form, join or assist labor organizations, and to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body. The California Supreme Court has recognized that it is not unlawful for public employees to strike unless it has been determined that the work stoppage poses an imminent threat to public health or safety.[2] Employees of fire departments and fire services, however, are specifically denied the right to strike or to recognize a picket line of a labor organization while in the course of the performance of their official duties.[3] Additionally, the Fourth District Court of Appeal has held that police work stoppages are per se illegal.[4]

Under the Meyers-Milias-Brown Act, the local employer establishes rules and regulations regarding employer-employee relations, in consultation with employee organizations.[5] The local agency employer is obligated to meet and confer in good faith with representatives of employee bargaining units on matters within the scope of representation.[6] If agreement is reached between the employer and the employee representatives, that agreement is

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[1] Government Code sections 3500 et seq.; Statutes 1968, chapter 1390.

[2] *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564.

[3] Labor Code section 1962.

[4] *City of Santa Ana v. Santa Ana Police Benevolent Association* (1989) 207 Cal.App.3d 1568.

[5] Government Code section 3507.

[6] Government Code section 3505.

memorialized in a memorandum of understanding which becomes binding once the local governing body adopts it.[7]

Related Test Claim — Local Government Employment Relations (01-TC-30)

A related test claim was filed on August 1, 2002, regarding statutory changes to the Meyers-Milias-Brown Act (Stats. 2000, ch. 901) and regulations implementing the statutory changes (Title 8, California Code of Regulations, §§ 31001 – 61630). That test claim has not yet been brought before the Commission.

Test Claim Legislation

The test claim legislation[8] added several sections to the Code of Civil Procedure providing new, detailed procedures that could be invoked by the employee organization in the event an impasse in negotiations has been declared. Section 1299 stated the following legislative intent:

> The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern, are a predictable consequence of labor strife and poor morale that is often the outgrowth of substandard wages and benefits, and are not in the public interest. The Legislature further finds and declares that the dispute resolution procedures contained in this title provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers.
>
> It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers. It is further the intent of the Legislature that, in order to effectuate its predominant purpose, this title be construed to apply broadly to all public employers, including, but not limited to, charter cities, counties, and cities and counties in this state.
>
> It is not the intent of the Legislature to alter the scope of issues subject to collective bargaining between public employers and employee organizations representing firefighters or law enforcement officers.
>
> The provisions of this title are intended by the Legislature to govern the resolution of impasses reached in collective bargaining between public employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests…

The legislation provided that if an impasse was declared after the parties exhausted their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties were unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties was unable to effect settlement of a dispute between the parties, the employee

[7] Government Code section 3505.1.

[8] Statutes 2000, chapter 906 (Senate Bill 402).

organization could, by written notification to the employer, request that their differences be submitted to an arbitration panel.[9] Within three days after receipt of written notification, each party was required to designate one member of the panel, and those two members, within five days thereafter, were required to designate an additional impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.[10]

The arbitration panel was required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon.[11] The panel was authorized to make inquiries and investigations, hold hearings, and take any other action, including further mediation, that the panel deemed appropriate.[12] Five days prior to the commencement of the arbitration panel's hearings, each of the parties was required to submit a last best offer of settlement on the disputed issues.[13] The panel decided the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complied with specified factors.[14]

The panel then delivered a copy of its decision to the parties, but the decision could not be publicly disclosed for five days.[15] The decision was not binding during that period, and the parties could meet privately to resolve their differences and, by mutual agreement, modify the panel's decision.[16] At the end of the five-day period, the decision as it may have been modified by the parties was publicly disclosed and binding on the parties.[17]

Code of Civil Procedure section 1299.9, subdivision (b), provided that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, would be borne by the employee organization.

Test Claim Legislation Declared Unconstitutional

The test claim legislation in its entirety was declared unconstitutional by the California Supreme Court on April 21, 2003, as violating portions of article XI of the California Constitution.[18] The basis for the decision is that the legislation: 1) deprives the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and 2) delegates to a private body the power to interfere with local agency

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[9] Code of Civil Procedure section 1299.4, subdivision (a).

[10] Code of Civil Procedure section 1299.4, subdivision (b).

[11] Code of Civil Procedure section 1299.5, subdivision (a).

[12] *Ibid.*

[13] Code of Civil Procedure section 1299.6, subdivision (a).

[14] *Ibid.*

[15] Code of Civil Procedure section 1299.7, subdivision (a).

[16] *Ibid.*

[17] Code of Civil Procedure section 1299.7, subdivision (b).

[18] *County of Riverside v. Superior Court of Riverside County* (2003) 30 Cal.4th 278 (*County of Riverside*).

financial affairs and to perform a municipal function, as prohibited in article XI, section 11, subdivision (a).[19]

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

- Litigation costs until such time as there is a final judgment on the constitutionality of S.B 402, including actions for declaratory relief, opposition petitions to compel arbitration, and resultant appeals.
- Costs for training agency management, counsel, staff and members of governing bodies regarding S.B. 402 as well as the intricacies thereof.
- Costs incident to restructuring bargaining units that include employees that are covered by S.B. 402 and those which are not covered by S.B. 402.
- Increased staff time in preparing for negotiations in order to collect and compile comparability data specified in Code of Civil Procedure, section 1299.4.
- Increased time of agency negotiators, including staff, consultants, and attorneys, in handling two track negotiations: those economic issues which are subject to S.B 402 arbitration and those issues which are not subject to arbitration.
- Time to prepare for and consult with the governing board regarding the last best and final offer to be submitted to the arbitration panel.
- Time to prepare for and participate in any mediation process.
- Consulting time of negotiators, staff and counsel in selecting the agency panel member.
- Time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator.
- Time of the agency negotiators, staff and counsel in briefing the agency panel member.
- Time of the agency negotiators, staff and counsel in preparing for the arbitration hearing.
- Time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses.
- Time of the agency panel member and attorney in pre-arbitration meetings of the panel.
- Staff and attorney time involved in discovery pursuant to Code of Civil Procedure, sections 1281.1, 1281.2 and 1299.8.
- Staff, attorney, witness and agency panel member time for the hearings.
- Attorney time in preparing the closing brief.
- Agency panel member time in consulting in closed sessions with the panel.
- Time of the attorney, negotiators, and staff in consulting with the agency panel member prior to the issuance of the award.
- Time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators.

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[19] *County of Riverside* (2003) 30 Cal.4th 278, 282.

- Time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.
- Costs of implementing the award above those that would have been incurred under the agency's last best and final offer.
- Costs of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous, including the fact that the act covers "all other forms of remuneration," and covers employees performing "any related duties" to firefighting and investigating.
- An additional intangible cost element at the last best offer phase of negotiations, involving "enhancements" to compensation packages that may be added when the local agency perceives possible vulnerabilities in its negotiating position, estimated to be an overall 3% to 5% increase based on the most recent negotiations with the Palos Verdes Estates Police Officers' Association.

Department of Finance Position

Department of Finance submitted comments on the test claim concluding that the administrative and compensation costs claimed in the test claim are not reimbursable costs pursuant to article XIII B, section 6 of the California Constitution, based on various court decisions and the provisions of the test claim legislation. Specifically, the Department asserts that:

1) the test claim legislation does not create a new program or higher level of service in an existing program, and the costs alleged do not stem from the performance of a requirement unique to local government;

2) alleged higher costs for compensating the claimant's employees are not reimbursable, since compensation of employees in general is a cost that all employers must pay; furthermore, allowing reimbursement for any such costs could "undermine an employer's incentive to collectively bargain in good faith;"

3) alleged cost for increased compensation is not unique to local government; even though claimant may argue that compensation of firefighters and law enforcement officers is unique to local government, the "focus must be on the hardly unique function of compensating employees in general;" and

4) Code of Civil Procedure section 1299.9, subdivision (b), provides that costs of the arbitration proceeding and expenses of the arbitration panel, except those of the employer representative, are to be borne by the employee organization; in the test claim legislation, the Legislature specifically found that the duties of the local agency employer representatives are substantially similar to the duties required under the current collective bargaining procedures and therefore the costs incurred in performing those duties are not reimbursable state mandated costs; and thus, during the course of arbitration proceedings, "there are not any net costs that the employers would have to incur that would not have been incurred in good faith bargaining or that are not covered by the employee organizations."

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[20] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[21] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[22] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[23] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[24]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[25] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[26] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[27]

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[20] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[21] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[22] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[23] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[24] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (San Diego Unified School Dist.); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[25] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874; (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.).

[26] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[28]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[29] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[30]

This test claim presents the following issue:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Is the test claim legislation subject to article XIII B, Section 6 of the California Constitution?

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.

As noted above, the test claim legislation in its entirety was declared unconstitutional by the California Supreme Court in *County of Riverside.*[31] The Court stated that the legislation violates two provisions of article XI of the California Constitution: "It deprives the county of its authority to provide for the compensation of its employees (§ 1, subd. (b)) and delegates to a private body the power to interfere with county financial affairs and to perform a municipal function (§ 11, subd.(a))."[32]

Thus, no mandate is in existence as of the date of the court's ruling on April 21, 2003. The question, then, is whether any mandate existed from the time the legislation was enacted until the court's ruling.

There exists no "general rule" with regard to the effectiveness of a statute during that period between its passage and the unconstitutionality determination. Oliver P. Field, a well-regarded scholar in this area of law, states in his treatise, "The Effect of an Unconstitutional Statute":

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[28] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[29] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[30] *County of Sonoma v. Commission on State Mandates,* 84 Cal.App.4th 1264, 1280 (*County of Sonoma*), citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[31] *County of Riverside, supra,* (2003) 30 Cal.4th 278, 296; "The Court of Appeal correctly held that Senate Bill 402 violates sections 1, subdivision (b), and 11, subdivision (a) [of article XI of the California Constitution]. Accordingly, we affirm the judgment of the Court of Appeal."

[32] *County of Riverside, supra,* (2003) 30 Cal.4th 278, 282.

> There are several rules or views, not just one, as to the effect of an unconstitutional statute. All courts have applied them all at various times and in differing situations, Not all courts agree, however, upon the applicability of any particular rule to a specific case. It is this lack of agreement that causes the confusion in the case law of the subject.[33]

The traditional approach was that an unconstitutional statute is "void ab initio," that is, "[a]n unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[34] This approach has been criticized in later decisions, however, and the trend has been toward a more equitable view that binding rights and obligations may be based on a statute that is subsequently declared unconstitutional, and that not every declaration of unconstitutionality is retroactive in its effect.[35]

Nevertheless, under California state mandates law, the determination as to whether a mandate exists is a question of law.[36] As stated in *County of Sonoma*, the Commission must strictly construe article XIII B, section 6 and not apply it as an equitable remedy.[37, 38] Mr. Field's treatise devotes a chapter to "Mistake of Law and Unconstitutional Statutes: Payments and Services"[39] which is the most analogous to the situation arising in this test claim. In California, the prevailing case law denies recovery of money under contracts where a mistake of law, based on a statute that was subsequently declared unconstitutional, was the basis for the original payment.[40]

Thus, staff finds that the test claim legislation created no mandate under article XIII B, section 6 of the California Constitution for any period of time because the statute was declared unconstitutional and must, for purposes of this analysis, be considered as inoperative as though it had never been passed.

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[33] Oliver P. Field, The Effect of an Unconstitutional Statute (1935), pages 2-3.

[34] *Norton v. Shelby County* (1886) 118 U.S. 425.

[35] *Chicot County Drainage District v. Baxter State Bank* (1940) 308 U.S. 371.

[36] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1279, citing *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[37] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280; see also *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817, citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.

[38] The doctrine of equity in this sense means the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances..." Equity is based on a system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict. (See Black's Law Dict. (7th ed., 1999) p. 561, col. 1.))

[39] Oliver P. Field, The Effect of an Unconstitutional Statute (1935); pages 221-240.

[40] *Wingerter v. City and County of San Francisco* (1901) 134 Cal. 547; *Campbell v. Rainey* (1932) 127 Cal.App. 747.

Conclusion

Staff finds that the test claim legislation does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends that the Commission adopt this analysis and find none of the activities claimed reimbursable.

Original List Date: 10/25/2001
Last Updated: 3/1/2006
List Print Date: 03/23/2006
Claim Number: 01-TC-07
Issue: Binding Arbitration

Mailing Information: Draft Staff Analysis

Mailing List

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COMMENTS ON DRAFT STAFF ANALYSIS BY CITY PALOS VERDES ESTATES

Binding Arbitration

01-TC-07

The following is submitted by the City of Palos Verdes Estates to the Draft Staff Analysis issued by the Commission on State Mandates' Staff.

This matter brings forth an issue of first impression: Is there a reimbursable mandate for a statute which was enacted but subsequently declared unconstitutional from the date the statute became effective until the judicial determination of unconstitutionality? Claimant believes that there is no other response other than to find that the statute is a reimbursable mandate.

In the within matter, Chapter 906, Statutes of 2000 became effective on January 1, 2001. The within test claim was filed on October 24, 2001.

Chapter 906 created a major change in public sector labor relations landscape by mandating local governments, at the unilateral discretion of employee organizations, binding interest arbitration as the method for resolving negotiating impasses on all economic issues for all classes of positions that are related to fire protection and law enforcement in all California public agencies. The only entities excluded from coverage by this legislation were the State of California and those charter agencies in which the electorate had adopted binding interest arbitration procedures prior to January 1, 2001.

On April 21, 2003, the California Supreme Court, in *County of Riverside* v. *State of California* (2003) 30 Cal.4th 278, declared Chapter 906 unconstitutional in violation of the California Constitution, Article XI, Section 1, as the County, not the state or anyone else, shall provide for the compensation of its employees. Additionally, the Supreme Court found that the within test claim legislation violated California Constitution, Article XI, Section 11, subdivision (a), which prohibits the Legislature from delegating certain local issues to a private person or body, by delegating the issue of compensation to an arbitrator.

> "'The effective date [of a statute] is . . . the date upon which the statute came into being as an existing law." (*People v. McCaskey* (1985) 170 Cal. App. 3d 411, 416 [216 Cal. Rptr. 54].)'" *Preston* v. *State Board of Equalization* (2001) 25 Cal. 4th 197, 223.

Thus, as of January 1, 2001, Chapter 906 was the law in the State of California.

> "Where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion. Elder v. Anderson, 205 Cal.App.2d 326 [23 Cal.Rptr. 48]; *Drummey* v. *State Bd. of Funeral Directors*, 13 Cal.2d 75 [87 P.2d 848].
>
> "In *Drummey, supra*, the court at page 83 stated: ". . . where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency the writ may be issued to control his action. [Citations.]"
>
> "Code of Civil Procedure section 1085 in pertinent part provides, "[The writ of mandate] may be issued by any court, except a municipal or justice court, . . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, . . ."" *Great Western Savings and Loan Association* v. *City of Los Angeles* (1973) 31 Cal. App. 3d 403, 413.

As of January 1, 2001, local governmental officials had no alternative other than to enforce the provisions of this legislation, otherwise they would be subject to a writ of mandate to compel binding arbitration.

In fact, it was because the County of Riverside refused to engage in binding arbitration that the writ of mandate action was commenced against it, resulting in the decision of the Supreme Court which made this test claim legislation invalid as being unconstitutional. *See, County of Riverside, supra* at 283.

In *Lockyear* v. *City and County of San Francisco* (2004) 33 Cal. 4th 1055, the California Supreme Court discussed at length the legality of local city and county officials disregarding statutes upon the belief that they are unconstitutional.

In *Lockyear*, the California Attorney General filed an original writ of mandate proceeding in the California Supreme Court to require the local officials to comply with the California marriage statutes which limit marriage to a couple comprised of a man and a woman. The City and County of San Francisco had issued approximately 4,000 marriage licenses to same sex couples. In accepting the grant of original jurisdiction, the California Supreme Court acknowledged that the same legal principles could come into play in a variety of situations:

> "The same legal issue and the same applicable legal principles could come into play, however, in a multitude of situations. For example, we would face the same legal issue if the statute in question were among those that restrict the

possession or require the registration of assault weapons, and a local official, charged with the ministerial duty of enforcing those statutes, refused to apply their provisions because of the official's view that they violate the Second Amendment of the federal Constitution. In like manner, the same legal issue would be presented if the statute were one of the environmental measures that impose restrictions upon a property owner's ability to obtain a building permit for a development that interferes with the public's access to the California coastline, and a local official, charged with the ministerial duty of issuing building permits, refused to apply the statutory limitations because of his or her belief that they effect an uncompensated "taking" of property in violation of the just compensation clause of the state or federal Constitution.

"Indeed, another example might illustrate the point even more clearly: the same legal issue would arise if the statute at the center of the controversy were the recently enacted provision (operative January 1, 2005) that imposes a ministerial duty upon local officials to accord the same rights and benefits to registered domestic partners as are granted to spouses (see Fam. Code, § 297.5, added by Stats. 2003, ch. 421, § 4), and a local official--perhaps an officeholder in a locale where domestic partnership rights are unpopular--adopted a policy of refusing to recognize or accord to registered domestic partners the equal treatment mandated by statute, based solely upon the official's view (unsupported by any judicial determination) that the statutory provisions granting such rights to registered domestic partners are unconstitutional because they improperly amend or repeal the provisions of the voter-enacted initiative measure commonly known as Proposition 22, the California Defense of Marriage Act (Fam. Code, § 308.5) without a confirming vote of the electorate, in violation of article II, section 10, subdivision (c) of the California Constitution." *Lockyear, supra* at 1067.

In the Court's discussion, the analysis commenced with an examination of the separation of powers doctrine:

As indicated above, that issue--phrased in the narrow terms presented by this case--is whether a local executive official, charged with the ministerial duty of enforcing a statute, has the authority to disregard the terms of the statute in the absence of a judicial determination that it is

> unconstitutional, based solely upon the official's opinion that the governing statute is unconstitutional. As we shall see, it is well established, both in California and elsewhere, that--subject to a few narrow exceptions that clearly are inapplicable here--a local executive official does *not* possess such authority.
>
> " This conclusion is consistent with the classic understanding of the separation of powers doctrine--that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. It is true, of course, that the separation of powers doctrine does not create an absolute or rigid division of functions. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52 [51 Cal. Rptr. 2d 837, 913 P.2d 1046].) Furthermore, legislators and executive officials may take into account constitutional considerations in making discretionary decisions within their authorized sphere of action--such as whether to enact or veto proposed legislation or exercise prosecutorial discretion. When, however, a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the statute in performing a mandated act, the official generally has no authority to disregard the statutory mandate based on the official's own determination that the statute is unconstitutional. (See, e.g., *Kendall v. United States* (1838) 37 U.S. 524, 613 [9 L.Ed. 1181] ["To contend, that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible"].)" *Lockyear, supra* at 1068-1069.

Thus, in the within matter, local officials had no authority to disregard Chapter 906 – it is not within their province to determine constitutionality of a legislative enactment. As presented in the *Lockyear* matter, the issue was: "Thus, the issue before us is whether under California law the authority of a local executive official, charged with the ministerial duty of enforcing a state statute, includes the authority to disregard the statutory requirements when the official is of the opinion the provision is unconstitutional but there has been no judicial determination of unconstitutionality." *Lockyear, supra* at 1082. The court concluded: "As we shall explain, we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional." *Lockyear, supra.*

The court first examined the California Constitution:

> Article III, section 3.5 provides in full: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [P] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. (b) To declare a statute unconstitutional. (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."", *Lockyear* at 1083.

The Court, in analyzing Article III, Section 3.5 came to the conclusion that it did not have to determine whether the proscription against administrative agencies determining that a statute was unconstitutional applied to local officials, because it was previously settled law that the same result applied to local officials under previously settled law.

> "As we shall explain, we have determined that we need not (and thus do not) decide in this case whether the actions of the local executive officials here at issue fall within the scope or reach of article III, section 3.5, because we conclude that prior to the adoption of article III, section 3.5, it already was established under California law--as in the overwhelming majority of other states (see, *post*, at pp. 1104-1107) -- that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute. Because the adoption of article III, section 3.5 plainly *did not grant or expand* the authority of local executive officials to determine that a statute is unconstitutional and to act in contravention of the statute's terms on the basis of such a determination, we conclude that the city officials do not possess this authority and that the actions challenged in the present case were unauthorized and invalid." *Lockyear* at 1085-1086.

The Supreme Court first commenced with an analysis of basic statutory construction:

> "First, one of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, "is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will

> be resolved in favor of its validity." (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 58, pp. 102-103 [citing, among numerous other authorities, *In re Madera Irrigation District* (1891) 92 Cal. 296, 308; *San Francisco v. Industrial Acc. Com.* (1920) 183 Cal. 273, 280; *People v. Globe Grain and Mill. Co.* (1930) 211 Cal. 121, 127 [294 P. 3]].)" *Lockyear, supra* at 1086.

Thus, up until the time that the Supreme Court held that Binding Arbitration was unconstitutional on April 21, 2003, it is presumed that the test claim legislation was constitutional as no court had yet determined it not to be.

The Supreme Court analyzed the state of the law which resulted in the enactment of California Constitution, Article III, Section 3.5. That case was in *Southern Pac. Transportation v. Public Utilities Com.* (1976) 18 Cal.3d 308, which resulted in a strong disagreement amongst the members of the Supreme Court as to whether a constitutional agency vested with quasi-judicial powers had the authority to declare a statute unconstitutional.[1]

However, as noted by the Supreme Court in *Lockyear,* thereafter the state of California law was clear:

> "(14) In light of the foregoing review of the relevant case law, we believe that after this court's decision in *Southern Pacific, supra,* 18 Cal.3d 308, the state of the law in this area was clear: administrative agencies that had been granted judicial or quasi-judicial power by the California Constitution possessed the authority, in the exercise of their administrative functions, to determine the constitutionality of statutes, but agencies that had not been granted such power under the California Constitution lacked such authority. (See *Hand v. Board of Examiners in Veterinary Medicine* (1977) 66 Cal. App. 3d 605, 617-619 [136 Cal. Rptr. 187].) Accordingly, these decisions recognize that, under California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution." *Lockyear, supra* at 1092-1093.

The conclusion was thus quite simple: As local agency officials do not have a grant of judicial authority, they do not possess the power to determine if a statute is unconstitutional:

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[1] In *Southern Pac.*, the PUC had declared a law unconstitutional, to which the Supreme Court disagreed. However, the main disagreement was whether constitutional agencies with quasi-judicial powers had the authority to determine a statute unconstitutional.

> "Given the foregoing decisions and their reasoning, it appears evident that under California law as it existed prior to the adoption of article III, section 3.5 of the California Constitution, *a local executive official*, such as a county clerk or county recorder, possessed no authority to determine the constitutionality of a statute that the official had a ministerial duty to enforce. If, in the absence of a grant of judicial authority from the California Constitution, an administrative agency that was required by law to reach its decisions only after conducting court-like quasi-judicial proceedings did not generally possess the authority to pass on the constitutionality of a statute that the agency was required to enforce, it follows even more so that a local executive official who is charged simply with the ministerial duty of enforcing a statute, and who generally acts without any quasi-judicial authority or procedure whatsoever, did not possess such authority. As indicated above, we are unaware of any California case that suggests such a public official has been granted judicial or quasi-judicial power by the California Constitution." *Lockyear, supra* at 1093.

In fact, the Supreme Court goes on to note that pursuant to the Tort Claims Act, a local governmental official who acts in reliance upon a statute that is subsequently declared invalid or unconstitutional is immunized from liability:

> "First, as a matter of state law, Government Code section 820.6 explicitly provides that "[i]f a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable."" *Lockyear, supra* at 1097.

Thus, to the extent that any local agency acted upon Chapter 906, said agency and officials would be immune from liability from any taxpayer or other suit filed.

The net result is that pending the determination of the Supreme Court in *County of Riverside*, Chapter 906 was deemed constitutional. Any actions taken thereupon by local agencies were immune from liability until the judicial determination of its unconstitutionality. Thus, we believe, that Chapter 906 constituted a reimbursable state mandated program until such time as it was declared to be unconstitutional.

Local agencies, being legally bound by Chapter 906, incurred substantial costs itemized in the test claim. Being bound, failure to comply requires an agency to challenge the law judicially, at considerable cost. The considerable costs incident to both were incurred by agencies during the 27 months between the time the law became effective and the Supreme Court decision finding it to be unconstitutional.

The Commission staff has analyzed this issue, and come to a different result based upon a line of cases involving mistake of law, without analysis.

The first case relied upon by Commission staff to find there is no reimbursable mandate was *Wingerter* v. *City and County of San Francisco* (1901) 134 Cal. 547. In that matter, an executrix had filed an inventory and appraisement in an estate, and paid the $325 fee in 1895, required at that time by statute. Thereafter, the estate was distributed to the plaintiff. In May, 1897, the California Supreme Court ruled that the statute requiring the fee to be paid upon filing of the inventory and appraisement was unconstitutional. Thereafter, the plaintiff filed this action to recover the fees paid under a theory of mistake of law, the mistake being the belief that the statute was constitutional. The Supreme Court refused the refund, stating:

> "Section 1578 of the Civil Code, upon which the plaintiff relies for recovery, is contained in the chapter relating to "consent," in the article upon contracts, and is explanatory of section 1567, which declares that an apparent consent is not real or free if obtained through "mistake." A contract thus obtained may be rescinded (sec. 1689), or its enforcement may be defended at law or enjoined in equity. The section cannot be invoked to sustain an action for the recovery of taxes or other public debts voluntarily paid under a statute which is afterwards declared to be unconstitutional. In *Cooley* v. *County of Calaveras*, 121 Cal. 482, it was said: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." Under the rule there declared, the plaintiff is not entitled to a recovery. The mistake relied on in *Rued* v. *Cooper*, 119 Cal. 463, cited on behalf of the plaintiff, was held not to be a mistake of law, and the decision was placed upon the ground that by virtue of section 1542 of the Civil Code the release given to the plaintiff did not include the claim sued upon." *Wingerter* at 548.

Thus, a mistake of law sufficient to rescind a contract is inapplicable when there is no contract. In the within matter, there is no contract between the State and the various local

agencies such that if the local agencies act upon the contract, such that it could be rescinded.

The other case relied upon by Commission staff to find there is no reimbursable mandate is also inapplicable, and does not help them with their analysis. The case is *Campbell* v. *Rainey* (1932) 127 Cal.App. 747. In that matter, suit was filed by a shareholder of a bank against the Superintendent of Banks of the State of California to recover partial payments made on an assessment, which assessment was subsequently declared unconstitutional. The shareholder attempted to recover the funds on the premise that the funds were paid under compulsion and mistake of law. In its decision, the court opined that since the Superintendent of Banks would have to file suit to collect the funds, the partial assessments paid were not made under compulsion, and thus no recovery was available for the plaintiff.

It is our conclusion that the analysis performed by Commission staff on this matter of first impression is not on point. However, we believe that the Supreme Court's analysis of the genesis of California Constitution, Article III, Section 3.5 is on point.[2] When legislation is going through the process prior to adoption, there are a plethora of committee hearings and analyses performed. If there is any risk for a statute being declared unconstitutional, it should be borne by the State, which has the resources for a full and complete analysis of pending legislation prior to enactment. In the within matter, Chapter 906 was only in existence for approximately 27 months. What would occur were a program to be in effect for years, found to be reimbursable and subsequently declared unconstitutional. The Commission's staff would have same be void *ab initio*, and place all of the risk on local government. We believe that this is not a correct result.

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[2] Article III, section 3.5 was proposed by the Legislature and placed before the voters as Proposition 5 at the June 6, 1978 election, and was adopted by the electorate. The ballot argument in favor of Proposition 5, contained in the election brochure distributed to voters prior to the election, stated in part: "Every statute is enacted only after a long and exhaustive process, involving as many as four open legislative committee meetings where members of the public can express their views. If the agencies question the constitutionality of a measure, they can present testimony at the public hearing during legislative consideration. Committee action is followed by full consideration by both houses of the Legislature. [P] Before the Governor signs or vetoes a bill, he receives analyses from the agencies which will be called upon to implement its provisions. If the Legislature has passed the bill over the objections of the agency, the Governor is not likely to ignore valid apprehensions of his department, as he is Chief Executive of the State and is responsible for most of its administrative functions. [P] Once the law has been enacted, however, it does not make sense for an administrative agency to refuse to carry out its legal responsibilities because the agency's members have decided the law is invalid. Yet, administrative agencies are so doing with increasing frequency. These agencies are all part of the Executive Branch of government, charged with the duty of enforcing the law. [P] The Courts, however, constitute the proper forum for determination of the validity of State statutes. There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform. [P] Proposition 5 would prohibit the State agency from refusing to act under such circumstances, unless an appellate court has ruled the statute is invalid. [P] We urge you to support this Proposition 5 in order to insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts. Your passage of Proposition 5 will help preserve the concept of the separation of powers so wisely adopted by our founding fathers." (Ballot Pamp. Primary Elec. (June 6, 1978) argument in favor of Prop. 5, p. 26.)..." *Lockyear, supra* at 1083-1084.

The cases cited by Commission staff are both distinguishable. Both involved mutual mistakes of law, i.e., neither party asserted the unconstitutionality of the laws there involved, contrary to the facts in the instant situation. In the *Campbell* case, the court found on the facts that the plaintiff was not bound to comply with the law.

We believe that any risk of a program being found to be unconstitutional should be clearly placed on the State which has the resources to analyze legislation prior to its enactment. Local authorities have no alternative than to assume that legislation is valid until such time as it is declared unconstitutional by the courts of the State of California.

Accordingly, we respectfully request that this Commission find that Binding Arbitration was a reimbursable, mandated program from its effective date of January 1, 2001, until it was declared unconstitutional on April 21, 2003.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 12th day of April, 2006 at Palos Verdes Estates, California.

James B. Hendrickson, City Manager

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On April 13, 2006 I served the Comments to Draft Staff Analysis by City of Palos Verdes Estates, Binding Arbitration, 01-TC-07, by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 13th day of April, 2006 at Sacramento, California.

Declarant

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COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, Plaintiff and Respondent,
v.
LOS ANGELES COUNTY EMPLOYEES' ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO et al., Defendants and Appellants
L.A. No. 31850.

Supreme Court of California

May 13, 1985.

SUMMARY

The trial court, in a tort action, awarded a county sanitation district damages and prejudgment interest against a county employees' union in connection with the union's involvement in a labor strike against the district. The trial court found the strike to be unlawful and in violation of the public policy of the state. (Superior Court of Los Angeles County, No. C 166219, Charles H. Older, Judge.)

The Supreme Court reversed, holding the common law prohibition against public sector strikes should not be recognized, that strikes by public sector employees as such are neither illegal nor tortious under California common law, and that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. It held that the right of public employees to strike is not unlimited, and that the Legislature could conclude that certain categories of public employees perform such essential services that a strike would invariably result in imminent danger to the public health and safety, and must therefore be prohibited. It held the courts must proceed on a case-by-case basis. (Opinion by Broussard, J., with Mosk and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J., with Reynoso, J., concurring. Separate concurring opinion by Bird, C. J. Separate concurring opinion by Grodin, J. Separate dissenting opinion by Lucas, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Labor § 47--Labor Disputes--Strikes Against Public Entity--Fire Fighters.
With the exception of fire fighters (*565Lab. Code, § 1962), no statutory prohibition against strikes by public employees exists in the state.

(2a, 2b) Labor § 47--Labor Disputes--Strikes Against Public Entity.
The fact that Gov. Code, § 3509 specifically precludes the application to public employees of Lab. Code, § 923, which has been construed to protect the right of private sector employees to strike, is not to be viewed as a general prohibition on the right of public employees to strike.

(3a, 3b, 3c) Labor § 47--Labor Disputes--Strikes Against Public Entity--Common Law Prohibition--Rationale.
The common law prohibition against public employee strikes is not supported by the four policy rationales and justifications advanced in its support, namely that a strike by public employees is tantamount to a denial of governmental authority or sovereignty; the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, since they are set by the legislative body through unilateral lawmaking; that granting public employees the right to strike would afford them excessive bargaining leverage, since legislative bodies are responsible for public employment decisionmaking, and would result in distortion of the political process and an improper delegation of legislative authority; and that public employees provide the central public services which, if interrupted by strikes, would threaten the public welfare.

(4a, 4b) Courts § 32--Decisions and Orders--Power and Duty of Courts-- Rejection of Common Law Doctrine--Public Employee Strikes.
The judiciary, and not only the Legislature, can reject the common law doctrine prohibiting public employee strikes. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. Courts may modify, or even abolish the common law rule when reason or equity demand it, or when its underlying principles are no longer

justifiable in light of modern society.

(5a, 5b) Courts § 32--Decisions and Orders--Power and Duty of Courts-- Legislative Inaction.
When the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development.

(6a, 6b, 6c) Labor § 47--Labor Disputes--Strikes Against Public Entity--Common Law Prohibition.
There is no common law prohibition *566 against public sector strikes, such strikes are not tortious under California common law, and it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Accordingly, a county sanitation district was not entitled to damages and prejudgment interest awarded against a public employees union predicated on the premise its strike against the district was illegal under the common law prohibition.

[Labor law: Right of public employees to strike or engage in work stoppage, note, 37 A.L.R.3d 1147. See also Cal.Jur.3d, Labor, § 191; Am.Jur.2d, Labor and Labor Relations, § 1734.]

(7a, 7b) Labor § 13--Labor Unions--Fundamental Right of Workers.
The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute.

(8a, 8b) Labor § 14--Labor Unions--Nature and Purpose--Economic Pressure.
Workmen may lawfully combine to exert various forms of economic pressure on an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, and it is not dependent on the existence of a labor controversy between the employer and his employee.

(9a, 9b) Constitutional Law § 61--First Amendment and Other Fundamental Rights of Citizens--Governmental Regulation and Restriction of Fundamental Rights--Necessity for Specificity--Freedom of Association.
Even where a compelling state purpose is present, restrictions on the freedom of association protected by U.S. Const., 1st Amend., and made applicable to the states by U.S. Const., 14th Amend., must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective. *567

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BROUSSARD, J.

Defendants appeal from a judgment awarding plaintiff sanitation district damages and prejudgment interest in connection with defendant union's involvement in a labor strike against plaintiff. The case squarely presents issues of great import to public sector labor-management relations, namely whether all strikes by public employees are illegal and, if so,

whether the striking union is liable in tort for compensatory damages. After careful review of a long line of case law and policy arguments, we conclude that the common law prohibition against all public employee strikes is no longer supportable. Therefore, the judgment for the plaintiff finding the strike to be unlawful and awarding damages, interest and costs must be reversed.

I. *Statement of the Case.*

Defendant union (Local 660 or the union) is a labor organization affiliated with the Service Employees International Union, AFL-CIO, and has been the certified bargaining representative of the blue collar employees of the Los Angeles Sanitation District since 1973. Plaintiff is one of 27 sanitation *568 districts within Los Angeles County [FN1] and is charged with providing, operating and maintaining sewage transport and treatment facilities and landfill disposal sites throughout the county. [FN2] The District employs some 500 workers who are directly or indirectly responsible for the operation and maintenance of its facilities and who are members of, or represented by, Local 660. Since 1973, the District and Local 660 have bargained concerning wages, hours and working conditions pursuant to the Meyers-Milias-Brown Act (MMBA). (Gov. Code, § § 3500-3511.) Each year these negotiations have resulted in a binding labor contract or memorandum of understanding (MOU). (See *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513, 540 P.2d 609].)

FN1 Each such district is a separate and autonomous political subdivision of the State of California, authorized by Health and Safety Code section 4700 et seq. County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement to act on behalf of itself and the 26 other districts in numerous matters, including personnel and labor relations. (These 27 sanitation districts are hereinafter jointly referred to as the District.)

FN2 In 1976, the facilities operated by the District included 6 sanitary landfills which together received about 15,000 tons of solid waste each day, 11 treatment plants processing 450 million gallons of raw sewage per day, 4 maintenance yards, and 46 pumping stations. In maintaining these operations, the District served approximately 4 million residents of the county.

On July 5, 1976, approximately 75 percent of the District's employees went out on strike after negotiations between the District and the union for a new wage and benefit agreement reached an impasse and failed to produce a new MOU. The District promptly filed a complaint for injunctive relief and damages and was granted a temporary restraining order. The strike continued for approximately 11 days, during which time the District was able to maintain its facilities and operations through the efforts of management personnel and certain union members who chose not to strike. [FN3] On July 16, the employees voted to accept a tentative agreement on a new MOU, the terms of which were identical to the District's offer prior to the strike.

FN3 The union maintains that the strike settled on July 12, while the trial court's findings agreed with the District's contention that the strike settled on July 16. In addition, the District maintained that the strike was not entirely peaceful and had alleged various acts of vandalism were committed by the strikers. The union denied these charges in full.

The District then proceeded with the instant action for tort damages. The trial court found the strike to be unlawful and in violation of the public policy of the State of California and thus awarded the District $246,904 in compensatory damages, [FN4] prejudgment interest in the amount of $87,615.22 and costs of $874.65. *569

FN4 This figure represents the following strike-related damages: Wages and FICA payments: $304,227; earned compensatory time off valued at $16,040; miscellaneous security, equipment and meal expenses: $55,080; health care benefits paid to striking employees: $6,000; less a $134,443 set off in wages, FICA and retirement benefits that the District did not have to pay out on behalf of striking workers.

II. *The Traditional Prohibition Against Public Employee Strikes.*

Common law decisions in other jurisdictions at one time held that no employee, whether public or private, had a right to strike in concert with fellow workers. In fact, such collective action was generally viewed as a conspiracy and held subject to both civil and criminal sanctions. [FN5] Over the course of the 20th century, however, courts and legislatures

gradually acted to change these laws as they applied to private sector employees; today, the right to strike is generally accepted as indispensable to the system of collective bargaining and negotiation, which characterizes labor-management relations in the private sector. [FN6]

FN5 See *Commonwealth v. Pullis* (Mayor's Ct. Phil. 91806) reported in 3 Commons, Documentary History of American Industrial Society (1910) p. 59; *Walker v. Cronin* (1871) 107 Mass. 555; *Vegelahn v. Guntner* (1896) 167 Mass. 92 [44 N.E. 1077]; *Loewe v. Lawlor* (1908) 208 U.S. 274 [52 L.Ed. 488, 28 S.Ct. 301].

FN6 Congress gradually, through a series of legislative enactments, not only granted private sector employees a right to strike and to engage in other concerted activities, but also deprived employers of their traditional remedies of injunction and damage suits. (See 38 Stat. 730 (1914) [Clayton Antitrust Act], codified as amended at 15 U.S.C. § § 15, 17, 26 (1970), 26 (1970), U.S.C. § 52 (1970); 47 Stat. 70 (1930) [Norris-La Guardia Act], codified at 29 U.S.C. § § 101-115 (1970); 47 Stat., pt. II 577 (1926) [Railway Labor Act], codified as amended at 45 U.S.C. § § 151-188 (1970); 49 Stat. 449 (1935) [Wagner Act], codified as amended at 29 U.S.C. § § 141-197 (1970).)

By contrast, American law continues to regard public sector strikes in a substantially different manner. A strike by employees of the United States government may still be treated as a crime, [FN7] and strikes by state and local employees have been explicitly allowed by courts or statute in only 11 states. [FN8] *570

FN7 Employees of the federal government are statutorily prohibited from striking under 5 United States Code section 7311 (1976), which prohibits an individual from holding a federal position if he "participates in a strike, or asserts the right to strike against the Government of the United States ...." In *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp. 879, affd., 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (1971), the court upheld the constitutionality of the strike prohibitions, yet declared unconstitutional the "wording insofar as it inhibits the *assertion* of the right to strike ..." (*Id.* at p. 881 [italics in original].) In 1947, Congress originally denied federal employees the right to strike in section 305 of the Labor Management Relations Act (Taft-Hartley Act), chapter 120, 61 Statutes at Large 136 (1947). This act was repealed and ultimately replaced by section 7311.

FN8 Those 11 states are Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin. (See further discussion below.) Interestingly, the United States is virtually alone among Western industrial nations in upholding a general prohibition of public employee strikes. Most European countries have permitted them, with certain limitations, for quite some time as has Canada. See, e.g., Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943, 961-964.

Contrary to the assertions of the plaintiff as well as various holdings of the Court of Appeal, [FN9] this court has repeatedly stated that the legality of strikes by public employees in California has remained an open question. In *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 687-688 [8 Cal.Rptr. 1, 355 P.2d 905], this court stated in dictum that "[i]n the absence of legislative authorization public employees in general do not have the right to strike ..." but proceeded to hold that a statute affording public transit workers the right "'to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection'" granted these employees a right to strike. However, in our very next opinion on the issue, *In re Berry* (1968) 68 Cal.2d 137 [65 Cal.Rptr. 273, 436 P.2d 273], we invalidated an injunction against striking public employees as unconstitutionally overbroad, and *expressly* reserved opinion on "the question whether strikes by public employees can be lawfully enjoined." (*Id.*, p. 151.)

FN9 See, e.g., *Stationary Engineers v. San Juan Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41]; *Service Employees' International Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal.App.3d 400, 408 [101 Cal.Rptr. 69]; *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers* (1970) 13

Cal.App.3d 863, 867 [92 Cal.Rptr. 134]; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cal.Rptr. 258]; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35 [80 Cal.Rptr. 518].

In our next opportunity to examine public employee strikes, *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898 [120 Cal.Rptr. 707, 534 P.2d 403], which involved a suit challenging the validity of a strike settlement agreement enacted by the city, we held only that such settlement agreements are valid. After noting the Court of Appeal holdings that public employee strikes are illegal and the employees' counterargument that such strikes are impliedly authorized by statute, our unanimous opinion declared that we had no occasion to resolve that controversy in that action. (*Id.*, p. 912.)

In a similar vein, this court has carefully and explicitly reserved judgment on the issue of the legality of public employee strikes on at least three other occasions in recent years. [FN10] Indeed, our reluctance to address the issue head-on has elicited critical commentary from both dissenting and concurring *571 opinions, which have urged us to resolve the question once and for all. [FN11] While we had ample reason for deciding the aforementioned cases without determining the broader question of the right of public employees to strike, the instant case presents us with the proper circumstances for direct consideration of this fundamental issue.

FN10 *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]; *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 [192 Cal.Rptr. 123, 663 P.2d 893]; and *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191 [193 Cal.Rptr. 518, 666 P.2d 960].

FN11 See, e.g., dissenting opinion of Richardson, J., in *San Diego Teachers Assn. v. Superior Court, supra*, 24 Cal.3d 1 and concurring opinion of Richardson, J., in *El Rancho Unified School Dist. v. National Education Assn., supra*, 33 Cal.3d at page 962, where he stated that "[t]his court should no longer continue its hesitant, tentative ritual dance around the perimeter of this central legal principle. ..."

Before commencing our discussion, however, we must note that the Legislature has also chosen to reserve judgment on the general legality of strikes in the public sector. As Justice Grodin observed in his concurring opinion in *El Rancho Unified School Dist. v. National Education Assn., supra*, 33 Cal.3d 946, 964, "the Legislature itself has steadfastly refrained from providing clearcut guidance." (1a) With the exception of firefighters (Lab. Code, § 1962), no statutory prohibition against strikes by public employees in this state exists. [FN12] The MMBA, the statute under which the present controversy arose, does not directly address the question of strikes.

FN12 For just one example, the Winton Act (former Ed. Code, § 13080 et seq.), which governed the relationship between local school boards and teachers' unions, neither affirmed nor rejected the teachers' right to strike. In 1975 the Legislature repealed the Winton Act and added new provisions to the Government Code to establish an Education Employment Relations Board (see Gov. Code, § 3540 et seq.); the new enactment also does not prohibit strikes by teachers. It also bears mention that the California Assembly Advisory Council on Public Employee Relations in its final report of March 15, 1973, concluded that, "[s]ubject only to [certain specified] restrictions and limitations ... public employees should have the right to strike" (p. 24) and proposed a statute to carry out these goals (appen. a). However, this proposed statute was never enacted into law, perhaps further reflecting a legislative decision to leave the ultimate determination of this thorny issue to the judiciary.

The MMBA sets forth the rights of municipal and county employees in California. [FN13] (Gov. Code, § § 3500-3511.) The MMBA protects the right of such employees "to form, join, and participate in the activities of employee *572 organizations ... for the purpose of representation on all matters of employer-employee relations." It also requires public employers to "meet and confer" in good faith with employee representatives on all issues within the scope of representation. As explained in its preamble, one of the MMBA's main purposes is to improve communications between public employees and their employers by providing a reasonable method for resolving disputes. A further stated purpose is to promote improved personnel relations by "providing a uniform basis for recognizing the right of public

employees to join organizations of their own choice." [FN14]

FN13 The MMBA revised its predecessor, the Brown Act, in 1968. The MMBA amendments, however, apply only to local government employees because the MMBA deleted reference to the "State of California" and explicitly defined "public employee" as one employed by any political subdivision of the state. (See Gov. Code, § 3501.) Presently, state employees are governed by the State Employer-Employee Relations Act (Gov. Code, § § 3512-3524).
Additional groups of employees were excepted from coverage under the Brown Act by previous legislation. These employees are consequently not covered by the MMBA. (See Pub. Util. Code, § § 25051-25052, added by Stats. 1955, ch. 1036, § 2, at pp. 1960-1961 [governing bargaining between employees of the Alameda-Contra Costa Transit District and their employers]; Pub. Util. Code, Appen. 1, § 3.6(b)-(g) [governing bargaining in the Los Angeles Metropolitan Transit Authority]; Ed. Code, § § 13080- 13089 [governing educational employees].)
For a detailed discussion of the scope and purposes of the MMBA, see Grodin, *Public Employees Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Note, *Collective Bargaining Under the Meyers-Milias-Brown Act - Should Local Employees Have the Right to Strike* (1984) 35 Hastings L.J. 623.

FN14 However, the MMBA contains no clear mechanism for resolving disputes. It merely provides that if the parties fail to reach an agreement, they *may* agree to appoint a mediator or use other impasse resolution procedures agreed upon by the parties. Additionally, the MMBA does not authorize the establishment of an administrative agency to resolve controversies arising under its provisions. In contrast, statutes governing other public employees in California authorize the Public Employee Relations Board (PERB) to resolve disputes and enforce the provisions of the legislation. (See Gov. Code, § 3541.3 (setting the powers and duties of the PERB under the Educational Employment Relations Act (EERA)); and Gov. Code, § 3513, subd. (g) [making the powers and duties of the PERB under the EERA applicable to the State Employees Relations Act].)

On its face, the MMBA neither denies nor grants local employees the right to strike. This omission is noteworthy since the Legislature has not hesitated to expressly prohibit strikes for certain classes of public employees. For example, the above-noted prohibition against strikes by firefighters was enacted nine years before the passage of the MMBA and remains in effect today. Moreover, the MMBA includes firefighters within its provisions. Thus, the absence of any such limitation on other public employees covered by the MMBA at the very least implies a lack of legislative intent to use the MMBA to enact a general strike prohibition. [FN15]

FN15 Apparently this decision was the result of political compromise and/or a desire that the courts would take the difficult first step of unambiguously indicating whether public employees generally have the right to strike. As one noted commentator explains, "The entire subject of strikes and impasse resolution procedures is avoided, except for the declaration that the parties may elect to engage a mediator. What emerges is a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation. The courts have, on the whole, done an admirable job of exegesis, but their decisions cannot help but reflect the underlying weakness of the text." (Grodin, *op. cit. supra*, 23 Hastings L.J. at p. 761.)

(2a) Plaintiffs have suggested that section 3509 of the MMBA must be construed as a general prohibition on the right to strike because it specifically precludes the application of Labor Code section 923 [FN16] to public employees. *573 Labor Code section 923 has been construed by this court to protect the right of private sector employees to strike (see *Petri Cleaners, Inc. v. Automotive Employees, etc. Local No. 88* (1960) 53 Cal.2d 455 [2 Cal.Rptr. 470, 349 P.2d 76]); yet, an examination of other California statutes governing public employees makes it perfectly clear that section 3509 was *not* included in the MMBA as a means for prohibiting strikes.

FN16 Section 923 provides in pertinent part: "... the individual workman [shall] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference ... of employers ... in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

A provision identical to section 3509 is contained in the statutes governing educational employees and firefighters. However, an explicit strike prohibition is included in the firefighters statute *in addition* to this provision. The fact that the Legislature felt it necessary to include this express strike prohibition clearly indicates that it neither intended nor expected its preclusion of section 923 to serve as a blanket prohibition against strikes. Furthermore, in *San Diego Teachers Assn. v. Superior Court, supra*, 24 Cal.3d at page 13, this court interpreted section 3549 of the EERA, a provision *identical to* section 3509 of the MMBA, as specifically *not* prohibiting strikes. Therefore, plaintiff's assertion that section 3509 must be read as a legislative prohibition of public employee strikes cannot be sustained. [FN17]

FN17 Since the present case involves employees subject to the MMBA, we do not consider whether provisions of statutes governing other employees could be interpreted to limit the right of such employees to strike.

In sum, the MMBA establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector. The Legislature, however, intentionally avoided the inclusion of any provision which could be construed as either a blanket grant or prohibition of a right to strike, thus leaving the issue shrouded in ambiguity. In the absence of clear legislative directive on this crucial matter, it becomes the task of the judiciary to determine whether, under the law, strikes by public employees should be viewed as a prohibited tort.

III. *The Common Law Prohibition Against Public Employee Strikes.*

(3a) As noted above, the Court of Appeal and various lower courts in this and other jurisdictions have repeatedly stated that, absent a specific statutory grant, all strikes by public employees are per se illegal. A variety of policy rationales and legal justifications have traditionally been advanced in support of this common law "rule," and numerous articles and scholarly *574 treatises have been devoted to debating their respective merits. [FN18] The various justifications for the common law prohibition can be summarized into four basic arguments. First - the traditional justification - that a strike by public employees is tantamount to a denial of governmental authority/sovereignty. Second, the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, because they are set by the legislative body through unilateral lawmaking. Third, since legislative bodies are responsible for public employment decisionmaking, granting public employees the right to strike would afford them excessive bargaining leverage, resulting in a distortion of the political process and an improper delegation of legislative authority. Finally, public employees provide essential public services which, if interrupted by strikes, would threaten the public welfare.

FN18 Among the more notable works to appear recently on the subject of labor relations in the public sector are: Hanslowe & Aciemo, *The Law and Theory of Strikes By Government Employees* (1982) 67 Cornell L.Rev. 1055; Comment, *Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity* (1976) 13 San Diego L.Rev. 931; Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes* (1974) 11 San Diego L.Rev. 473; Comment, *The Collective Bargaining Process at the Municipal Level Lingers in Its Chrysalis Stage* (1974) 14 Santa Clara Law. 397; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining* (1972) 19 UCLA L.Rev. 867; Ley, *Strikes by Government Employees: Problems and Solutions* (1971) 57 A.B.A.J. 771; Witt, *The Public Sector Strike: Dilemma of the Seventies* (1971) 8 Cal. Western L.Rev. 102; Bernstein, *Alternatives to the Strike in Public Labor Relations* (1971) 85 Harv.L.Rev. 459; Burton & Krider, *The Role and Consequences of Strikes by Public*

Employees (1970) 79 Yale L.J. 418; Wellington & Winter, *More on Strikes by Public Employees* (1970) 79 Yale L.J. 441; Kheel, *Strikes and Public Employment* (1969) 67 Mich.L.Rev. 931; Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Thorne, *The Government Employee and Organized Labor* (1962) 2 Santa Clara Law. 147; Note, Labor Relations in the Public Service (1961) 75 Harv.L.Rev. 391; Annot., Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage (1971) 37 A.L.R.3d 1147.

Our determination of the legality of strikes by public employees necessarily involves an analysis of the reasoning and current viability of each of these arguments. The first of these justifications, the sovereignty argument, asserts that government is the embodiment of the people, and hence those entrusted to carry out its function may not impede it. [FN19] This argument was *575 particularly popular in the first half of the 20th century, when it received support from several American Presidents. [FN20]

FN19 For example, in *City of Cleveland v. Division 268 of Amal. Ass'n* (1949) 41 Ohio Ops. 236, 239 [90 N.E.2d 711, 715], the court stated that "[i]t is clear that in our system of government, the government is a servant of all of the people. And a strike against the public, a strike of public employees, has been denominated ... as a rebellion against government. The right to strike, if accorded to public employees ... is one means of destroying government. And if they destroy government, we have anarchy, we have chaos." A California case which relied on this sovereignty argument is *Nutter v. City of Santa Monica* (1946) 74 Cal.App.2d 292 [168 Cal.Rptr. 741].

FN20 Commenting on the Boston police strike, Calvin Coolidge asserted that "[t]here is no right to strike against public safety by anybody, anywhere, at any time" (quoted in *Norwalk Teachers Ass'n v. Board of Education* (1951) 138 Conn. 269, 273 [83 A.2d 482, 484, 31 A.L.R.2d 1133]). Woodrow Wilson, commenting on the same strike, stated that the strike is "'an intolerable crime against civilization'" (quoted in *id.*, at p. 273 [83 A.2d at p. 484]).
In another famous pronouncement of the sovereignty argument, President Franklin Roosevelt stated: "'[M]ilitant tactics have no place in the functions of any organization of Government employees. ... [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.'" (*Id.*, at pp. 273-274 [83 A.2d at p. 484] [quoting a letter from President Roosevelt to the president of the National Federation of Federal Employees (Aug. 16, 1937)].)

The sovereignty concept, however, has often been criticized in recent years as a vague and outdated theory based on the assumption that "the King can do no wrong." As Judge Harry T. Edwards has cogently observed, "the application of the strict sovereignty notion - that governmental power can never be opposed by employee organizations - is clearly a vestige from another era, an era of unexpanded government ... With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the 'sovereign,' government employees understandably no longer feel constrained by a notion that 'The King can do no wrong.' The distraught cries by public unions of disparate treatment merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis a vis the employer as their private counterparts." (Edwards, *The Developing Labor Relations Law in the Public Sector* (1972) 10 Duq. L.Rev. 357, 359-360.) [FN21]

FN21 See also *Anderson Fed. of Teach.* v. *School City of Anderson* (1969) 252 Ind. 588 [251 N.E. 2d 15, 20, 37 A.L.R.3d 1131] (dis. opn. of DeBruler, C. J.). ("[Sovereign immunity] is not a rational argument at all but a technique for avoiding dealing with the merits of the issue [of whether public employees may strike] .... The conflict of real social forces cannot be solved by the invocation of magical phrases like 'sovereignty.'")
Chief Justice DeBruler also notes that where the government has discretion over the terms and conditions of employment, "[a]ny

> decision within this discretionary area is authorized by the government, and therefore, obviously does not deny the authority of government." (*Id.*, at p. 20.)

In recent years, courts have rejected the very same concept of sovereignty as a justification for governmental immunity from tort liability. In California, the death knell came in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457], where this court stated that, *576 "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." (55 Cal.2d at p. 216.) As noted by this court in *Muskopf*, perpetuation of the doctrine of sovereign immunity in tort law led to many inequities, and its application effected many incongruous results. Similarly, the use of this archaic concept to justify a per se prohibition against public employee strikes is inconsistent with modern social reality and should be hereafter laid to rest.

The second basic argument underlying the common law prohibition of public employee strikes holds that since the terms of public employment are fixed by the Legislature, public employers are virtually powerless to respond to strike pressure, or alternatively that allowing such strikes would result in "government by contract" instead of "government by law." (See *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 46 [210 P.2d 305].) This justification may have had some merit before the California Legislature gave extensive bargaining rights to public employees. However, at present, most terms and conditions of public employment are arrived at through collective bargaining under such statutes as the MMBA.

We have already seen that the MMBA establishes a variety of rights and protections for public employees - including the right to join and participate in union activities and to meet and confer with employer representatives for the purpose of resolving disputed labor-management issues. The importance of mandating these rights, particularly the meet and confer requirement, cannot be ignored. The overall framework of the MMBA represents a nearly exact parallel to the private sector system of collective bargaining - a system which sets forth the guidelines for labor-management relations in the private sphere and which protects the right of private employees to strike. By enacting these significant and parallel protections for public employees through the MMBA, the Legislature effectively removed many of the underpinnings of the common law per se ban against public employee strikes. While the MMBA does not directly address the issue of such strikes, its implications regarding the traditional common law prohibition are significant.

This argument was eloquently explained by Justice Grodin in his concurring opinion in *El Rancho Unified Sch. Dist. v. National Education Assn.*, *supra*, 33 Cal.3d at page 963, where he pointed out that "[t]he premise underlying the court's opinion in *City of L.A.* [94 Cal.App.2d 36] - that it is necessarily contrary to public policy to establish terms and conditions of employment for public employees through the bilateral process of collective bargaining rather than through unilateral lawmaking - has since been rejected by the Legislature. The heart of the statute under consideration in *577 this case [the Educational Employment Relations Act], for example, contemplates that matters relating to wages, hours, and certain other terms and conditions of employment for teachers will be the subject of negotiation and agreement between a public school employer and organizations representing its employees. (Gov. Code, § § 3543.2, 3543.3, 3543.7.) Thus, the original policy foundation for the 'rule' that public employee strikes are illegal in this state has been substantially undermined, if not obliterated."

The remaining two arguments have not served in this state as grounds for asserting a ban on public employee strikes but have been advanced by commentators and by courts of other states. With the traditional reasons for prohibiting such strikes debunked, these additional reasons do not convince us of the necessity of a judicial ukase prohibiting all such strikes.

The first of these arguments draws upon the different roles of market forces in the private and public spheres. This rationale suggests that because government services are essential and demand is generally inelastic, public employees would wield excessive bargaining power if allowed to strike. Proponents of this argument assume that economic constraints are not present to any meaningful degree in the public sector. Consequently, in the absence of such constraints, public employers will be forced to make abnormally large concessions to workers, which in turn will distort our political process by forcing either higher taxes or a redistribution of resources between government services. [FN22]

> FN22 See e.g., *United Federation of Postal Clerks v. Blount*, *supra*, 325 F.Supp. 879, 884, ("In the private sphere, the strike is

used to equalize bargaining power, but this has universally been held not to be appropriate when its object and purpose can only be to influence the essentially political decisions of Government in the allocation of its resources.")

For an even more extensive elaboration of this "distortion of the political process" argument, see Wellington & Winter, *The Limits of Collective Bargaining in Public Employment, supra*, 78 Yale L.J. 1107.

There are, however, several fundamental problems with this "distortion of the political process" argument. For one, as will be discussed more fully below, a key assumption underlying the argument that all government services are essential is factually unsupportable. Modern governments engage in an enormous number and variety of functions, which clearly vary as to their degree of essentiality. As such, the absence of an unavoidable nexus between most public services and essentially necessarily undercuts the notion that public officials will be forced to settle strikes quickly and at any *578 cost. The recent case of the air-traffic controllers' strike [FN23] is yet another example that governments have the ability to hold firm against a strike for a considerable period, even in the face of substantial inconvenience. As this court concluded in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen, supra*, "Permitting employees to strike does *not* delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable." (54 Cal.2d at p. 693, italics added.)

FN23 In August 1981, the Professional Air Traffic Controllers Organization (PATCO) launched a nationwide strike against the federal government. President Ronald Reagan ordered the discharge of 11,000 striking controllers who had not returned to work within a two-day grace period. Up to the time of this writing, the Administration has rejected all suggestions for a general amnesty, its position being that the strikers, by violating the federal government's prohibition on strikes and their own "no-strike" oath, have forfeited their jobs with the Federal Aviation Administration forever. Federal courts upheld the government's position in *PATCO v. Federal Labor Relations Authority* (D.C. Cir. 1982) 685 F.2d 547. For a more detailed analysis of the strike, see Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers* (1983) 50 U.Chi.L.Rev. 731.

Other factors also serve to temper the potential bargaining power of striking public employees and thus enable public officials to resist excessive demands: First, wages lost due to strikes are as important to public employees as they are to private employees. Second, the public's concern over increasing tax rates will serve to prevent the decisionmaking process from being dominated by political instead of economic considerations. A third and related economic constraint arises in such areas as water, sewage and, in some instances, sanitation services, where explicit prices are charged. Even if representatives of groups other than employees and the employer do not formally enter the bargaining process, both union and local government representatives are aware of the economic implications of bargaining which leads to higher prices which are clearly visible to the public. A fourth economic constraint on public employees exists in those services where subcontracting to the private sector is a realistic alternative. For example, Warren, Michigan resolved a bargaining impasse with an American Federation of State, County and Municipal Employees (AFSCME) local by subcontracting its entire sanitation service; Santa Monica, California, ended a strike of city employees by threatening to subcontract its sanitation operations; in fact, San Francisco has chosen to subcontract its entire sanitation system to *private* firms. If this subcontract option is preserved, wages in the public sector clearly need not exceed the rate at which subcontracting becomes a realistic alternative. [FN24] *579

FN24 See further discussion in Burton & Krider, *The Role and Consequences of Strikes by Public Employees, supra*, 79 Yale L.J. 418, 425-427.

The proponents of a flat ban on public employee strikes not only ignore such factors as the availability of subcontracting, but also fail to adequately consider public sentiment towards most strikes and assume that the public will push blindly for an early resolution at any cost. In fact, public sentiment toward a strike often limits the pressure felt by political leaders, thereby reducing the strike's effectiveness. A Pennsylvania Governor's Commission Report stressed just such public

sentiment as an important reason to *grant* a limited right to strike: "[T]he limitations on the right to strike which we propose ... will appeal to the general public as so much fairer than a general ban on strikes that the public will be less likely to tolerate strikes beyond these boundaries. Strikes can only be effective so long as they have public support. *In short, we look upon the limited and carefully defined right to strike as a safety valve that will in fact prevent strikes.*" [FN25] (Italics in original.)

> FN25 Governor's Commission to Revise the Public Employee Law of Pennsylvania, Report and Recommendations, reprinted in 251 Gov. Empl. Rel. Rep. (BNA) E-1, E-3 (1968). This report is discussed in detail in Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees, supra*, 67 Cornell L.Rev. 1055.

In sum, there is little, if any empirical evidence which demonstrates that governments generally capitulate to unreasonable demands by public employees in order to resolve strikes. The result of the strike in the instant case clearly suggests the opposite. During the 11-day strike, negotiations resumed, and the parties subsequently reached an agreement on a new MOU, the terms of which were *precisely the same* as the District's last offer prior to the commencement of the strike. Such results certainly do not illustrate a situation where public employees wielded excessive bargaining power and thereby caused a distortion of our political process.

The fourth and final justification for the common law prohibition is that interruption of government services is unacceptable because they are essential. As noted above, in our contemporary industrial society the presumption of essentiality of most government services is questionable at best. In addition, we tolerate strikes by private employees in many of the same areas in which government is engaged, such as transportation, health, education, and utilities; in many employment fields, public and private activity largely overlap.

In a dissenting opinion in *Anderson Fed. of Teach.* v. *School City of Anderson, supra*, Chief Justice DeBruler of Indiana observed that the source and management of most service enterprises is irrelevant to the relative essentiality of the services: "There is no difference in impact on the community between a strike by employees of a public utility and employees of *580 a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of destruction caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a political and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector." (251 N.E.2d at p. 21.)

Recently, the United States Supreme Court also eschewed the classic equation of public ownership of an industry with the essentiality of that industry. In an earlier case which reflected the traditional reasoning, *United States v. Mineworkers* (1947) 330 U.S. 258 [91 L.Ed. 884, 67 S.Ct. 677], the Supreme Court had held that the government's wartime seizure of private coal mines rendered those mining operations public services and changed the rights of the miners, though the function of the mines remained exactly the same. The court then approved the issuance of an injunction against striking workers, a remedy that would not have been available had the mines still been considered a private enterprise.

In the recent case of *Transportation Union v. Long Island R. Co.* (1982) 455 U.S. 678 [71 L.Ed.2d 547, 102 S.Ct. 1349], however, the court held that employees of a formerly private railroad, which had recently been acquired by a governmental entity, retained their right to strike under the Railway Labor Act. In this latter instance, the Supreme Court clearly recognized that the public takeover of the railroad did not necessarily change the rights of the employees; the court therefore suggested that the railroad became no more essential after its public acquisition. Although the decision's basis in the supremacy clause limits its direct precedential value on labor law, the ruling nevertheless signifies a major departure from the court's earlier holding in *Mineworkers, supra* - that a service becomes essential once it comes under government control. The *Transportation Union* case thus underscores the conclusion that it is *the nature of the service provided* which determines its essentiality and the impact of its disruption on the public welfare, as opposed to a simplistic determination of whether the service is provided by public or private employees. Indeed, strikes by private workers often pose a more serious threat to the public interest than would many of those which involve public employees.

We of course recognize that there are certain "essential" public services, the disruption of which would seriously threaten the public health or safety. In fact, defendant union itself concedes that the law should still act to render *581 illegal any strikes in truly essential services which would constitute a genuine threat to the public welfare. Therefore, to the extent that the "excessive bargaining power" and "interruption of essential services" arguments still have merit, specific health and safety limitations on the right to strike should suffice to answer the concerns underlying those arguments.

In addition to the various legal arguments advanced to persuade the courts to impose a judicial ban on public employee strikes - arguments which, as we have seen, are decidedly unpersuasive in the context of modern jurisprudence and experience - there is the broader concern that permitting public employees to strike may be, on balance, harmful to labor-management relations in the public sector. This is essentially a political argument, best addressed to the Legislature. We review the matter only to point out that the issue is not so clear cut as to justify judicial intervention, since the Legislature could reasonably conclude that recognizing public employees' right to strike may actually enhance labor-management relations.

At least 11 states have granted most of their public employees a right to strike, [FN26] and the policy rationale behind this statutory recognition further undercuts several of the basic premises relied upon by strike-ban advocates. As the aforementioned Pennsylvania Governor's Commission Report concluded: "The collective bargaining process will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer, and the limitations on the right to strike will serve notice on the employee that there are limits to the hardships that he can impose." (251 Gov. Empl. Rel. Rep., *supra*, at p. B-3.)

FN26 See footnote 8, *ante*, for a list of the 11 states. Typically these statutes permit public sector strikes, unless such strikes endanger the public health, safety, or welfare. The statutes generally prohibit strikes by police and fire-protection employees, employees in correctional facilities, and those in health-care institutions. In some instances, statutes provide binding arbitration to resolve certain disputes for which strikes are proscribed. Thus, the public sector strike has begun to achieve some degree of legitimacy, despite the strong opposition of critics.

It is unrealistic to assume that disputes among public employees and their employers will not occur; in fact, strikes by public employees are relatively frequent events in California. For example, 46 strikes occurred during 1981-1983, which actually marks a significant decline when compared to the number during the 5 previous years. [FN27] Although the circumstances behind *582 each individual strike may vary somewhat, commentators repeatedly note that much of the reason for their occurrence lies in the fact that without the right to strike, or at least a credible strike threat, public employees have little negotiating strength. This, in turn, produces frustrations which exacerbate labor-management conflicts and often provoke "illegal" strikes.

FN27 Public employee strikes in California, 1970-1983:*

1970	1971	1972	1973	1974	1975	1976
20	14	18	15	45	44	23

1977	1978	1979	1980	1981	1982	1983
59	29	87	55	20	6	20

*Source: *An Analysis of 1981-1983 Strikes in California's Public Sector* (1984) (Mar. 1984 Inst. of Ind. Rel., U.C. Berkeley) 60 Cal. Pub. Empl. Rel. 7, 9. Public employees include all workers in public agencies in California, excluding federal service and public utilities.

The noted labor mediator, Theodore W. Kheel, aptly described this process when analyzing New York's Taylor Law (which makes all public employee strikes illegal) and its resultant effect on labor relations in that state: "It would be unfair to place upon the legal machinery sole responsibility for these interruptions of critical services on which the welfare of New York depends. But the fact remains that the machinery - including the prohibition on strikes with attendant penalties and the fact-finding boards with their power to make recommendations - did not work to settle these disputes or stop the strikes, slowdowns, or threats. In fact it is probable that the Taylor Law exacerbated these conflicts. For one thing, it made subversive a form of conduct society endorsed for private workers. It encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess. It made the march to jail a martyr's procession and a badge of honor for union leaders. ... In simple point of fact, it did not and is not likely to work as a mechanism for resolving conflicts in public employment relations through joint determination, whether called collective bargaining or collective negotiations." (Kheel, *Strikes and Public Employment, supra*, 67 Mich.L.Rev. 931, 936.) [FN28] *583

FN28 Indeed the per se prohibition is notoriously ineffective. See Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes, supra*, 11 San Diego L.Rev. 473, 480. The council's study found that the "present laws do not deter strikes, and furthermore, that once an illegal strike is instituted the law has very little effect in compelling the strikers to return to work. Part of the reason for this is that many public employers hesitate to request an injunction because they believe that the employees would continue to strike, thereby forcing the employer to either initiate contempt proceedings and subject his employees to quasi-criminal penalties, or stand idly and ineffectually by as the illegal strike continues. Either of these alternatives, if pursued, would have a deleterious effect on future employee-management relations once the strike is settled."
See also statement of Professor Reginald Alleyne, UCLA Law School, in the Transcript of Proceedings, MMBA Hearing, California Legislative Assembly, Interim Public Employment and Retirement Committee, page 20. Professor Alleyne cited statistics which supported his view that "In 99 and 9/10 of the cases in the private sector they succeed and reach an agreement."
See also Cebulski, *An Analysis of 22 Illegal Strikes and California Law* (1973) 18 Cal. Pub. Empl. Rel. 2, 9 (chart showing that strikes in which public sector employers imposed legal sanctions lasted *twice as long* as strikes in which the employers did not attempt to impose sanctions).

It is universally recognized that in the private sector, the bilateral determination of wages and working conditions through a collective bargaining process, in which both sides possess relatively equal strength, facilitates understanding and more harmonious relations between employers and their employees. In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith; [FN29] this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a strike often provides the best impetus for parties to reach an agreement at the bargaining table, because *both* parties lose if a strike actually comes to pass. Thus by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than to encourage, work stoppages.

FN29 See, e.g., Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n (1974) 114 N.H. 245 [317 A.2d 555, 557].

Theodore Kheel has explained this argument very well: "[W]e should acknowledge the failure of unilateral determination, and turn instead to true collective bargaining, even though this must include the possibility of a strike. We would then clearly understand that we must seek to improve the bargaining process and the skill of the negotiators to prevent strikes. ... With skillful and responsible negotiators, no machinery, no outsiders, and no fixed rules are needed to settle disputes. For too long our attention has been directed to the mechanics and penalties rather than to the participants in the process. It is now time to change that, to seek to prevent strikes by encouraging collective bargaining to the fullest extent possible." [FN30]

FN30 Kheel, *op. cit. supra*, 67 Mich.L.Rev. at pages 940-941.

A final policy consideration in our analysis addresses a more philosophical issue - the perception that the right to strike, in the public sector as well as in the private sector, represents a basic civil liberty. [FN31] The widespread

acceptance *584 of that perception leads logically to the conclusion that the right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community.

FN31 Another interesting and related policy argument in support of granting a right to strike to public employees rests on a recognition of the changing shape and values of the American economic system itself. In essence, it focuses on the fact that our market economy has evolved from its classical model into an increasingly mixed and pluralistic form. In this process of increased government intervention, the line between public and private enterprise has become increasingly blurred. At the same time, a concomitant blurring has occurred between traditional political and economic activity, and it is this latter overlap which renders a flat ban on all public sector strikes so difficult to defend. The argument then analogizes the deviation of the American system from classical economic models and the corresponding reevaluation of public strike prohibitions to the Solidarity-inspired developments in Poland prior to the latest military crackdown. Ironically, the traditional common law argument that public sector bargaining and striking is antidemocratic and inimical to our political process, closely mirrors the Polish government's view that unions and strikes are antisocial - indeed revisionist and reactionary - conduct in a system operated purportedly for the benefit of all. Deviations from classical models and beliefs thus confront both ideological viewpoints. The argument for a right to strike for public employees in a capitalist system clearly gains strength as society evolves away from the classical ideal of a pure market economy where the public and private sectors are clearly separated. Similarly, the case for a right to strike in a socialist system grows stronger as that society deviates from the classical ideals of the socialist model. For a more detailed analysis of this theory, see Hanslowe & Acierno, *supra*, 67 Cornell L.Rev. at pages 1072-1073.

(4a) Plaintiff's argument that only the Legislature can reject the common law doctrine prohibiting public employee strikes flies squarely in the face of both logic and past precedent. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it.

This court has long recognized the need to redefine, modify or even abolish a common law rule "when reason or equity demand it" or when its underlying principles are no longer justifiable in light of modern society. (See *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 [115 Cal.Rptr. 765, 525 P.2d 669]; *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 216 [11 Cal.Rptr. 89, 359 P.2d 457]; *Green v. Superior Court* (1974) 10 Cal.3d 616, 629 [111 Cal.Rptr. 704, 517 P.2d 1168]; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393].)

This court's history provides numerous examples of this principle. In *Li v. Yellow Cab Co., supra*, 13 Cal.3d at page 812, when this court first adopted a rule of comparative negligence, we expressly rejected the contention that any change in the law of contributory negligence was exclusively a matter for the Legislature, and overturned more than a century of precedent. In *Rodriguez v. Bethlehem Steel Corp., supra*, 12 Cal.3d 382, we directly repudiated the assertion that recognition of a spousal action for loss of consortium required legislative action (see pp. 393-395) and reversed numerous prior decisions in endorsing that cause of action. (5a) Furthermore, "[w]hen the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time when the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development." *585 (*People v. Drew* (1978) 22 Cal.3d 333, 347, fn. 11 [149 Cal.Rptr. 275, 583 P.2d 1318].)

(6a) For the reasons stated above, we conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law. We must immediately caution, however, that the right of public employees to strike is by no means unlimited. Prudence and concern for the general public welfare require certain restrictions.

The Legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential services that a strike would invariably result in imminent danger to public health and safety, and must therefore be prohibited. [FN32]

FN32 See, e.g., Minnesota Statutes Annotated section 179.63(11) (1981) (firefighters, peace officers, guards at correctional facilities), Oregon

Revised Statutes section 243.736 (1979) (firefighters, police officers and guards at correctional or mental health institutions); Pennsylvania Statutes Annotated, title 43, section 1101.1001 (guards at correctional or mental health institutions and employees necessary to the functioning of the courts). For a further discussion of these provisions, see Hanslowe & Acierno, *The Law and Theory of Strike by Government Employees, supra*, 67 Cornell L.Rev. 1055, 1079-1083.
See also Burton & Kinder, *supra*, 79 Yale L.J. at page 437 (advocating a presumption of illegality in strikes involving truly essential services, thereby relieving the state of the burden to demonstrate the elements necessary for an injunction).

While the Legislature may enact such specific restrictions, the courts must proceed on a case-by-case basis. Certain existing statutory standards may properly guide them in this task. As noted above, a number of states have granted public employees a limited right to strike, and such legislation typically prohibits strikes by a limited number of employees involved in clearly essential services. In addition, several statutes provide for injunctive relief against other types of striking public employees when the state clearly demonstrates that the continuation of such strikes will constitute an imminent threat or "clear and present danger" to public health and safety. [FN33] Such an ***586** approach guarantees that essential public services will not be disrupted so as to genuinely threaten public health and safety, while also preserving the basic rights of public employees.

FN33 See, e.g., Alaska Statutes section 23.40.200(c) (strikes by most public employees may not be enjoined unless it can be shown that it has begun to threaten the health, safety and welfare of the public); Oregon Revised Statutes section 243.726(3)(a) (injunctive relief available when strike creates a clear and present danger or threat to the health, safety or welfare of the public); Pennsylvania Statutes Annotated, title 43, section 1101.1003 (injunctive relief available when strike creates a clear and present danger or threats to the health, safety or welfare of the public); Wisconsin Statutes Annotated section 111.70(7m)(b) (injunctive relief available if strike poses an imminent threat to the public health or safety). See also *School District for City of Holland v. Holland Educ. Ass'n* (1968) 348 Mich. 314 [157 N.W.2d 206, 210] (Mich. Supreme Ct., in teachers strike cases, declaring state's policy is not "to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace"); *Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n* (1974) 114 N.H. 245 [317 A.2d 555, 559] (N.H. Supreme Ct. refused to rule on the legality of teachers' strikes but stated that in determining whether to issue a strike injunction, a court should consider "whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue."). The Federal Labor Management Relations Act of 1947 (29 U.S.C. § § 141-187), follows a similar approach with respect to private sector strikes. It empowers the President to direct the Attorney General to enjoin a threatened or actual strike if it affects an industry involved in interstate commerce and if permitted to occur or continue would imperil the national health or safety. (29 U.S.C. § § 176-180.)

After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area: 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. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.

Although we recognize that this balancing process may impose an additional burden on the judiciary, it is neither a novel nor unmanageable task. [FN34] Indeed, an examination of the strike in the instant case affords a good example of how this new standard should be applied. The 11-day strike did not involve public employees, such as firefighters or law enforcement personnel, ***587** whose absence from their duties would clearly endanger the public health and safety. Moreover, there was no showing by the District that the health and safety of the public was at any time imminently threatened. That is not to say that had the strike continued indefinitely, or had the availability of replacement personnel been insufficient to maintain a reasonable sanitation system, there could not have been at some point a clear showing of a substantial threat to the public health and welfare. [FN35] However, such was not the case here, and the legality of the strike would have been upheld under our newly adopted standard. [FN36]

FN34 Legislation in several states already requires the courts to make this precise

determination. (See, e.g., the relevant statutory provisions in Alaska, Ore., Pa. and Wis.) For just one example, under the Pennsylvania Public Employee Relations Act, public employees are not prohibited from striking after they have submitted to mediation and fact finding, unless or until such a strike creates a clear and present danger or threat to the health, safety and welfare of the public. (Pa. Stat. Ann. tit. 43, § 1101.1003.) In such cases, the employer may petition for equitable relief, including injunctions, and is entitled to relief if the court finds that the strike creates the danger or threat. (*Id.*) The Pennsylvania courts have applied this standard to several classes of public employees. (See, e.g., *Bethel Park Sch. v. Bethel Park Fed. of Tchrs. 1607, Am. Fed'n of Teachers* (1980) 54 Pa. Commw. 49, 52 [420 A.2d 18] (teacher's strike constituted a clear and present danger to the public's health, safety and welfare and school district entitled to back-to-work order in view of potential losses of state subsidies, instructional days vocational job, higher education opportunities, counseling, social and health services, extracurricular enrichment programs and employees' work opportunities and wages); *Bristol Township Education Ass'n v. School District* (1974) 14 Pa. Commw. 463, 468-470 [322 A.2d 767] (school district entitled to injunction against teacher's strike under similar circumstances); *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W.* (1973) 67 Pa. D. & C.2d 564, 565-567 (sewer and water authority not entitled to injunction forcing striking employees back to work since there was no clear and present danger in view of the fact that the services provided by the authority could still be performed during the strike, apparently by supervisors, with relatively little inconvenience).

FN35 Had such a showing been made, the trial court would then have had the authority to issue an injunction and declare the strike illegal. In cases involving sanitation strikes, it is often the *length* of the strike which will ultimately require issuance of an injunction. (See, e.g., *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W.*, *supra*, 67 Pa. D. & C.2d 564, 565-567.) In addition, if particular jobs performed by striking sanitation or other public employees require unique skills and training, it is conceivable that a public agency might be unable to find adequate replacements. In the instant matter, however, replacement personnel adequately maintained needed sanitation services without any significant threat of harm to the public. Further, the District's allegations of vandalism by the strikers (see fn. 4, *ante*), while perhaps citing individual illegal acts, were by no means enough to render the entire strike illegal or even a substantial public threat.

FN36 The trial court in this matter had no reason to make a finding regarding the threat to public health and safety posed by the strike. The court merely relied on prior Court of Appeal opinions, which had held that public employee strikes were per se illegal in the absence of a specific statutory grant. In the future, trial courts will clearly be required to make such a finding. In these cases, the scope of appellate review will ordinarily be limited to determining whether reasonable grounds existed for the trial court's decision.

Defendant union has also urged this court to find that a per se prohibition of all public employee strikes violates the California Constitution's guarantees of freedom of association, free speech, and equal protection. They do not contend that such a constitutional infringement is present when a court exercises its equitable authority to enjoin a strike based on a showing that the strike represents a substantial and imminent danger to the public health or safety. Instead, the union argues that in the absence of such a showing, per se prohibition is constitutionally unsupportable.

(7a) The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication [FN37] as well as by statute; in this case, it is *588 specifically mandated by the provisions of the MMBA itself. (8a) In addition, "'[i]t is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. (Citations) This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, (citations) and it is not dependent upon the existence of a labor controversy between the employer and his employee.'" (*In re Blaney* (1947) 30 Cal.2d 643, 648 [184 P.2d 892], quoting *Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 682 [123 P.2d 20].)

FN37 In upholding the National Labor Relations Act against constitutional attack, the United States Supreme Court recognized that the right

> of employees to organize for the purpose of collective bargaining is fundamental. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33 [81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352].)
>
> It is also axiomatic that employees form and join labor organizations to protect their interests in labor disputes, and the United States Supreme Court has long recognized that "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. [Citations.]" (*Thornhill v. Alabama* (1940) 310 U.S. 88, 102 [84 L.Ed. 1093, 1102, 60 S.Ct. 736].) In addition, whenever a labor organization undertakes a concerted activity, its members exercise their right to assemble, and organizational activity has been held to be a lawful exercise of that right. (*Thomas v. Collins* (1945) 323 U.S. 516 [89 L.Ed. 430, 65 S.Ct. 315].)
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> The freedoms of speech and assembly are applicable to the states through the Fourteenth Amendment (*Hague v. C. I. O.* (1939) 307 U.S. 496 [83 L.Ed. 1493, 59 S.Ct. 954]), and may be exercised in an economic context. As explained by the United States Supreme Court in *N.A.A.C.P. v. Alabama*: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [Citations.] It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [Citations.] Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N.A.A.C.P. v. Alabama, supra*, 357 U.S. 449, 460 [2 L.Ed.2d 1488, 1498, 78 S.Ct. 1163].)

As the union contends, however, the right to unionize means little unless it is accorded some degree of protection regarding its principal aim - effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A creditable right to strike is one means of doing so. As yet, however, the right to strike has not been accorded full constitutional protection, the prevailing view being that "[t]he right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a ' fundamental right ....'" (*Auto. Workers v. Wis. Board* (1949) 336 U.S. 245, 259 [93 L.Ed. 651, 666, 69 S.Ct. 516].)

Further, the federal ban on public employee strikes has been specifically upheld as constitutionally permissible. (See *United Federation of Postal Clerks v. Blount, supra*, 325 F.Supp. 879, 884; affd. *589(1971) 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].) In the absence of any explicit constitutional protection of the right to strike, the *Blount* court reasoned that the law prohibiting only public employees from striking need only have a rational basis to avoid offending constitutional guarantees. The court then easily found that the common law policy justifications (discussed in detail above) did indeed provide a rational basis for the per se prohibition. (See, *United Federation of Postal Clerks* v. *Blount, supra*, at p. 883.)

Thoughtful judges and commentators, however, have questioned the wisdom of upholding a per se prohibition of public employee strikes. They have persuasively argued that because the right to strike is so inextricably intertwined with the recognized fundamental right to organize and collectively bargain, some degree of constitutional protection should be extended to the act of striking in both the public and private sectors.

As Judge J. Skelly Wright declared in his concurrence in *United Federation of Postal Clerks v. Blount, supra*, "[i]f the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike, is historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness. That fact is not irrelevant to the constitutional calculations. Indeed, in several decisions, the Supreme Court has held that the First Amendment right of association is at least concerned with essential organizational activities which give the particular association life and promote its fundamental purposes. ... [Citations.] I do not suggest that the right to strike is co-equal with the right to form labor organizations. ... But I do believe that the right to strike is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or 'compelling' justification." (325 F.Supp. 879, 885.)

Chief Justice Roberts of the Rhode Island Supreme Court

offered similar sentiments in a case involving a teachers' strike in that state: "Obviously, the right to strike is essential to the viability of a labor union, and a union which can make no credible threat of strike cannot survive the pressures in the present-day industrial world. If the right to strike is fundamental to the existence of a labor union, that right must be subsumed in the right to organize and bargain collectively. ... The collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism. ... I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis. ... The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest *590 than would many of those engaged in by public employees. ... In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable." (*School Committee v. Westerly Teachers Ass'n* (1973) Ill R.I. 96 [299 A.2d 441, 447-449], dis. opn.)

We are not persuaded that the personal freedoms guaranteed by the United States and California Constitutions confer an *absolute right* to strike, [FN38] but the arguments above may merit consideration at some future date. If the right to strike is afforded some constitutional protection as derivative of the fundamental right of freedom of association, then this right cannot be abridged absent a substantial or compelling justification.

FN38 As stated in the United States Supreme Court in *Dorchy v. Kansas*: "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike." (*Dorchy v. Kansas* (1926) 272 U.S. 306, 311 [71 L.Ed. 248, 269, 47 S.Ct. 86].) Similarly, we do not find that the comparable personal freedoms guaranteed by the California Constitution confer an absolute right to strike. (See, e.g., *In re Porterfield* (1946) 28 Cal.2d 91, 114 [168 P.2d 706, 167 A.L.R. 675].)

(9a) As this court stated in *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22 [64 Cal.Rptr. 409, 434 P.2d 961], which invalidated a loyalty oath requirement for public employees in this state, "even where a compelling state purpose is present, restrictions on the cherished freedom of association protected by the First Amendment and made applicable to the states by the Fourteenth Amendment must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes ... those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective. (*Keyishian v. Board of Regents, supra*, 385 U.S. 589, 602-603; *Elfbrandt v. Russell*, 384 U.S. 11, 15, *et seq.*; *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433; *Shelton v. Tucker*, 364 U.S. 479, 488; *Bagley v. Washington Township Hospital Dist., supra*, 65 Cal.2d 499, 506-509; *Fort v. Civil Service Com., supra*, 61 Cal.2d 331, 337-338.)"

(3b) As discussed at length above, the traditional justifications espoused in favor of a per se prohibition cannot withstand a significant degree of judicial scrutiny. Indeed, since not all public employee services are essential and many private employees perform services more vital to the public health *591 and safety than do their counterparts in the public sector, the simplistic public/private dichotomy does not constitute a "compelling" justification for a per se prohibition of public employee strikes. Thus the constitutional arguments of defendant union and several amici cannot easily be dismissed, particularly since we will retain the limitation that public strikes may be prohibited when they threaten the public health or safety. [FN39]

FN39 Contrary to the characterization of our dissenting colleague, we neither applaud nor disapprove of strikes by public employees as a matter of social policy, for in the present state of the law that is not our function. The old rule in this state, to the effect that strikes by public employees are unlawful, rested expressly upon the premise that wages and conditions of employment for public employees may only be set by unilateral action of the public employer, and that collective bargaining for such employees in itself was contrary to public policy. *It is the Legislature which has removed the underpinnings from the old rule, by sanctioning a system of collective bargaining for local government employees.* At the same time, the Legislature has maintained a stony silence regarding the status of public employee strikes under the new statutory scheme. To the extent that we examine alternative justifications which have been asserted in support of a ban on such strikes, we do so only to determine whether there are any such justifications which are so compelling as to require acceptance by the courts even in the absence of legislative action. We find

an affirmative answer only as regards those strikes which imperil public health or safety. As to other strikes, we conclude that the policy questions involved are highly debatable, and best left to the legislative branch in the first instance. We find nothing in the dissenting opinion which detracts from this logic. The "cogent analysis" upon which the dissent relies for "the various rationales underlying the 'no strike' rule" (*post*, p. 610) refers nakedly to "differences in the employment relationship" between public and private sectors, and to "the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship." (*Id.*, at p. 611.) What the significant differences are which require a different rule, or why strikes are incompatible with the employer-employee relationship in the public sector, we are not told. Surely judicial intervention in so complex an arena requires greater justification than that.

The dissent decries also what it perceives to be the ambiguity in our rule prohibiting strikes which threaten public safety or health, and states a preference for those statutes which clearly define classes of employees who may or may not strike. The formulation we have adopted, however, is in accord with the rule in several states (*ante*, p. 585), and the dissent points to no evidence that such a rule is incapable of effective judicial administration. On the contrary, such a rule, which depends upon an assessment of public detriment from a particular strike, is entirely in accord with the traditional role of courts in equity. If the Legislature wishes to adopt a different rule, of course it may do so.

Since we have already concluded that the traditional per se prohibition against public employee strikes can no longer be upheld on common law grounds, we do not find it necessary to reach the issue in constitutional terms. Although we are not inclined to hold that the right to strike rises to the magnitude of a fundamental right, it does appear that associational rights are implicated to a substantial degree. As such, the close connection between striking and other constitutionally protected activity adds further weight to our rejection of the traditional common law rationales underlying the per se prohibition. (Cf. *592 *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 195 [203 Cal.Rptr. 127, 680 P.2d 1086].)

(6b) We conclude that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Since the trial court's judgment for damage in this case was predicated upon an erroneous determination that defendants' strike was unlawful, the judgment for damages cannot be sustained. [FN40]

FN40 The trial court relied upon *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41], which held that the conduct of an illegal strike was a tort for which damages may be recovered. Since we have held that the strike in this case was not illegal, we need not consider the correctness of that decision.

The judgment is reversed.

Mosk, J., and Grodin, J., concurred.

KAUS, J.

I concur in the judgment insofar as it holds that a peaceful strike by public employees does not give rise to a tort action for damages against the union. I am aware of nothing in the Meyers-Milias-Brown Act which suggests that the Legislature intended that common law tort remedies should be applied in this context, and without such legislative endorsement I believe it is improper to import tort remedies that were devised for different situations into this sensitive labor relations arena. As this court noted in *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 917 [120 Cal.Rptr. 707, 534 P.2d 403]: "The question as to what sanctions should appropriately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy. In the past, several states have attempted to deter public employee strikes by imposing mandatory draconian statutory sanctions on striking employees; 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 the absence of a determination by the Legislature that a tort action, resulting in a money damage award determined by a jury many years after the strike, is the appropriate method for dealing with public employee strikes, I do not believe the judiciary should, on its own, embrace this "solution" to the problem. (See, e.g., *Lamphere Sch. v. Lamphere Fed. of Teachers* (1977) 400 Mich. 104 [252 N.W.2d 818, 827-832, 84 A.L.R.3d 314]; *City of Fairmont v. Retail, Wholesale, etc.* (W.Va. 1980) 283 S.E.2d 589, 592-595; contra *593 *State v. Kansas City Firefighting Local 42*

(Mo.App. 1984) 672 S.W.2d 99, 107-116.) I would therefore disapprove the contrary holding in *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 111-114 [140 Cal.Rptr. 41].

In concluding that a common law tort action does not lie in these circumstances, it is not necessary to determine whether such a strike is "legal" or "illegal" in an abstract sense, or whether, and under what circumstances, such a strike could properly be enjoined. The question of injunctive relief presents significantly different considerations than the propriety of a tort action, and it is not before us in this case. We should await the facts of a concrete dispute before we attempt to resolve it.

Finally, I believe it is equally unwise to venture an opinion on potential constitutional challenges to future legislative action in this field. In my view, we should - if anything - be encouraging the Legislature to attempt to deal with the difficult public policy questions in this area, not frightening it away with premature warnings of possible constitutional minefields.

Reynoso, J., concurred.

BIRD, C. J.,

Concurring.

(1b), (2b), (3c), (4b), (5b), (6c), (7b), (8b), (9b) I write separately because I believe it is only fair to give the Legislature some guidance in an area filled with constitutional problems. To prompt the Legislature to enter this field without such guidance [FN1] not only invites error but encourages it. Such a practice is not only disingenuous, it is disrespectful to the litigants and knowingly misleads the public.

FN1 See concurring opinions of Grodin, J. and Kaus, J. See also *In re Misener* (1985) *ante*, page 543 [213 Cal.Rptr. 569, 698 P.2d 637] and its antecedent, *People v. Collie* (1981) 30 Cal.3d 43 [177 Cal.Rptr. 458, 634 P.2d 534, 23 A.L.R.4th 776], which graphically illustrate this very problem.

Today's decision brings the law of public employee strikes into the 20th century and makes the common law contemporary. As the court has explained, the flat prohibition against such strikes was grounded in outmoded notions of sovereignty and unreasoned fears of free labor organization.

It is appropriate that today's affirmation of the right to strike should come so soon after the tragic events surrounding the strike of Solidarity, the Polish labor union. The Solidarity strikers proclaimed that the rights to organize collectively and to strike for dignity and better treatment on the job were fundamental human freedoms. When the Polish government declared martial law and suppressed the union in December 1981, Americans especially mourned the loss of these basic liberties. *594

The public reaction to the Solidarity strike revealed the strength of the American people's belief that the right to strike is an essential feature of a free society. In an economy increasingly dominated by large-scale business and governmental organizations, the right of employees to withhold their labor as a group is an essential protection against abuses of employer power. (See, e.g., *Amer. Foundries v. Tri-City Council* (1921) 257 U.S. 184, 209 [66 L.Ed. 189, 199, 42 S.Ct. 72, 27 A.L.R. 360].) Hence, it is widely presumed that "we have the right as free men to refuse to work for just grievances: the strike is an unalienable weapon of any citizen." (Reagan & Hubler, Where's the Rest of Me? (1965) p. 138.)

The majority opinion suggests that the right to strike may have constitutional dimensions. (Maj. opn., *ante*, at pp. 589-591.) I write separately to elaborate on this point. Although the right to strike has a long history in American jurisprudence, its textual and theoretical foundations have eluded a comprehensive analysis. Instead, the courts have danced a minuet around the issue. The time has come to make explicit that which has so frequently been presumed. If the right to strike does indeed differentiate this country from those that are not free, then it must be given substance and enforced.

The constitutional right to strike rests on a number of bedrock principles: (1) the basic personal liberty to pursue happiness and economic security through productive labor (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § § 1, 7, subd. (a)); (2) the absolute prohibition against involuntary servitude (U.S. Const., 13th Amend.; Cal. Const., art. I, § 6); and (3) the fundamental freedoms of association and expression (U.S. Const., 1st Amend.; Cal. Const., art. I, § § 2, subd. (a), 3).

It is beyond dispute that the individual's freedom to withhold personal service is basic to the constitutional concept of "liberty." Without this freedom, working people would be at the total mercy of their employers, unable either to bargain effectively or to extricate themselves from an intolerable situation. Such a condition would make a mockery of the fundamental right to pursue life, liberty and happiness by engaging in the common occupations of the community. (See *Sailer Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17 [95 Cal.Rptr. 329, 485 P.2d

529, 46 A.L.R.3d 351]; see also *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 110 [207 Cal.Rptr. 285, 688 P.2d 894] (conc. and dis. opn. of Bird, C. J.) [right to withhold personal service as a landlord is a constitutionally protected liberty interest]; *id.*, at p. 114 (dis. opn. of Mosk, J.) [same]; cf. U.S. Const., 13th Amend. [prohibiting involuntary servitude]; Cal. Const., art. I, § 6 [same].)

Nevertheless, in the early years of this country, the concerted withholding of labor was outlawed under the doctrine of "criminal conspiracy." (See *595 Frankfurter & Greene, The Labor Injunction (1930) pp. 2-3, and cases cited.) Although workers - with the exception of chattel slaves - enjoyed the right to leave employment as individuals, they were prohibited from doing so as a group. (*Ibid.*) Apparently, the courts assumed that working people could adequately protect their liberty interests by exercising their personal right to terminate employment and compete as individuals in the labor market.

As Archibald Cox has written, "[s]ome of the major problems of constitutional law ... arise from the necessity of shaping guarantees born of an individualistic society to the conditions resulting from the solidarity of organized groups." (Cox, *Strikes, Picketing and the Constitution* (1951) 4 Vand.L.Rev. 574, 579 [hereafter Cox].) The recognition of group rights for laborers trailed behind the legal acceptance of the modern business corporation, a group form of property ownership. [FN2]

FN2 The modern form of corporate organization, which grants the corporate management broad powers to act on behalf of shareholders, emerged in the latter part of the 19th century. (See generally, Berle & Means, The Modern Corporation and Private Property (1939) pp. 127-152.) During the 1890's, the United States Supreme Court ruled that corporations possess constitutional rights. (See, e.g., *Chicago, &c. Railway Co. v. Minnesota* (1890) 134 U.S. 418 [33 L.Ed. 970, 10 S.Ct. 462] ["liberty"]; *Smyth v. Ames* (1898) 169 U.S. 466 [42 L.Ed. 819, 18 S.Ct. 418] ["property"].)

The right to strike was initially regarded as labor's counterpart to the massive economic power concentrated in the corporation. With the rise of monolithic business enterprises, it could no longer be maintained that employees' freedom to compete in the labor market as individuals would be sufficient to protect their liberty interests. In a famous dissenting opinion, Justice Oliver Wendell Holmes observed: "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." (*Vegelahn v. Guntner* (Mass. 1896) 44 N.E. 1077, 1081 (dis. opn. of Holmes, J.).)

In Holmes's view, the right to strike was integral to this latter combination: "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal *596 of those advantages which they otherwise lawfully control." (*Vegelahn v. Guntner, supra*, 44 N.E. at p. 1081.)

This theoretical foundation was later adopted by the United States Supreme Court. In an opinion by Chief Justice Taft, the court declared: "[Unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court." (*Amer. Foundries v. Tri-City Council, supra*, 257 U.S. at p. 209 [66 L.Ed. at p. 199].)

A few years later the high court, with Chief Justice Hughes writing, asserted that the right of employees to engage in "collective action" was "not to be disputed." (*Texas & N. O. R. Co. v. Ry. Clerks* (1930) 281 U.S. 548, 570 [74 L.Ed. 1034, 1046, 50 S.Ct. 427].) Finally, the court proclaimed that employees' rights of self-organization were "fundamental" in nature. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33 [81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352].)

Though these forceful statements suggest that the Supreme Court included the right to strike among those liberties protected by the Constitution, that proposition was never squarely asserted. Instead, a federal district

court was the first to define the right in unambiguous terms: "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community." (*Stapleton v. Mitchell* (D.Kan. 1945) 60 F.Supp. 51, 61, app. dism. by stip., 326 U.S. 690 [90 L.Ed. 406, 66 S.Ct. 172] [invalidating a Kansas law that prohibited various labor activities, including strikes]; see also *Alabama State Federation of Labor* v. *McAdory* (1944) 246 Ala. 1 [18 So.2d 810, 827-828] [striking down Alabama law that prohibited all strikes not endorsed by a majority of the struck employer's employees].)

The status of the right to strike as a constitutionally protected "liberty" arises not only from the considerations of fairness set forth by Justice *597 Holmes and Chief Justices Taft and Hughes, but also from the inherent nature of work. In the words of Justice Felix Frankfurter, "[t]he coming of the machine age tended to despoil human personality. It turned men and women into 'hands.' The industrial history of the early Nineteenth Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence." (*A.F. of L. v. American Sash Co.* (1949) 335 U.S. 538, 542-543 [93 L.Ed. 222, 225, 69 S.Ct. 258, 6 A.L.R.2d 481] (conc. opn. of Frankfurter, J.).)

Perhaps in response to this concern, some courts - including a California Court of Appeal - adopted an absolutist position, recognizing no distinction whatever between the rights of employees to quit work as individuals or in a group: "It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. [Citations.] These rights may be exercised in association with others so long as they have no unlawful object in view. " (*Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366, 370-371 [207 P. 412]; see also Tobriner, *The Organizational Picket Line: Lawful Economic Pressure* (1951) 3 Stan.L.Rev. 423, 426, fn. 16 [in spite of four separate opinions, the decision of this court in *Parkinson Co. v. Bldg. Trades Council* (1908) 154 Cal. 581 [98 P. 1027] rests on the absolute right of a labor union to strike].)

It has been argued that constitutional protection for strike activities would intrude on the legislative function. The courts have exercised restraint in applying the constitutional guarantee of "liberty" to legislative determinations of economic policy. This restraint reflects the fear that the diffuse concept of liberty could be employed as a device for the imposition of judicial policy judgments. (See *Lochner v. New York* (1905) 198 U.S. 45, 74-76 [49 L.Ed. 937, 948-949, 25 S.Ct. 539] (dis. opn. of Holmes, J.).)

Nevertheless, the mere fact that an enactment covers economic matters does not insulate it from scrutiny where an important constitutional guarantee is implicated. The Constitution expressly protects certain rights of "property." (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § § 1, 7, subd. (a).) As Professor Cox has observed, "[a] constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital must recognize the worker's interest in the conditions under *598 which he labors and the price he receives for his work." (Cox, *supra*, 4 Vand.L.Rev. at p. 580.)

Furthermore, recognition of the right to strike does not require an unconstrained judicial construction of the term "liberty." The courts can find constitutional guidance in the close nexus between the right to strike and a specific constitutional provision: the ban on involuntary servitude. (U.S. Const., 13th Amend.; Cal. Const., art. I, § 6.) Though this provision might not by itself guarantee the right to strike, it does provide clear support for the proposition that the strike is an exercise of constitutionally protected liberty.

Justice Brandeis once declared, in a case involving a peaceful, concerted refusal to work: "If, on the undisputed facts of this case, refusal to work can be enjoined, Congress [has] created ... an instrument for imposing restraints upon labor which reminds of involuntary servitude." (*Bedford Co. v. Stone Cutters Assn.* (1927) 274 U.S. 37, 65 [71 L.Ed. 916, 928, 47 S.Ct. 522, 54 A.L.R. 791] (dis. opn. of Brandeis, J., joined by Holmes, J.); see also *France Packing Co. v. Dailey* (3d Cir. 1948) 166 F.2d 751, 758 (dis. opn. of O'Connell, J.) [construing War Labor Disputes Act to permit voluntary strikes in view of the constitutional ban on involuntary servitude].) Some courts have invalidated antistrike restrictions as inconsistent with the ban on involuntary servitude. (See e.g., *Henderson v. Coleman* (1942) 150 Fla. 185 [7 So.2d 117, 121]; *United States v. Petrillo* (N.D.Ill. 1946) 68 F.Supp. 845, 849, revd. (1947) 332 U.S. 1 [91 L.Ed. 1877, 67 S.Ct. 1538].) [FN3]

FN3 In *Petrillo*, the Supreme Court reversed the district court's holding as to involuntary

servitude solely on the ground that the restriction at issue did not - on its face - prohibit strike activities. (*United States v. Petrillo, supra*, 332 U.S. at pp. 12-13 [91 L.Ed. at pp. 1885-1886].)

The close connection between the right to strike and the prohibition against involuntary servitude derives from the purposes of the 13th Amendment. That amendment guarantees the freedom to terminate employment not for its own sake, but in order to "prohibit[] that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." (*Bailey v. Alabama* (1911) 219 U.S. 219, 241 [55 L.Ed. 191, 201, 31 S.Ct. 145].)

Accordingly, the amendment is concerned not merely with the formal right to quit, but also with the *practical ability of working people to protect their interests in the workplace*: "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. *599 When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." (*Pollock v. Williams* (1944) 322 U.S. 4, 18 [88 L.Ed. 1095, 1104, 64 S.Ct. 792]; see generally, Cox, *supra*, 4 Vand.L.Rev. at p. 576.)

As courts and commentators universally acknowledge, the group right to strike has replaced the individual right to "change employers" as the principal defense of working people against oppressive conditions. The rise of multinational corporations and large-scale government has produced a corresponding decrease in the practical significance of the right to quit for the individual. To withdraw the right to strike is to deprive the worker of his or her only effective bargaining power. (See maj. opn., *ante*, at pp. 589-590; see also Burton & Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418, 419-420, and sources cited.) This undeniable fact is reflected in the intensity of the public reaction to the suppression of the Solidarity strike.

Over 30 years ago, the question of whether the 13th Amendment protects the right to strike was termed "momentous" by two justices of the United States Supreme Court. (*A.F. of L. v. American Sash Co., supra*, 335 U.S. at p. 559 [93 L.Ed. at p. 234] (conc. opn. of Rutledge, J., joined by Murphy, J.) [expressly reserving judgment on the question].) Yet, that court has never squarely addressed the issue. [FN4]

FN4 The court came closest to confronting the issue in *Auto. Workers v. Wis. Board* (1949) 336 U.S. 245 [93 L.Ed. 651, 69 S.Ct. 516]. In that case, a union had conducted a series of "union meetings" at irregular times during work hours. The Wisconsin Employment Relations Board issued an order prohibiting any "concerted effort to interfere with production of the complainant *except by leaving the premises in an orderly manner for the purpose of going on strike*." (*Id.*, at p. 250 [93 L.Ed. at p. 661], italics added.) The court sustained the order against a 13th Amendment challenge. Whatever the merits of this conclusion (see *id.*, at p. 269 [93 L.Ed. at p. 671] (dis. opn. of Murphy, J.) [the majority find the union's tactic objectionable only because it is effective]), it is clear that the court did not decide the general question of whether the 13th Amendment guaranteed the right to strike: "Our only question is ... whether it is beyond the power of the State to prohibit the particular course of conduct described." (*Id.*, at p. 251 [93 L.Ed. at p. 661].)

The notion of a 13th Amendment right to strike has been rejected by some lower federal courts and state courts. These courts have relied on two lines of reasoning. First, some have suggested that the prohibition against involuntary servitude protects only the right of employees to withhold personal services as individuals. (See, e.g., *Western Union Tel. Co. v. International B. of E. Workers* (N.D.Ill. 1924) 2 F.2d 993, 994-995, affd. (7th Cir. 1925) 6 F.2d 444 [46 A.L.R. 1538].) However, as explained above, this line of *600 argument cannot justify the total nonprotection of strike activities in an economy dominated by large and powerful employers. (See *ante*, at p. 598-599.)

Other courts have held that the 13th Amendment does not protect a *temporary* withholding of labor. (See, e.g., *Dayton Co. v. Carpet, Linoleum and Resilient Fl. D., etc.* (1949) 229 Minn. 87 [39 N.W.2d 183, 197-198], app. dism., (1950) 339 U.S. 906 [94 L.Ed. 1334, 70 S.Ct. 570].) However, in view of the purposes of the prohibition on involuntary servitude, "can it matter whether the worker quits permanently or merely leaves the establishment until conditions are changed? In the former case he may be said to be exercising the right to sell his services to the highest bidder, leaving others to take his former job, while in the latter case he is seeking to injure the employer by cutting off the supply of labor. But this reasoning scarcely justifies a constitutional distinction, for in either case the improvement of employment conditions ultimately depends upon a withholding of labor from marginal employers until they offer more. ... [T]he temporary or permanent character of the quitting seems irrelevant." (Cox, *supra*, 4 Vand.L.Rev. at pp. 576-577.)

More fundamentally, it is not suggested here that the prohibition on involuntary servitude standing alone necessarily guarantees the right to strike. That provision does, however, provide ample support for the proposition that the right to strike must be counted among those constitutionally protected "liberties" that are essential to human freedom.

The concerted withholding of labor warrants protection not only as an exercise of personal liberty, but also as an incident of the fundamental freedoms of association and expression. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 2, 3.) As the majority point out, the right of workers to combine and exert "'various forms of economic pressure'" on employers is constitutionally protected. (Maj. opn., *ante*, at p. 588, quoting *In re Blaney* (1947) 30 Cal.2d 643, 647-648 [184 P.2d 892].)

Working people enjoy the constitutional right to form and join unions. (See, e.g., *Orr v. Thorpe* (5th Cir. 1970) 427 F.2d 1129, 1131; *American Federation of State, Co., & Mun. Emp. v. Woodward* (8th Cir. 1969) 406 F.2d 137, 139-140.) Without a constitutionally protected right to strike, the use of these freedoms would be "little more than an exercise in sterile ritualism." (*School Committee v. Westerly Teachers Ass'n* (1973) 111 R.I. 96 [299 A.2d 441, 448] (dis. opn. of Roberts, C. J.); see also *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp. 879, 885 (conc. opn. of Wright, J.), affd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].) *601

Recent decisions concerning consumer boycotts provide persuasive authority for the protection of strikes under the guarantees of free association and expression. [FN5] Consumer boycotts were, like strikes, originally prohibited at common law. (See generally, Note, *Political Boycott Activity and the First Amendment*, *supra*, 91 Harv.L.Rev. at pp. 676-677.)

FN5 A boycott is an organized refusal to deal. (See Note, *Political Boycott Activity and the First Amendment* (1978) 91 Harv.L.Rev. 659.) A strike is one form of boycott - i.e., an organized refusal by workers to provide labor.

However, in a series of cases involving consumer boycotts by civil rights advocates, the courts began to recognize that such boycotts, like strikes, provide a necessary counterweight to entrenched economic power. In 1948, Justice Roger Traynor observed that "[i]n their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them. ... Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality." (*Hughes v. Superior Court* (1948) 32 Cal.2d 850, 868 [198 P.2d 885] (dis. opn. of Traynor, J.), affd. (1950) 339 U.S. 460 [94 L.Ed. 985, 70 S.Ct. 718]; see also *Garner v. Louisiana* (1961) 368 U.S. 157, 201 [7 L.Ed.2d 207, 239, 82 S.Ct. 248] (conc. opn. of Harlan, J.) [the First and Fourteenth Amendments protect sit-ins called to protest the racial practices of private businesses].)

In *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 907-915 [73 L.Ed.2d 1215, 1232-1238, 102 S.Ct. 3409] (hereafter *Claiborne Hardware*), the United States Supreme Court held that a peaceful, politically motivated boycott constituted an exercise of the constitutional freedoms of association and expression. In that case, black citizens of Port Gibson, Mississippi, boycotted white-owned businesses to pressure those businesses and elected public officials to implement policies of racial equality. (*Id.*, at pp. 898-900 [73 L.Ed.2d at pp. 1226-1228]; *N. A. A. C. P. v. Claiborne Hardware Co.* (Miss. 1980) 393 So.2d 1290, 1295-1297.) The Mississippi Supreme Court affirmed the trial court's holding that the boycotted businesses were entitled to injunctive and monetary relief. (*Id.*, at pp. 1293-1302.)

The United States Supreme Court reversed. (*Claiborne Hardware, supra*, 458 U.S. at p. 934 [73 L.Ed.2d at p. 1249].) The court rejected the common law view that boycotts were devoid of constitutional value by virtue of their coercive nature. "Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action." (*602 *Id.*, at p. 910 [73 L.Ed.2d at p. 1234].) On the contrary, the boycott was entitled to protection as an effective and nonviolent means of bringing about political, social, and economic change. (*Id.*, at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].) Accordingly, "[t]he right of the States to regulate economic activity could not justify a complete prohibition" against the boycott. (*Id.*, at p. 914 [73 L.Ed.2d at p. 1237].) [FN6]

FN6 The court's analysis covered both the boycott itself and the expressive activities used to sustain and expand it. (*Claiborne Hardware, supra*, 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].) A boycott is at once a form of association and a means of expression. The decision to boycott results from processes of assembly and debate. (See, e.g., *Id.*, at p. 907 [73 L.Ed.2d at p. 1232].) Once commenced, the boycott is a form of symbolic expression. Most obviously, it forcefully communicates the participants' views to the target. Further, as a newsworthy event, the boycott provides the

> participants with a platform for explaining and advocating their views to the public. They pay for this platform by foregoing the benefits of trade or employment. (Compare *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, 296 [70 L.Ed.2d 492, 498-499, 102 S.Ct. 434] [the contribution and expenditure of money are essential to effective advocacy since the means for communicating with the public are costly].) In short, the boycott is a nonviolent method of conveying not only the content but also the intensity of the participants' views.

This court has recently had occasion to apply the principles announced in *Claiborne Hardware*. In *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188 [203 Cal.Rptr. 127, 680 P.2d 1086] (hereafter *Environmental Planning*), an environmental group sought to influence a newspaper's editorial policies by boycotting businesses that advertised in the newspaper. The newspaper's publisher brought suit claiming tortious interference with an economic relationship.

This court rejected the publisher's argument that only civil rights boycotts should be accorded constitutional protection: "As in *Claiborne Hardware*, ... [the boycotters'] activities constitute a 'politically motivated boycott designed to force governmental and economic change' (458 U.S. at p. 914 []), and the fact that the change which they seek bears upon environmental quality rather than racial equality, can hardly support a different result." (*Environmental Planning, supra*, 36 Cal.3d at p. 197.) Applying common law principles in light of federal and state constitutional guarantees, the court held that the environmental group was engaging in lawful activity. (*Id.*, at pp. 197-198.)

I see no principled basis for granting protection to "politically motivated " consumer boycotts while withdrawing protection from labor boycotts. In *Environmental Planning*, this court expressly reserved the question whether *Claiborne Hardware's* apparent distinction between political and labor boycotts reflects the dictates of the California Constitution. (36 Cal.3d at p. 198, fn. 9.) The prior decisions both of this court and of the United *603 States Supreme Court indicate that labor boycotts should be entitled to full constitutional protection.

Differential treatment of political and labor activity runs afoul of the well-established principle of judicial impartiality among speakers and messages. "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N. A. A. C. P. v. Alabama* (1958) 357 U.S. 449, 460-461 [2 L.Ed.2d 1488, 1498-1499, 78 S.Ct. 1163], quoted by the majority, *ante*, at p. 587, fn. 37; see also *Environmental Planning, supra*, 36 Cal.3d at p. 197.)

Similarly, labor unions are entitled to no less protection than civil rights organizations and environmental groups. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. " (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 777 [55 L.Ed.2d 707, 718, 98 S.Ct. 1407].)

If these principles of judicial neutrality held sway without qualification, the political-labor distinction could be rejected without further discussion. However, as this court has recognized, "commercial" expression is accorded a lowered level of protection. (See *Environmental Planning, supra*, 36 Cal.3d at p. 197; accord *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64 [77 L.Ed.2d 469, 476, 103 S.Ct. 2875, 2879].)

The United States Supreme Court has defined commercial speech alternately as " speech which does 'no more than propose a commercial transaction'" (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 762 [48 L.Ed.2d 346, 358, 96 S.Ct. 1817]) or "expression related solely to the economic interests of the speaker and its audience" (*Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561 [65 L.Ed.2d 341, 348, 100 S.Ct. 2343]). Labor expression cannot be reduced to such narrow concerns. It should not be relegated to the lowered protection accorded commercial expression.

Labor disputes cover a broad range of issues, many of which involve basic concerns of liberty. "A collective bargaining agreement is an effort to erect a system of industrial self-government." (*Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 580 [4 L.Ed.2d 1409, 1416, 80 S.Ct. 1347].) For the bulk of each day, working people are subject to the codes of conduct that govern their workplaces. Those codes - whether embodied in collective *604 bargaining agreements, employer rule books, or informal practices - govern matters ranging from race relations to permission to use the bathroom. (See generally, Shulman, *Reason, Contract, and Law in Labor Relations* (1955) 68 Harv.L.Rev. 999, 1002-1008 [hereafter Shulman]; Cox, *Reflections Upon Labor Arbitration* (1959) 72 Harv.L.Rev. 1482, 1490.) While on the job, working people feel the force of these rules more

immediately and directly than those of the government.

Herein lies the link between the guarantee of personal liberty, as informed by the ban on involuntary servitude, and the freedoms of association and expression. The issues that arise in the workplace rival those addressed in the political process in their actual impact on the breadth of liberty enjoyed by working people. The strike is an essential weapon in the worker's defense against "that control by which the personal service of one man is disposed of or coerced for another's benefit ...." (*Bailey v. Alabama, supra*, 219 U.S. at p. 241 [55 L.Ed. at p. 201]; see *ante*, at pp. 598-599. And, it is a weapon that employs the constitutionally favored methods for promoting change: peaceful association and expression. (See *ante*, at p. 602 & fn. 6.) Surely, the Constitution protects the efforts of working people to preserve and expand their liberties by means of nonviolent - albeit outspoken and impolite - forms of association and expression. (Cf. *Claiborne Hardware, supra*, 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].)

As the Polish strikers discovered, a free labor organization cannot coexist with political tyranny. The converse is no less true: "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." (Shulman, *supra*, 68 Harv.L.Rev. at p. 1002.) [FN7]

> FN7 The Constitution does not mandate collective bargaining. Whatever the particular system of labor relations, a degree of liberty in the employment relationship is essential to democracy.

The fact that unions and their members seek increased compensation as well as greater liberty does not lower the expression of their grievances to the level of commercial speech. In the words of Congress, "[t]he labor of a human being is not a commodity or article of commerce." (15 U.S.C. § 17.) Unlike the sale of a commodity, the sale of labor gives rise to rights of control over a person's time and activity. The employer obtains not only the product of the employee's labor, but also considerable power to dictate when and how the work will be performed. (See generally, Dept. of Health, *605 Ed. & Welf., Work in America (1973) [hereafter HEW Report].) The amount of compensation is, in part, a tradeoff for personal subordination. This feature of wages and benefits explains why the 13th Amendment, a guarantee of personal liberty, is concerned with "the defense against oppressive hours, pay [and] working conditions." (*Pollock v. Williams, supra*, 322 U.S. at p. 18 [88 L.Ed. at p. 1104].) [FN8]

> FN8 Over a century ago, John Stuart Mill eloquently expressed a view of liberty in the employment relation: "Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing." (Mill, On Liberty (Shields edit. 1956) p. 72.) More recently, it has been widely recognized that issues relating to authority and work content are of central importance in labor relations. (See, e.g., HEW Report; Hill, Competition and Control at Work (1982) pp. 16-44; Hiszowicz, Industrial Sociology (1982); Work in America: The Decade Ahead (Kerr & Rosow edits. 1979); Martin, Contemporary Labor Relations (1979) pp. 125-129; Tepperman, Not Servants Not Machines: Office Workers Speak Out (1976); Case Studies on the Labor Process (Zimbalist edit. 1979).) Whatever one's views on the question of personal liberty in the workplace, it is clear that debate and controversy over that issue cannot be reduced to the status of purely "commercial" speech.

In short, the asserted political-labor distinction provides no basis for denying to working people and unions the protection afforded civil rights activists and environmentalists. Accordingly, a restraint on the right to strike should be upheld under the California Constitution only if it serves a compelling state interest by the least restrictive means. [FN9] *606

> FN9 The notion that the United States Constitution protects the right to strike was rejected by a two-judge majority in *United Federation of Postal Clerks v. Blount, supra*, 325 F.Supp. 879, affd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (hereafter *Blount*). However, the California Constitution possesses independent vitality. (See, e.g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 764-766 [135 Cal.Rptr. 345, 557 P.2d 929].) Hence, *Blount* is not binding authority as to the state constitutional claim. Nor did the *Blount* court provide any persuasive reasoning in support of its holding. First, the *Blount* court erroneously suggested that since the common law provided no protection for strikes, neither did the United States Constitution. (*Blount, supra*, 325 F.Supp. at p. 882.) The court did not have the benefit of the

Claiborne Hardware decision, which held that a consumer boycott was constitutionally protected in spite of the fact that such boycotts had been prohibited under the common law. (458 U.S. at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].) Moreover, this court today overturns the common law ban on public employee strikes in this state.

Next, the court asserted that the right to strike was fully protected for the first time by section 7 of the National Labor Relations Act (NLRA). (*Blount, supra*, 325 F.Supp. at p. 882.) However, as the Chief Justice of the Rhode Island Supreme Court has explained, the NLRA presumed that working people already possessed the right to strike: "The fact is that § 7 of that act makes no mention of the right to strike. In § 13 thereof reference is made to the right to strike as follows: 'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.' Obviously, § 13 is a rule of construction. [Citation.] It is my opinion that the NLRA recognized the rights which labor already had and was intended to afford those rights extensive legislative protection." (*School Committee v. Westerly Teachers Ass'n, supra*, 299 A.2d at p. 447 (dis. opn. of Roberts, C. J.).)

Nowhere did the *Blount* court address the concerns set forth in the present opinion.

Other federal authorities are no more persuasive. In two cases decided prior to *Claiborne Hardware, supra*, 458 U.S. 886, the Supreme Court summarily rejected First Amendment claims by labor unions. (See *NLRB v. Retail Store Employees* (1980) 447 U.S. 607, 616 [65 L.Ed.2d 377, 385-386, 100 S.Ct. 2372] [upholding restriction on peaceful consumer boycott picketing]; *Longshoremen v. Allied International, Inc.* (1982) 456 U.S. 212, 226-227 [72 L.Ed.2d 21, 32, 102 S.Ct. 1656] [upholding prohibition against longshoremen refusing to handle cargo bound to or from the Soviet Union].) However, in each case, the court provided only one paragraph of explanation, relying mainly on the "coercive" nature of boycott activities. The subsequent decision in *Claiborne Hardware* undercut this reasoning. Peaceful boycott activities were held protected in spite of their coercive aspects. (458 U.S. at p. 910 [73 L.Ed.2d at p. 1234].) Clearly, there is no principled basis for refusing to apply this approach in the labor context. (See *ante*, at pp. 602-605; see also Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole* (1984) 11 Hastings Const. L.Q. 189, 232-246; Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression* (1984) 43 Maryland L.Rev. 4, 12-19; Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law* (1984) 93 Yale L.J. 409 [hereafter Harper]; Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech* (1982) 91 Yale L.J. 938; Note, *Peaceful Labor Picketing and the First Amendment* (1982) 82 Colum.L.Rev. 1469.)

The right to strike must be guaranteed to public and private employees alike. In accepting public employment, individuals do not thereby sacrifice their constitutional rights. (See, e.g., *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 503-505 [55 Cal.Rptr. 401, 421 P.2d 409].) The constitutional guarantees of personal liberty, freedom of association, and freedom of expression are no less important to public workers than to other working people.

At one time, the ban on public employee strikes might have been described as a limited exception to the general right to strike. However, between 1930 and 1970, public employees increased from about 3.2 million to more than 13 million. As a percentage of the work force, public employment rose from approximately 6.5 percent to over 15 percent, with state and local workers accounting for most of the increase. [FN10] There would be an obvious inconsistency were this court to recognize that the right to strike is essential to a free society while denying that right to a significant proportion of the working population.

FN10 These figures were compiled from United States Department of Commerce's Statistical Abstract of the United States, page 303, table No. 487 (1984) [hereafter Statistical Abstract]; 1 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970 (1975) Series D 11-25, page 127; 2 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, *supra*, Series Y 272-289, page 1100, Series Y 308-317, page 1102, Series Y 332-334, page 1104.

It has been argued that public employee strikes lack constitutional protection since they enable public workers to exercise a disproportionate influence *607 on the

political process. In this view, the principles announced in *Claiborne Hardware* should apply only to consumer boycotts. The power to withhold patronage is said to be less dangerous than the power to withhold labor because consumer power is more widely dispersed. (See generally Harper, *supra*, 93 Yale L.J. at pp. 426-427.)

However, as the present majority opinion explains, the coercive potential of public employee strikes is sharply limited by economic and political conditions. Many government services can be foregone over substantial periods without serious harm. Others can be contracted out to private industry. Where services are financed by user fees, the users can exert effective pressure against the strikers. Last but not least, the taxpaying public in general frequently mounts effective opposition to public employee strikes. (See maj. opn., *ante*, at pp. 578-579.)

On a deeper level, the constitutional considerations behind the right to strike are, if anything, more compelling than those supporting the right to withhold patronage. Consumer boycotts, unlike strikes, do not implicate either the fundamental liberty to pursue happiness through labor or the prohibition against involuntary servitude. (See *ante*, at pp. 596-600.)

Furthermore, the argument of "disproportionate" political influence is untenable in view of the United States Supreme Court's treatment of monetary wealth, perhaps the most concentrated form of economic power. [FN11] Restrictions on political expenditures and contributions are subject to strict judicial scrutiny. (*Buckley v. Valeo* (1976) 424 U.S. 1, 15-19, 58-59 [46 L.Ed.2d 659, 685-688, 710, 96 S.Ct. 612].) Corporations as well as individuals enjoy the right to employ concentrated wealth in the political process. (*First National Bank of Boston v. Bellotti, supra*, 435 U.S. at pp. 777, 789-792 [55 L.Ed.2d at pp. 725-728].)

> FN11 As of 1972, 1 percent of the population held over 20 percent of the nation's personal wealth. (See *Statistical Abstract, supra*, at p. 487, table No. 794.) Some 218,000 individuals possessed estates worth over $10 million each. (*Id.*, at p. 479, table No. 791.) As this court has recognized, such wealth can enable the possessor to exercise a disproportionate influence on the political process. (*Citizens Against Rent Control v. City of Berkeley* (1980) 27 Cal.3d 819, 826-827 [167 Cal.Rptr. 84, 614 P.2d 742], revd. *sub nom. Citizens Against Rent Control v. Berkeley, supra*, 454 U.S. 290 [70 L.Ed.2d 492, 102 S.Ct. 434].)

In *Citizens Against Rent Control v. City of Berkeley, supra*, 27 Cal.3d 819, this court addressed the constitutionality of a Berkeley city ordinance that prohibited contributions of more than $250 per person to committees formed to support or oppose a ballot measure. The court held that the ordinance was necessary to serve the compelling governmental interest in *608 preventing well-financed special interest groups from dominating the referendum process. (*Id.*, at pp. 825-829, 832.)

The United States Supreme Court reversed. (*Citizens Against Rent Control v. Berkeley, supra*, 454 U.S. 290 [hereafter *CARC*].) The high court reasoned that the pooling of financial resources was essential to effective advocacy because of the rising costs of advertising and direct mail. (*Id.*, at p. 296, fn. 5 [70 L.Ed.2d at p. 499]; accord *Federal Election Commission v. National Conservative Political Action Committee* (1985) ___ U.S. ___ [84 L.Ed.2d 455, 467-468, 105 S.Ct. 1459, 1467-1468].) Further, the court rejected this court's view that the city could restrict the use of concentrated wealth by special interest groups in order to assure others an equal voice in the political process. (*CARC, supra*, 454 U.S. at pp. 295-296 [70 L.Ed.2d at pp. 498-499].)

In *Claiborne Hardware, supra*, 458 U.S. 886, the high court made clear that its concern for effective advocacy was not limited to the expenditure of money, a form of economic power that is possessed primarily by the wealthy. Instead, the court extended the reasoning of *CARC* to cover the collective withholding of patronage, a form of economic influence available to ordinary consumers. (*Id.*, at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].)

The strike, a combination for the purpose of withholding labor, is no less essential to working people than was the pooling of wealth to the landlords in *CARC* or the collective withholding of purchasing power to the civil rights activists in *Claiborne Hardware*. While working people cannot compete with wealthy individuals or corporations in paying for access to mass communications, they can bring their causes to the public's attention by withholding the one asset that they possess in abundance - the capacity to engage in productive labor.

This court can scarcely deny to working people the protections that are accorded the forms of economic power possessed by other groups. As Justice Traynor once observed, the courts "should not impose ideal standards on one side [of a conflict among groups in society] when they are powerless to impose similar standards upon the other." (*Hughes v. Superior Court, supra*, 32 Cal.2d at p. 868 (dis. opn. of Traynor, J.).)

It remains only to determine whether the common law's flat prohibition on public employee strikes is necessary to serve a compelling state interest. The majority have convincingly refuted the traditional justifications for that ban. (See maj. opn., *ante*, at pp. 573-580.) Although the state has a compelling *609 interest in averting immediate and serious threats to the public health and safety, a flat ban on public employee strikes is by no means the least restrictive method for accomplishing that end. (See *id.*, at p. 580.) Accordingly, today's holding is compelled not only by common law principles but also by the California Constitution.

GRODIN, J.,

Concurring.

Though I have signed Justice Broussard's plurality opinion, I write separately in response to the concerns expressed in the concurring opinion by Justice Kaus.

I suggest there is little merit in attempting to distinguish, with regard to strikes by employees covered by the Meyers-Milias-Brown Act, between the availability of an injunction at common law and the availability of a damage action. If an injunction is violated, the violation can give rise to a proceeding in contempt for which monetary sanctions may be imposed. The underlying legal question is whether there exists a common law predicate for either remedy. The plurality opinion holds, and I agree, that the Meyers-Milias-Brown Act has removed the principal theoretical justification which had been advanced in this state for the proposition that all strikes by local government employees are tortious. Finding no alternative justification sufficiently compelling to require acceptance by the courts in the absence of legislative action, except as regards strikes which imperil public health or safety, the opinion properly places the ball in the Legislature's court, where it belongs. (*Ante*, p. 591, fn. 39.)

Other states and countries have developed a wide range of policies for dealing with public employee strikes, and the arena is clearly one in which experimentation should be encouraged. Consequently, I share Justice Kaus' concern that we should not attempt to prejudge the constitutionality of any particular legislative response. The plurality opinion explicitly finds it unnecessary to reach the issue in constitutional terms (*ante*, p. 591), and as I understand it discusses the Constitution only in order to demonstrate that were we to adopt the district's position - that there exists an absolute common law ban on public employee strikes in the context of the present statutory scheme - substantial questions of constitutional dimension would arise. (*Ibid.*) It is with that understanding that I join in the opinion.

LUCAS, J.

I respectfully dissent. In my view, public employees in this state neither have the right to strike, nor should they have that right. In any event, in light of the difficulty in fashioning proper exceptions to the basic "no strike" rule, and the dangers to public health and safety arising from even a *temporary* cessation of governmental services, the courts should defer to the Legislature, a body far better equipped to create such exceptions. *610

The majority paints a glowing picture of the public strike weapon as a means of "enhanc[ing] labor-management relations" (*ante*, p. 581), "equalizing the parties' respective bargaining positions," (p. 583), assuring "good faith" collective bargaining (*ibid.*), and "providing a clear incentive for resolving disputes" (*ibid.*). Indeed, so enamored is the majority with the concept of the public strike that it elevates this heretofore *illegal* device to a "basic civil liberty." (*Ibid.*) Though wholly unnecessary to its opinion, the majority in dictum even suggests that public employees may have a *constitutional* right to strike which cannot be legislatively abridged absent some "substantial or compelling justification." (P. 590.)

Thus, in the face of an unbroken string of Court of Appeal cases commencing nearly 35 years ago which hold that public strikes are illegal, we suddenly announce our finding that public strikes are not only lawful in most cases, but indeed they may constitute a panacea for many of the social and economic ills which have long beset the public sector. One may wonder, as I do, why we kept that revelation a secret for all these years. (See *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 962 [192 Cal.Rptr. 123, 663 P.2d 893] [conc. opn. by Richardson, J.].)

Despite the majority's encomiums, the fact remains that public strikes may devastate a city within a matter of days, or even hours, depending on the circumstances. For this reason, among many others, the courts of this state (and the vast majority of courts in other states and the federal government) have declared *all* public strikes illegal. As indicated above, until today the California Courts of Appeal uniformly had followed that rule. (See, e.g., *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 105-107 [140 Cal.Rptr. 41], hg. den.; *Los Angeles Unified School Dist. v. United Teachers* (1972) 24 Cal.App.3d 142, 145-146 [100 Cal.Rptr. 806], hg. den.; *Trustees of Cal. State Colleges v. Local 1352 S.F. State etc. Teachers* (1970) 13

Cal.App.3d 863, 867 [92 Cal.Rptr. 134], hg. den.; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cal.Rptr. 258], hg. den.; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35-36 [80 Cal.Rptr. 518], hg. den.; *Pranger v. Break* (1960) 186 Cal.App.2d 551, 556 [9 Cal.Rptr. 293], hg. den.; *Newmarker v. Regents of Univ. of Cal.* (1958) 160 Cal.App.2d 640, 646 [325 P.2d 558]; *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 86, 46-47 [210 P.2d 305], hg. den.)

Justice Coughlin's opinion in the *City of San Diego* case offers a cogent analysis of the various rationales underlying the "no strike" rule. He observed *611 that "This California common law rule is the generally accepted common law rule in many jurisdictions. [Citations, including cases from 24 states.]

"The common law rule has been adopted or confirmed statutorily by 20 states and the federal government. [Citations.]

"... The common law rule [that] public employees do not have the right to bargain collectively or to strike is predicated expressly on the necessity for and lack of statutory authority conferring such right. Where a statute authorizes collective bargaining and strikes it includes them within the methods authorized by law for fixing the terms and conditions of employment. *Those who advocate the right of public employees to strike should present their case to the Legislature.* [Italics added.]

"

"Wherever the issue has been raised, it has been held laws governing the rights of public employees to engage in union activities, collective bargaining, strikes and other coercive practices, not equally applicable to private employees, and vice versa, are premised on a constitutionally approved classification; and, for this reason, are not violative of the constitutional guarantee of equal protection of the law. [Citations.] [¶] The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need for a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship. [Citation.]" (8 Cal.App.3d at pp. 311-315.)

The decision to allow public employee strikes requires a delicate and complex balancing process best undertaken by the Legislature, which may formulate a comprehensive regulatory scheme designed to avoid the disruption and chaos which invariably follow a cessation or interruption of governmental services. The majority's own proposal, to withhold the strike weapon only where "truly essential" services are involved (p. 580) and a "substantial and imminent threat" is posed (p. 586), will afford little guidance to our trial courts who must, on a "case-by-case" basis (*ibid.*), decide such issues. Nor will representatives of labor or management be able to *612 predict with any confidence or certainty whether a particular strike is a lawful one or, being lawful at its inception, will become unlawful by reason of its adverse effects upon the public health and safety. In short, the majority's broad holding will prove as unworkable as it is unwise.

Of the few states that permit strikes by public employees, virtually all do so by comprehensive statutory provisions. Some of the statutory schemes begin by creating classifications of employees, distinguishing, for example, workers whose services are deemed essential (e.g., police, firefighters), those whose services may be interrupted for short periods of time (e.g., teachers), and those whose services may be omitted for an extended time (e.g., municipal golf course attendants). [FN1] These schemes typically define various prerequisites to the exercise of the right to strike for those categories of workers permitted that option. The prerequisites include a period of mandatory mediation [FN2] as well as advance notice to the employer. [FN3] In addition, some statutory schemes lay out the ground rules for binding arbitration. [FN4]

FN1 See Alaska Statutes section 23.40.200(a) (1972) (categorizing, first, all police, fire, correctional, and hospital workers; second, public utility, snow removal, sanitation, and education employees; and third, all other public workers). See also Minnesota Statutes Annotated section 179A.03 (West Supp. 1985) (defining "essential" workers, etc.).

FN2 E.g., Alaska Statutes section 23.40.200(c) (1972) (mediation required); Illinois Public Act 83-1012, section 17 (1983) (Ill. Legis. Serv. 6781, to be codified at Ill. Ann. Stat. ch. 48, § 1617) (mediation required); Minnesota Statutes Annotated section 179A.18, subdivisions 1, 2 (West Supp. 1985) (mediation required for 45 days, 60 days in case of teachers); Pennsylvania Statutes Annotated, title 43, section 1101.1003 (Purden Supp. 1984) (mediation required); Wisconsin Statutes Annotated section

111.70(4)(cm) (West Supp. 1983) (mediation-arbitration required).

FN3 E.g., Illinois Public Act 83-1012, section 17 (5 days' notice required); Minnesota Statutes Annotated section 179A.18, subdivision 3 (West Supp. 1985) (10 days); Wisconsin Statutes Annotated section 111.70(4)(cm) (West Supp. 1983) (10 days).

FN4 E.g., Minnesota Statutes Annotated section 179A.16 (West Supp. 1985); Wisconsin Statutes Annotated section 111.70(4)(jm) (West Supp. 1983).

In contrast, the majority's new California rule is hopelessly undefined and unstructured. In addition to the breadth of the majority's "truly essential" standard, the statutes presently provide no systematic classification of employees according to the nature of their work and the degree to which the public can tolerate work stoppages. Only firefighters are expressly prohibited from striking and giving recognition to picket lines. (Lab. Code, § 1962.) Moreover, the four principal statutory schemes regulating other public employees establish widely differing approaches to labor relations for different types and levels of employees. (Compare Gov. Code, § § 3500-3510 [Meyers-Milias-Brown Act, covering local government employees]; 3512- 3524 [State Employer-Employee Relations Act, covering state employees]; *613 3540-3549.3 [Ed. Employment Relations Act, covering public school employees]; 3560-3599 [governing employment in higher education].) Thus, these statutes produce inconsistent results when, as here, the right to strike is given recognition almost across the board.

The Meyers-Milias-Brown Act, for example, provides "no clear mechanism for resolving disputes" between local governments and their workers. (*Ante*, p. 572, fn. 14.) In the absence of an administrative agency to settle charges of unfair labor practices and compel such remedies as mediation, presumably all strike-related issues will go to the courts in the first instance, but the courts are poor forums for the resolution of such issues. On the other hand, issues arising out of work stoppages by public school employees are to be resolved by the Public Employee Relations Board (PERB) on the basis of PERB's own set of remedies. Of course, this anomalous situation is in large part the product of this court's tolerance of strikes by teachers (*El Rancho Unified Sch. Dist. v. National Ed. Assn.*, *supra*, 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]) and PERB's correlative expansion of its authority so that it may compel mediation or adopt other remedies in labor disputes in public education (see Cal. Admin. Code, tit. 8, § 32000 et seq.).

Finally, nothing in PERB's explicit statutory powers (Gov. Code, § 3541.3) extends to mandatory arbitration, for example, so it remains to be established whether state employees, also under PERB's jurisdiction (*id.*, § 3513, subd. (g)), will be governed by the same ground rules as educational employees, or whether some of them, perhaps deemed "truly essential," will be subject to binding arbitration under rules that do not now exist.

I would affirm the judgment.

Respondent's petition for a rehearing was denied June 27, 1985. *614

Cal.,1985.

County Sanitation Dist. No. 2 of Los Angeles County v. Los Angeles County Employees Ass'n, Local 660

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H

CITY OF SANTA ANA, Plaintiff and Respondent,
v.
SANTA ANA POLICE BENEVOLENT ASSOCIATION et al., Defendants and Appellants
No. G005909.

Court of Appeal, Fourth District, Division 3, California.

Jan 31, 1989.

SUMMARY

During labor negotiations between a police officers union and a city, the city obtained from the superior court a preliminary injunction prohibiting police officers from striking or inducing a work stoppage or slow down or absenting themselves from work under guise of illness (a "sick-out"). All police functions were adequately staffed during the two day sick-out that had occurred by using other officers working overtime or extra shifts. (Superior Court of Orange County, No. 528839, Ronald L. Bauer, Temporary Judge. [FN*])

The Court of Appeal, holding the issues raised were reviewable even though the union and the city reached an accord while the appeal was pending, affirmed. The court held police work stoppages are per se illegal.

FN* Pursuant to California Constitution, article VI, section 21. (Opinion by Sills, J., [FN†] with Wallin, Acting P. J., and Crosby, J., concurring.)

FN† Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Courts § 13--Jurisdiction--Moot Questions--Public Interest Considerations--Appellate Review.
On a police officers union's appeal from a superior court's granting of a preliminary injunction to a city prohibiting the officers from engaging in a strike or "sick-out" during labor negotiations, the issues raised were of continuing public interest, and the likelihood of recurrence was such, that resolution by the *1569 Court of Appeal was appropriate even though the city and the union had reached an accord while the appeal was pending.

[See Am.Jur.2d, Courts, § 81.]

(2) Labor § 47--Labor Disputes--Strikes Against Public Entity--Police Officers--Sick-out.
Police work stoppages are per se illegal. Thus, during a labor dispute, there was no error in a trial court's enjoining police officers from striking or inducing a work stoppage or slow down or absenting themselves from work under guise of illness (a "sick-out"). It made no difference whether the activity was supposedly so organized as to avoid an imminent threat to public health or safety.

[State law or state common law rules prohibiting strikes by public employees or certain classes of public employees, note, 22 A.L.R.4th 1103. See also Cal.Jur.3d, Public Officers and Employees, § 182.]

COUNSEL

Seth J. Kelsey for Defendants and Appellants.

Edward J. Cooper, City Attorney, Richard E. Lay, Assistant City Attorney, and Frank L. Rhemrev, Deputy City Attorney, for Plaintiff and Respondent.

SILLS, J. [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

May police officers engage in a "sick-out" (blue flu) during labor negotiations? *No.*

I

The Santa Ana Police Benevolent Association (PBA), a nonprofit association of sworn and nonsworn public safety employees of the Santa Ana Police Department and the City of Santa Ana were engaged in a "meet and confer" bargaining process for a new memorandum of understanding when their old one expired. [FN1] An agreement had not been reached, when, on July 9, *1570 1987, 16 of the 18 officers on the graveyard shift telephoned that they were sick. These absences required 24 evening shift officers to remain on duty and work overtime for

several hours each. Later that same day, 41 evening shift officers called in sick. On the following morning, 83 day shift officers claimed to be ill; and the entire graveyard shift remained on duty so that normal police operations could continue. At this point, the city obtained a temporary restraining order enjoining the PBA members from striking or "being absent from work claiming illness when not ill." The PBA complied with the order and there were no further work slowdowns. Later in the month, the court issued a preliminary injunction prohibiting the officers from "striking or calling or inducing a strike or work stoppage, including a work slowdown, or being absent from work claiming illness when not ill in the nature of a strike."

FN1 Government Code section 3500 et seq. sets forth the procedures for labor negotiations between municipalities and public employees. These sections are commonly referred to as the Meyers-Milias-Brown Act.

II

The parties agree that all police functions were adequately staffed during the July 9 and 10 sick-out by using other officers working overtime or extra shifts. And, it appears the PBA and city recently reached an accord on a new memorandum of understanding. (1) Nevertheless, the issues raised in this appeal are "of continuing public interest and likely to recur in circumstances where, as here, there is insufficient time to afford full appellate review. Thus, it is appropriate to resolve the matter, notwithstanding the [aborted sick-out's] passage into history." (*Leeb v. DeLong* (1988) 198 Cal.App.3d 47, 51-52 [243 Cal.Rptr. 494]; see also *Gordon J. v. Santa Ana Unified School Dist.* (1984) 162 Cal.App.3d 530, 533 [208 Cal.Rptr. 657].)

(2) The PBA frames the issue in this appeal as "whether or not it is proper, under state law, for a court to enjoin a public safety employee organization from engaging in a 'sick-out' which is organized in a manner calculated to avoid an imminent threat to public health or safety." The city maintains that pretextual illnesses of officers involved in labor negotiations create unreasonable overtime demands on officers who do report for duty, thus seriously impairing the efficiency of the police department. Regardless of the precautions taken to maximize officer and public safety under these circumstances, the city insists officers cannot work as effectively when they are burdened with extra shift duty.

The law on this subject has undergone a relatively recent change. Courts of Appeal traditionally held sick-outs by public employees to be per se illegal and the proper objects of injunctive, and in some cases tort, relief. (See, e.g., *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796 [153 Cal.Rptr. 666]; *1571 *Pasadena Unified School Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41]; *Los Angeles Unified School Dist. v. United Teachers* (1972) 24 Cal.App.3d 142 [100 Cal.Rptr. 806]; *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863 [92 Cal.Rptr. 134]; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308 [87 Cal.Rptr. 258].) The discussion in the *American Federation* case is typical of the rationale adopted by the appellate courts: "The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need for a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship. [Citations.]" (8 Cal.App.3d at p. 315.)

In 1985, however, a plurality of the California Supreme Court, after acknowledging the "critical commentary" which accompanied its past refusals to determine "the issue of the legality of public employee strikes," rejected this analysis in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 570-571 [214 Cal.Rptr. 424, 699 P.2d 835]. [FN2] The plurality opinion first noted "'the Legislature itself has steadfastly refrained from providing clearcut guidance" and has prohibited strikes by only one group of public employees, firefighters (Lab. Code, § 1962). (*Id.*, at p. 571.) The three-justice plurality then directed trial courts to consider public employee strike cases on an individual basis: "[W]e conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California *1572 common law. We must immediately caution, however, that the right of public employees to strike is by no means unlimited.

Prudence and concern for the general public welfare require certain restrictions." (*Id.*, at p. 585.) The court added, "After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area: 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. This standard allows exceptions in certain essential areas of public employment (e.g., *the prohibition against firefighters and law enforcement personnel*) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike." (*Id.*, at p. 586, italics added.)

FN2 The public employer in *Sanitation District* obtained tort damages, not injunctive relief against the striking employee association. Justice Broussard authored the plurality opinion in which Justices Mosk and Grodin concurred. Justices Kaus and Reynoso concurred only "insofar as [the opinion] holds that a peaceful strike by public employeees does not give rise to a tort action for damages against the union." (*Id.*, at p. 592 (conc. opn. of Kaus, J.).) These concurring justices cautioned, however, that "[t]he question of injunctive relief presents significantly different considerations than the propriety of a tort action, and it is not before us in this case." (*Id.*, at p. 593 (conc. opn. of Kaus, J.).) Former Chief Justice Bird concurred separately to elaborate on the plurality's view " that the right to strike may have constitutional dimensions." (*Id.*, at p. 594 (conc. opn. of Bird, C. J.).) Then Associate Justice Lucas dissented, expressing his view that "public employees in this state neither have the right to strike, nor should they have that right[,] [and] the courts should defer to the Legislature, a body far better equipped to create [] exceptions [to the basic 'no strike' rule.]" (*Id.*, at p. 609 (dis. opn. of Lucas, J.).)

In the context of the instant case, it seems clear that work slowdowns or stoppages by police officers tread dangerous waters. Contrary to the position taken in the city's brief, strikes by law enforcement officers are not specifically and unequivocally exempted from the court's decision in *Sanitation District*. The court did, however, allude to strikes by law enforcement as ones which would be restrained under the new test. References to law enforcement as being an area for continued application of the common law rules appear throughout the opinion. Chief Justice Bird, concurring, noted that only a flat prohibition against public employee strikes was overruled and that the state still had a compelling interest "in averting immediate and serious threats to the public health and safety." (38 Cal.3d at p. 609 (conc. opn. of Bird, C. J.).) Justice Broussard later summarized the *Sanitation District* decision in *City and County of San Francisco v. United Assn. of Journeymen etc. of United States & Canada* (1986) 42 Cal.3d 810, 813 [230 Cal.Rptr. 856, 726 P.2d 538]: "[W]e held ... that public employee strikes were illegal only if they endangered the public health or safety."

The police argue that the particular activity sought to be enjoined must be analyzed in terms of whether a threat to public safety is present. We do not read *Sanitation District* as reaching this conclusion. Repeated references to strikes by police officers as ones which would still be prohibited lead us to conclude that police work stoppages are still per se illegal. On reflection, application of such a test to police functions would be an impossible task for the trier of fact. On most days, a work slowdown or stoppage by the police will not pose a threat to the public health or safety. On good days, there are no murders, no gridlock, and no chemical spills. A work slowdown by the graveyard shift on a quiet night might never be noticed. How wonderful hindsight. Appellate courts can look back months or years and conclude that a police strike did or did not imperil public safety. Unfortunately, trial judges asked to enjoin police strikes are not blessed with clairvoyant ***1573** powers - they cannot foresee an earthquake, a madman's shooting spree or a riot. If a disaster occurs during a police slowdown or strike, the inevitable investigation which will follow will undoubtedly point to the absent dispatcher or tardy patrol car as a cause. In the words of Milton, "They also serve who only stand and wait."

When a city is required to use the service of every officer who has already worked the night shift to meet the demands of the day shift, the obvious threat to public safety hardly merits discussion. The association presents the issue in their brief by asking: "May police officers lawfully engage in a short-term sick-out during labor negotiations if the concerted job action is conducted in such a manner as to allow for adequate staffing?" This framing of the issue begs the question. To argue that using officers who have already worked a shift constitutes adequate staffing is

hokum. In addition, attempting to characterize the sick-out as "short-term" finds no support in the record: The "sick-out" turned out to be short-term only because it was terminated by court order.

The judgment is affirmed.

Wallin, Acting P. J., and Crosby, J., concurred.

Appellants' petition for review by the Supreme Court was denied May 24, 1989. Mosk, J., was of the opinion that the petition should be granted. *1574

Cal.App.4 Dist.,1989.

City of Santa Ana v. Santa Ana Police Benev. Ass'n

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Supreme Court of California
COUNTY OF RIVERSIDE et al., Petitioners,
v.
THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; RIVERSIDE SHERIFF'S ASSOCIATION, Real Party in Interest.
No. S107126.

Apr. 21, 2003.

*378 SUMMARY

The trial court ordered a county to arbitrate disputed labor issues between the county and its sheriff's association. The court relied on Code Civ. Proc., § 1299 et seq., requiring counties and other local agencies to submit, under certain circumstances, to binding arbitration of economic issues that arise during negotiations with unions representing firefighters or law enforcement officers. (Superior Court of Riverside County, No. 361250, Sharon J. Waters, Judge.) The Court of Appeal, Fourth Dist., Div. Two, No. E030454, ordered issuance of a writ of mandate directing the trial court to set aside its order compelling arbitration and to enter a new order denying the motion to compel arbitration.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that the legislation violates Cal. Const., art. XI, § 1, subd. (b), which provides that a county's governing body shall provide for the compensation of employees. Under the constitutional language, the county, not the state or someone else, shall provide for the compensation of its employees. Code Civ. Proc., § 1299 et seq., impermissibly deprives the county of its constitutional authority. The court also held that the legislation violates Cal. Const., art. XI, § 11, subd. (a), which prohibits the Legislature from delegating certain local issues to a private person or body, by delegating the issue of compensation to an arbitrator. (Opinion by Chin, J., with Kennard, Baxter, Werdegar, and Brown, JJ., concurring. Concurring opinion by George, C. J. (see p. 296). Concurring opinion by Moreno, J. (see p. 300).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Counties § 8--Employees--Compensation--Statute Requiring Local Agency to Submit Labor Dispute Involving Firefighters and *279 Law Enforcement Officers to Binding Arbitration--Validity--Under Constitutional Provision That County Shall Provide for Compensation of Employees:Municipalities § 18--Legislative Control.
The trial court erred in ordering a county to arbitrate disputed labor issues between the county and its sheriff's association, under Code Civ. Proc., § 1299 et seq., requiring counties and other local agencies to submit, under certain circumstances, to binding arbitration of economic issues that arise during negotiations with unions representing firefighters or law enforcement officers. The legislation is unconstitutional under Cal. Const., art. XI, § 1, subd. (b), which provides that a county's governing body shall provide for the compensation of employees. Although a county may voluntarily submit compensation issues to arbitration, under the constitutional provision, the Legislature may not require this. The constitutional language is clear and specific; the county, not the state or someone else, shall provide for the compensation of its employees. This express grant of authority to the county necessarily implies the Legislature does not have that authority. Code Civ. Proc., § 1299 et seq., impermissibly deprives the county of its constitutional authority. The Legislature may regulate labor relations in the public sector, since this is a matter of statewide concern, but depriving a county of its authority to set salaries contravenes the constitutional directive. The statutory scheme is not merely procedural; it is substantive, as it permits a body other than a county's governing body to establish local salaries.

[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 437; 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 799 et seq.; West's Key Number Digest, Labor Relations ⚷ 413.]

(2) Constitutional Law § 5--California Constitution--Operation and Effect-- As Limitation of Power.
Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the

Legislature. Two important consequences result. First, the entire lawmaking authority of the state, except the people's rights of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers that are not expressly or by necessary implication denied to it by the Constitution. Thus, courts do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited. Second, all intendments favor the exercise of the Legislature's plenary authority. If there is any doubt as to the Legislature's power to act in any given case, the doubt should be *280 resolved in favor of the Legislature's action. Such restrictions and limitations imposed by the Constitution are to be construed strictly and are not to be extended to include matters not covered by the language used. On the other hand, courts also must enforce the provisions of the Constitution and may not lightly disregard a clear constitutional mandate.

(3) Statutes § 20--Construction--Judicial Function--Legislature's Finding That Municipal Matter Is of Statewide Concern.
The Legislature's findings that a municipal matter is of statewide concern are entitled to great weight, but they are not controlling. A court may not simply abdicate to the Legislature, especially when the issue involves the division of power between local government and that same Legislature. The judicial branch, not the legislative branch, is the final arbiter of this question. In some cases the factors that influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern. But the Legislature's view is not determinative of the issue as between state and municipal affairs. The Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.

(4) Courts § 37--Decisions--Stare Decisis--Unpublished Opinions--Collateral Estoppel.
Under Cal. Rules of Court, rule 977, unpublished judicial opinions generally may not be cited or relied on in another action, but there is an exception to this general rule where the opinion is relevant under the doctrine of collateral estoppel. For collateral estoppel to apply, the issue necessarily decided in the previous action must be identical to the one in the current action.

(5) Counties § 8--Employees--Compensation--Statute Requiring Local Agency to Submit Labor Dispute Involving Firefighters and Law Enforcement Officers to Binding Arbitration--Validity--Under Constitutional Provision Prohibiting Legislature from Delegating Local Issue to Private Body:Municipalities § 18-- Legislative Control.
Code Civ. Proc., § 1299 et seq., requiring counties and other local agencies to submit, under certain circumstances, to binding arbitration of economic issues that arise during negotiations with unions representing firefighters or law enforcement officers, is unconstitutional under Cal. Const., art. XI, § 11, subd. (a), which prohibits the Legislature from delegating certain local issues and municipal functions to a private person or body. In enacting this legislation, the Legislature has impermissibly delegated to a private body-the arbitration panel-the power to interfere with county money (by potentially *281 requiring the county to pay higher salaries than it chooses) and to perform municipal functions (determining compensation for county employees). Although Cal. Const., art. XI, does not define municipal functions, reading Cal. Const., art. XI, § 1, subd. (b) (county's governing body shall provide for compensation of employees), together with Cal. Const., art. XI, § 11, subd. (a), leads to the conclusion that compensating county employees is a municipal function. Also, the arbitrators are private, not public entities, since nothing in the statutory scheme requires them to be public officials. Thus, since the act of delegation does not change a private body into a public body and thereby validate the very delegation the constitutional provision prohibits, the Legislature has delegated authority to a private body.

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CHIN, J.

The Legislature recently enacted Senate Bill No. 402 (1999-2000 Reg. Sess.) (Senate Bill 402), which requires counties and other local agencies to submit, under certain circumstances, to binding arbitration of economic issues that arise during negotiations with unions representing firefighters or law enforcement officers. (Code Civ. Proc., § 1299 et seq.) We must determine whether this legislation violates either or both of two provisions of article XI of the California Constitution. [FN1] Section 1, subdivision (b), states that a county's "governing body shall provide for the ... compensation ... of employees." Section 11, subdivision (a), forbids the Legislature to "delegate to a private person or body power to ... interfere with county or municipal corporation ... money ... or perform municipal functions."

FN1 All further section references are to article XI of the California Constitution unless otherwise indicated.

We conclude, as did the Court of Appeal, that Senate Bill 402 violates both constitutional provisions. It deprives the county of its authority to provide for the compensation of its employees (§ 1, subd. (b)) and delegates to a private body the power to interfere with county financial affairs and to perform a municipal function (§ 11, subd. (a)).

*283 I. Facts and Procedural History

Riverside County (the County) and the Riverside Sheriff's Association (Sheriff's Association) engaged in negotiations over compensation for employees of the probation department. In May 2001, they reached an impasse. The Sheriff's Association requested that the dispute be submitted to binding arbitration pursuant to Code of Civil Procedure section 1299 et seq. The County refused, claiming that those provisions violate the California Constitution. The Sheriff's Association filed an action in the superior court to compel arbitration. The court ordered arbitration. It found the binding arbitration law constitutional, explaining, "The matters at issue, to wit, the possible disruption of law enforcement and firefighter services, are not matters of purely local concern but rather are of statewide concern. This statewide concern authorizes the Legislature to act and supports the constitutionality of this legislation."

The County filed a petition for a writ of mandate in the Court of Appeal asking that court to order the superior court to set aside its order compelling arbitration and enter a new order denying the motion

to compel arbitration. The Court of Appeal granted the petition. It found that Senate Bill 402 violates both section 1, subdivision (b), and section 11, subdivision (a). We granted the Sheriff's Association's petition for review.

II. Discussion

A. *Background*

Senate Bill 402, entitled "Arbitration of Firefighter and Law Enforcement Officer Labor Disputes," added section 1299 et seq. to the Code of Civil Procedure. (Stats. 2000, ch. 906, § 2.) The Court of Appeal opinion describes the bill: "Senate Bill 402 empowers unions representing public safety employees to declare an impasse in labor negotiations and require a local agency to submit unresolved economic issues to binding arbitration. Each party chooses an arbitrator, who together choose the third arbitrator. The panel then chooses, without alteration, between each side's last best offer, based on a designated list of factors. (Code Civ. Proc., § § 1299.4, 1299.6.)" The bill applies to any local agency or any entity acting as an agent of a local agency, but it does not apply to the State of California even acting as such an agent. (Code Civ. Proc., § 1299.3, subd. (c).)

Senate Bill 402 includes legislative findings. "The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern, are a ***284** predictable consequence of labor strife and poor morale that is often the outgrowth of substandard wages and benefits, and are not in the public interest. The Legislature further finds and declares that the dispute resolution procedures contained in this title provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers. [¶] It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers." (Code Civ. Proc., § 1299.)

(1a) The County argues that the Legislature's compelling it to enter into binding arbitration of compensation issues violates section 1, subdivision (b), and section 11, subdivision (a). At the outset, we emphasize that the issue is not whether a county may *voluntarily* submit compensation issues to arbitration, i.e., whether the county may delegate its own authority, but whether the Legislature may *compel* a county to submit to arbitration *involuntarily*. The issue involves the division of authority between the state and the county, not what the county may itself do. (See *Adams v. Wolff* (1948) 84 Cal.App.2d 435, 442 [190 P.2d 665] [the predecessor version of section 11, subdivision (a), "is a restraint on the state Legislature's right to interfere with municipal affairs and in no way regulates what may be done by a municipal corporation by charter provision"].)

(2) In deciding whether the Legislature has exceeded its power, we are guided "by well settled rules of constitutional construction. Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. [Citations.] Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] In other words, 'we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited.' [Citation.] [¶] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.' " (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161]; accord, *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 [172 Cal.Rptr. 487, 624 P.2d 1215].) On ***285** the other hand, "we also must enforce the provisions of our Constitution and 'may not lightly disregard or blink at ... a clear constitutional mandate.' " (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1252 [48 Cal.Rptr.2d 12, 906 P.2d 1112].)

We discuss the two provisions in the order in which they appear in the California Constitution, mindful, however, that ultimately we must view them together as a whole and not in isolation. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

B. *Section 1, subdivision (b)*

(1b) Section 1, subdivision (b), provides as relevant:

"The governing body [of each county] shall provide for the number, compensation, tenure, and appointment of employees." [FN2] The County argues that Senate Bill 402 violates this provision by compelling it to submit to binding arbitration of compensation issues. We agree. The constitutional language is quite clear and quite specific: the *county*, not the state, not someone else, shall provide for the compensation of its employees. Although the language does not expressly limit the power of the Legislature, it does so by "necessary implication." (*Methodist Hosp. of Sacramento v. Saylor, supra*, 5 Cal.3d at p. 691.) An express grant of authority to the county necessarily implies the Legislature does not have that authority. But Senate Bill 402 compels the county to enter into mandatory arbitration with unions representing its employees, with the potential result that the arbitration panel determines employee compensation. Senate Bill 402 permits the union to change the county's governing board from the body that sets compensation for its employees to just another party in arbitration. It thereby deprives the county of the authority that section 1, subdivision (b), specifically gives to counties.

> FN2 In its entirety, section 1, subdivision (b), provides: "The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. Except as provided in subdivision (b) of Section 4 of this article, each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing body shall provide for the number, compensation, tenure, and appointment of employees."

Any doubt in this regard is dispelled on reviewing the history behind section 1, subdivision (b). (See *Estate of Griswold* (2001) 25 Cal.4th 904, 911-912 [108 Cal.Rptr.2d 165, 24 P.3d 1191].) That provision "was originally enacted in June of 1970, as part of a comprehensive revision of article XI, governing the constitutional prerogatives of and limitations on California cities and counties." (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772 [35 Cal.Rptr.2d 814, 884 P.2d 645].) Its ***286** immediate predecessor, former section 5, had been amended in 1933 "to give greater local autonomy to the setting of salaries for county officers and employees, *removing that function from the centralized control of the Legislature*." (*Voters for Responsible Retirement v. Board of Supervisors, supra*, at p. 772, italics added.) [FN3] "The 1933 amendment transferred control over the compensation of most county employees and officers from the Legislature to the boards of supervisors." (8 Cal.4th at p. 774.) The Court of Appeal in this case explained further: "The ballot argument in favor of the 1933 amendment (put to the voters as Proposition 8) informs the voters that, 'This is a county home rule measure, giving the county board of supervisors ... complete authority over the number, method of appointment, terms of office and employment, and compensation of all ... employees.' (Ballot Pamp., Special Elec. (June 27, 1933) argument in favor of Prop. 8, p. 10.)" The ballot argument adds that taking "these powers from the State Legislature ... will bring the matter closer home, and will make possible adjustments of salaries and personnel in accordance with local desires ...." (Ballot Pamp., Special Elec. (June 27, 1933) argument in favor of Prop. 8, pp. 10-11.)

> FN3 As amended in 1933, former section 5 provided in relevant part: "The boards of supervisors in the respective counties shall regulate the compensation of all officers in said counties ... and shall regulate the number, method of appointment, terms of office or employment, and compensation of all deputies, assistants, and employees of the counties." (Stats. 1933, p. xxxv.)

(3) The Sheriff's Association argues that Senate Bill 402 is valid because it involves a matter of "statewide concern." It cites the legislative findings in support of the bill, including that "strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern," and that the "dispute resolution procedures" the bill establishes "provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers." (Code Civ. Proc., § 1299.) These findings are entitled to great weight. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 136 [185 Cal.Rptr. 232, 649 P.2d 874].) But they are not controlling. A court may not simply abdicate to the Legislature, especially when the issue involves the division of power between local government and that same

Legislature. The judicial branch, not the legislative, is the final arbiter of this question. (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 790 [163 Cal.Rptr. 460, 608 P.2d 277]; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 316, 317, fn. 22 [152 Cal.Rptr. 903, 591 P.2d 1].) "[I]t may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide *287 rather than merely local concern." (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63 [81 Cal.Rptr. 465, 460 P.2d 137].) But the Legislature's view "is not determinative of the issue as between state and municipal affairs .... [T]he Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." (*Ibid.*)

(1c) The Sheriff's Association cites two cases that permitted the Legislature to regulate relations between local governmental entities and their employees. In *Baggett v. Gates*, *supra*, 32 Cal.3d 128, we held that the Public Safety Officers' Procedural Bill of Rights Act, which, as its name suggests, provides procedural protections to public safety officers, applies to chartered cities despite the home rule provisions of the current section 5, subdivision (b). [FN4] Citing *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276 [32 Cal.Rptr. 830, 384 P.2d 158], we said that "general laws seeking to accomplish an objective of statewide concern"-in that case, creating uniform fair labor practices-"may prevail over conflicting local regulations even if they impinge *to a limited extent* upon some phase of local control." (*Baggett v. Gates*, *supra*, at p. 139, italics added.) We found that "the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern." (*Id.* at pp. 139-140.) [FN5] Similarly, in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [205 Cal.Rptr. 794, 685 P.2d 1145], we held that a charter city is subject to the meet-and-confer requirements of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.).

FN4 As relevant, section 5, subdivision (b), gives charter cities authority "to provide ... for: (1) the constitution, regulation, and government of the city police force ... and (4) ... for the compensation, method of appointment, qualifications, tenure of office and removal of ... [their] employees." (See *Baggett v. Gates*, *supra*, 32 Cal.3d at p. 137 & fn. 11.)

FN5 We explained why in greater detail: "The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries." (*Baggett v. Gates*, *supra*, 32 Cal.3d at p. 140.)

The Sheriff's Association argues, "It is well established that the Legislature may regulate labor relations in the public sector because it is a matter of statewide concern." We agree that the Legislature may regulate as to matters of statewide concern even if the regulation impinges "to a limited extent" (*Baggett v. Gates*, *supra*, 32 Cal.3d at p. 139) on powers the Constitution specifically reserves to counties (§ 1) or charter cities (§ 5). However, *288 *regulating* labor relations is one thing; *depriving* the county entirely of its authority to set employee salaries is quite another.

In *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal.3d at page 317, we noted that section 5 expressly gives charter cities authority over their employees' compensation. Because of this constitutional mandate, as well as prior authority, we held that "the determination of the wages paid to employees of charter cities as well as charter counties is a matter of local rather than statewide concern." (*Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, at p. 317.) Accordingly, we found unconstitutional Government Code section 16280, which prohibited the distribution of certain state funds to local public agencies that granted their employees cost-of-living increases, despite a legislative declaration that the statute was a matter of statewide concern. (*Sonoma County Organization of*

Public Employees v. County of Sonoma, supra, at pp. 302, 316.) For similar reasons, and despite a similar legislative declaration, we later invalidated legislation requiring the University of California to pay its employees at least prevailing wages. (*San Francisco Labor Council v. Regents of University of California, supra,* 26 Cal.3d at pp. 789-791.)

San Francisco Labor Council v. Regents of University of California, supra, 26 Cal.3d 785, control this case. In *Baggett v. Gates, supra,* 32 Cal.3d at page 137, we distinguished those two cases by noting that the Public Safety Officers' Procedural Bill of Rights Act, which was limited to providing procedural safeguards, "impinges only minimally on the specific directives of section 5, subdivision (b)." Especially pertinent here, we stressed "that the act does not interfere with the setting of peace officers' compensation." (*Ibid.*) By contrast, Senate Bill 402 does not *minimally impinge* on a specific constitutional directive; it *contravenes* that directive entirely: Section 1, subdivision (b), specifically directs that counties have authority over the compensation of their employees; Senate Bill 402 takes that authority away from counties.

Similarly, in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra,* 36 Cal.3d 591, the law in question did not establish a binding process but merely imposed procedural requirements. "While the Legislature established a procedure for resolving disputes regarding wages, hours and other conditions of employment, it did not attempt to establish standards for the wages, hours and other terms and conditions themselves." (*Id.* at p. 597.) We found no conflict between the city's constitutional powers and the limited state regulation. "Although the [law in issue] encourages binding agreements resulting from the parties' bargaining, the governing body of the *289 agency ... retains the ultimate power to refuse an agreement and to make its own decisions." (*Id.* at p. 601.) Here, the county's governing body does not retain the ultimate power; Senate Bill 402 gives that power to an arbitration panel at the behest of the union.

We have "emphasize[d] that there is a clear distinction between the *substance* of a public employee labor issue and the *procedure* by which it is resolved. Thus there is no question that 'salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws.' (*Sonoma County Organization of Public Employees v. County of Sonoma, supra,* 23 Cal.3d at p. 317.) Nevertheless, the process by which the salaries are fixed is obviously a matter of statewide concern and none could, at this late stage, argue that a charter city need not meet and confer concerning its salary structure." (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra,* at pp. 600-601, fn. 11; accord, *Voters for Responsible Retirement v. Board of Supervisors, supra,* 8 Cal.4th at p. 781.) Senate Bill 402 is not merely procedural; it is substantive. It permits a body other than the county's governing body to establish local salaries.

The Sheriff's Association also notes that section 1, subdivision (b), states that the governing body shall "prescribe" the compensation of its members (subject to referendum) but shall "provide" for the compensation of its employees. It argues that the word "'prescribe' ... empower[s] the designated entity to determine the amount of compensation for the designated officials. However, 'provide' means to compensate so they are available for use, and not necessarily determine the amount of compensation." Thus, the Sheriff's Association appears to argue that the Legislature, or someone else, may set salaries for county employees, and section 1, subdivision (b), merely empowers the county to pay those salaries. It relies on historical evidence indicating that the Constitution Revision Commission had used the words "prescribe" and "provide"-rather than "regulate," as in the 1933 amendment to former section 5-to differentiate between those matters that may, and those that may not, be delegated. (See *County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 669-670 & fn. 3 [114 Cal.Rptr. 283].) The argument fails.

Whether the *county* may delegate its own authority is irrelevant here. This county has chosen not to delegate its authority over employee salaries. As noted, the issue involves the distribution of authority between county and state, not what the county itself may do. Use of the words "prescribe" and "provide" did not change the previous law regarding the respective powers of the Legislature and counties. Section 13, adopted at the same time as section 1, subdivision (b), provides: "The provisions of Sections 1(b) (except *290 for the second sentence) ... of this Article relating to matters affecting the distribution of powers between the Legislature and cities and counties ... shall be construed as a restatement of all related provisions of the Constitution in effect immediately prior to the effective date of this amendment, *and as making no substantive change.*" (Italics added.) The language of

section 1, subdivision (b), empowering the county to provide for the compensation of employees, is in its last sentence, not its second. Accordingly, section 1, subdivision (b), did not change the law regarding the distribution of power between the counties and the Legislature. (See *Voters for Responsible Retirement v. Board of Supervisors, supra*, 8 Cal.4th at p. 775.) Former section 5 used the single word "regulate," which, as its history demonstrates, includes the setting of salaries.

The Sheriff's Association also cites an unpublished 1992 decision by the Court of Appeal that decided this case that it believes somehow supports its position. (4) Unpublished opinions, however, generally may not be cited or relied on in another action. (Cal. Rules of Court, rule 977(a).) The Sheriff's Association invokes an exception to this general rule, claiming the opinion is relevant under the doctrine of collateral estoppel. (Cal. Rules of Court, rule 977(b).) However, for collateral estoppel to apply, the issue necessarily decided in the previous action must be identical to the one in the current action. (*County of Santa Clara v. Deputy Sheriffs' Assn.* (1992) 3 Cal.4th 873, 879, fn. 7 [13 Cal.Rptr.2d 53, 838 P.2d 781]; *People v. Sims* (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77, 651 P.2d 321].) (1d) The issue here is whether Senate Bill 402 is constitutional. That bill, or anything like it, did not even *exist* in 1992. Although the 1992 opinion contains some language that might be pertinent to this case, and that either party might have cited had the opinion been published, the issue it decided involving the local referendum power was quite different than the one here. Accordingly, collateral estoppel does not apply, and the unpublished opinion may not be cited.

For these reasons, we agree with the Court of Appeal: "Senate Bill 402 removes from local jurisdictions, at the option of public safety unions, the authority to set the compensation of public safety employees that is expressly given to them by section 1, subdivision (b). This clearly violates section 1, subdivision (b)." [FN6]

FN6 The Chief Justice claims we are "reach[ing] out" to decide this question. (Conc. opn. of George, C. J., *post*, at p. 296.) However, section 1, subdivision (b), is as much a part of this case as section 11, subdivision (a). The County argued at all times in the trial court, the Court of Appeal, and this court that Senate Bill 402 violates section 1, subdivision (b); the parties fully briefed the question in the trial court, the Court of Appeal, and this court; the trial court and the Court of Appeal decided the question; and the question is within the scope of our grant of review. We see nothing peculiar in the language of either section 1, subdivision (b), or section 11, subdivision (a), that makes the latter but not the former ripe for decision. Indeed, the cases closest on point all involve home rule provisions comparable to those of section 1, subdivision (b). (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra*, 36 Cal.3d 591; *Baggett v. Gates, supra*, 32 Cal.3d 128; and *Sonoma County Organization of Public Employees v. County of Sonoma, supra*, 23 Cal.3d 296.) Moreover, because we must view the two constitutional provisions together as a whole and not in isolation, it would be difficult to decide the section 11, subdivision (a), question without reference to section 1, subdivision (b).
It should be apparent that we are deciding only the question before us-the constitutionality of Senate Bill 402.

*291 C. *Section 11, subdivision (a)*

(5) Section 11, subdivision (a), provides: "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." The county argues that in enacting Senate Bill 402, the Legislature has impermissibly delegated to a private body-the arbitration panel-the power to interfere with county money (by potentially requiring the county to pay higher salaries than it chooses) and to perform municipal functions (determining compensation for county employees). Again, we agree. This constitutional provision expressly denies the Legislature the power to act in this way. (*Methodist Hosp. of Sacramento v. Saylor, supra*, 5 Cal.3d at p. 691.)

The Sheriff's Association primarily argues that this delegation of authority to the arbitration panel is permissible because the delegation does not involve a purely municipal function but a matter of statewide concern. In *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480 [96 Cal.Rptr. 553, 487 P.2d 1193], we upheld legislation designed to

encourage regional planning in the Lake Tahoe area, including creation of the Tahoe Regional Planning Agency with jurisdiction over the entire multicounty region. The County of El Dorado contended, among other things, that the legislation violated former section 13, the predecessor version of section 11, subdivision (a), by impermissibly delegating authority to a special commission. [FN7] Noting that the Lake Tahoe region crosses county lines, we stated that "our cases have recognized 'that [former section 13] was intended to prohibit only legislation interfering with purely local matters.' " (*People ex rel. *292 Younger v. County of El Dorado*, *supra*, at p. 500.) It does not invalidate delegation "to accomplish purposes of more than purely local concern." (*Id.* at p. 501.)

> FN7 Former section 13 provided, as relevant: "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects ..., or to levy taxes or assessments or perform any municipal function whatever ...." (Stats. 1969, p. A-59, repealed June 2, 1970; see *People ex rel. Younger v. County of El Dorado*, *supra*, 5 Cal.3d at pp. 499-500.) Section 11, subdivision (a), the successor provision, no longer prohibits delegation of powers to special commissions, so the legislation at issue in that case would clearly have been valid under the current provision. (*People ex rel. Younger v. County of El Dorado*, *supra*, at p. 500, fn. 22.)

The Sheriff's Association argues that because of "the threat to the public safety caused by work stoppages," all matters concerning firefighters and peace officers are of statewide concern that the state may delegate as it thinks best. We disagree. Section 5, subdivision (a), gives charter cities general authority over "municipal affairs." Although the term "municipal affairs" is slightly different than section 11, subdivision (a)'s term "municipal functions," we believe that cases interpreting what are "municipal affairs" provide guidance in deciding what are "municipal functions." We have stated that "the various sections of article XI fail to define municipal affairs," and, accordingly, the courts must "decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern." (*Professional Fire Fighters, Inc. v. City of Los Angeles*, *supra*, 60 Cal.2d at p. 294; accord, *Baggett v. Gates*, *supra*, 32 Cal.3d at p. 136, fn. 10.) By this we meant that article XI contains no global definition of what are municipal affairs (or functions). But it is not entirely silent on the subject, and it is not silent here. "[T]his is not the usual case in which the courts are without constitutional guidance in resolving the question whether a subject of local regulation is a 'municipal affair' ...." (*Ector v. City of Torrance* (1973) 10 Cal.3d 129, 132 [109 Cal.Rptr. 849, 514 P.2d 433], quoted in *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal.3d at p. 316.) Section 1, subdivision (b), states that the *county* shall provide for employee compensation. Viewing, as we must, sections 1, subdivision (b), and 11, subdivision (a), together and not in isolation, they clearly provide that compensating county employees is a municipal function.

In *Ector v. City of Torrance*, *supra*, 10 Cal.3d at page 132, we had "the benefit of a specific directive in subdivision (b) of [section 5], which grants 'plenary authority' to charter cities to prescribe in their charters the 'qualifications' of their employees." Accordingly, we said that questions involving the qualifications of city employees are municipal affairs with which the Legislature may not interfere. (*Id.* at p. 133.) Similarly, in *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal.3d at page 317, we cited section 5's reference to compensation of employees to conclude that determining the wages of employees of charter cities and counties is a matter of local rather than statewide concern. Thus, establishing compensation for its employees is for the county to do, and section 11, *293 subdivision (a), prohibits the Legislature from delegating that function to a private body.

In *People ex rel. Younger v. County of El Dorado*, *supra*, 5 Cal.3d 480, the Legislature had established a special commission with jurisdiction over a regional problem. At that time, although no longer, the Constitution prohibited the delegation of authority to a special commission as well as to a private party. (See fn. 7, *ante*.) We upheld commissions that performed a function that " 'would be impossible for any one of the constituent municipal or suburban units to perform.' " (*People ex rel. Younger v. County of El Dorado*, *supra*, at p. 501.) No single county or other local agency could coordinate planning for the entire Lake Tahoe region. By contrast, a county may

easily provide for the compensation of its own employees. Thus, neither the constitutional language nor the rationale of *People ex rel. Younger v. County of El Dorado* applies here.

As with section 1, subdivision (b), the Sheriff's Association argues that the Legislature's power to *regulate* labor relations as to matters of statewide concern permits it to delegate this regulatory authority to an arbitration panel. The argument fails for the same reasons: Senate Bill 402 does not just permit the arbitration panel to impinge minimally on the county's authority; it empowers the panel actually to set employee salaries. The Sheriff's Association also argues that binding arbitration is a "quid pro quo for the lack of a right to strike." (See Lab. Code, § 1962; *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 586 [214 Cal.Rptr. 424, 699 P.2d 835].) This may (or may not) provide a policy argument in favor of binding arbitration, but it provides no reason to disregard a clear constitutional mandate. Moreover, like the Court of Appeal, we note that the state has exempted itself from this binding arbitration requirement. (Code Civ. Proc., § 1299.3, subd. (c).) We are skeptical that awarding binding arbitration as a quid pro quo can be of statewide concern to everyone except the state.

The Sheriff's Association argues that the arbitration panel is a public, not private, body within the meaning of section 11, subdivision (a). We disagree. The statute requires the two parties to select a "person" to be a member of the panel. These two then select "an impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel." (Code Civ. Proc., § 1299.4, subd. (b).) If the two do not agree on the third person, the statute has other provisions for selecting that person, but it continually uses the word "person" or "persons" to describe who may be the chairperson. (Code Civ. Proc., § 1299.4, subd. (c).) Nothing in the statute requires the arbitrators to be public officials; indeed, the statute appears to contemplate, and the parties assume, they will be private persons.

***294** The Sheriff's Association agrees that the members of the arbitration panel may be private persons, but it argues that empowering them to render binding arbitration decisions makes them a public body. It relies on a Rhode Island case that involved a similar mandatory arbitration law. (*City of Warwick v. Warwick Regular Firemen's Ass'n* (1969) 106 R.I. [256 A.2d 206].) In that case, the court reasoned that the Legislature gave the arbitration panel " the power to fix the salaries of public employees ... without control or supervision from any superior," and, therefore, each member of the panel "is a public officer and ... collectively the three constitute a public board or agency." (*Id.* at pp. 210-211.) The Sheriff's Association seeks to apply this reasoning here. But the constitutional provision in that case was very different from the one here. The Rhode Island Constitution merely stated that the "legislative power ... shall be vested" in the senate and house of representatives. (*City of Warwick v. Warwick Regular Firemen's Ass'n, supra*, 256 A.2d at p. 208, fn. 1.) It contained no language limiting the Legislature's delegation power like that of section 11, subdivision (a). As pointed out in a case involving the power to tax, if delegating to private persons the power to do a public act makes them a public body for purposes of section 11, subdivision (a), then "the constitutional provision would never be violated. Anyone to whom the Legislature delegated the power to tax [or any other power specified in section 11, subdivision (a)] would automatically cease being a 'private person or body.' " (*Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359, 1387 [48 Cal.Rptr.2d 269].) Section 11, subdivision (a), is not self-canceling. The act of delegation does not change a private body into a public body and thereby validate the very delegation the section prohibits. The Legislature has, indeed, delegated authority to a private body.

Both parties cite decisions from other states in support of their positions. The only cases that are relevant are those that involve statutory and constitutional provisions comparable to California's. These cases generally support the County. Section 11, subdivision (a), "was taken from Article III, section 20 of the 1873 Pennsylvania Constitution." (*Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority, supra*, 40 Cal.App.4th at p. 1377, citing Peppin, *Municipal Home Rule in California: IV* (1946) 34 Cal.L.Rev. 644, 677.) The Pennsylvania courts originally invalidated binding arbitration legislation under their constitutional provision. (*Erie Firefighters Local No. 293 v. Gardner* (1962) 406 Pa. 395 [178 A.2d 691].) As the Sheriff's Association notes, the Pennsylvania Supreme Court has since upheld binding arbitration. (*Harney v. Russo* (1969) 435 Pa. 183 [255 A.2d 560].) But that was *after* the Pennsylvania Constitution was amended specifically to permit such arbitration. (*Id.* at p. 562; see also *City of Washington*

v. Police Department (1969) 438 Pa. 168 [259 A.2d 437, 441-442, fn. 6] ["A *295 constitutional amendment was necessary for this provision because it had previously been held that a statute making an arbitration award binding on a public employer would be an unconstitutional delegation of legislative power"].) The California Constitution has not been amended to permit the Legislature to impose binding arbitration on counties. Thus, the Pennsylvania experience supports the County's position.

Two other states have also invalidated arbitration provisions under constitutional provisions similar to section 11, subdivision (a). (*City of Sioux Falls v. Sioux Falls, etc.* (1975) 89 S.D. 455 [234 N.W.2d 35] [binding arbitration]; *Salt Lake City v. I.A. of Firefighters, etc.* (Utah 1977) 563 P.2d 786 [arbitration that is partially binding, but advisory only as to salary and wage matters].) One court reached a contrary result, but it was unable to achieve a majority opinion. (*State v. City of Laramie* (Wyo. 1968) 437 P.2d 295 (plur. opn.).) We find the Wyoming case unconvincing. As recognized in *City of Sioux Falls v. Sioux Falls, etc.*, *supra*, at page 36, the Wyoming court cited Pennsylvania law but failed to note that the Pennsylvania Constitution had been amended to permit binding arbitration. In any event, California's constitutional history, including that behind section 1, subdivision (b), distinguishes California from Wyoming. This history, and the two California constitutional provisions, read together, make clear that, in California, the county, not the state or anyone else, sets compensation for its employees.

The Sheriff's Association also cites our opinion in *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507, 526 P.2d 971]. In that case, we interpreted "a provision for arbitration in a city charter affecting public employees." (*Id.* at p. 611.) We summarily rejected an argument by an amicus curiae "that the disputed issues are not arbitrable because submission of them to arbitration constitutes an unconstitutional delegation of legislative power. Arbitration of public employment disputes has been held constitutional by state supreme courts in *State v. City of Laramie* [, *supra*,] 437 P.2d 295 and *City of Warwick v. Warwick Regular Firemen's Ass'n* [, *supra*,] 106 R.I. 109. [¶] To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power." (*Id.* at p. 622, fn. 13.) That case does not aid the Sheriff's Association. As noted, this case involves the division of authority between state and county, not what a local agency may itself choose to do. Our citations to the Wyoming and Rhode Island decisions cannot be read as a blanket endorsement of everything in those cases, including matters irrelevant to the issue before us. Our opinion did not even mention section 1, subdivision (b), or section 11, subdivision (a).

*296 III. Conclusion

John Donne wrote, "No man is an island, entire of itself." (Donne, Devotions upon Emergent Occasions, No. 17.) So, too, no county is an island, entire of itself. No doubt almost anything a county does, including determining employee compensation, can have consequences beyond its borders. But this circumstance does not mean this court may eviscerate clear constitutional provisions, or the Legislature may do what the Constitution expressly prohibits it from doing.

The Court of Appeal correctly held that Senate Bill 402 violates sections 1, subdivision (b), and 11, subdivision (a). Accordingly, we affirm the judgment of the Court of Appeal.

Kennard, J., Baxter, J., Werdegar, J., and Brown, J., concurred.

GEORGE, C. J., Concurring.

I agree that the legislation before us is constitutionally impermissible in light of article XI, *section 11, subdivision (a)*, of the California Constitution (article XI, section 11(a)), which prohibits the Legislature from delegating "to a private person or body" a county's power to "perform municipal functions." In my view, however, the majority should base its decision solely upon that relatively narrow constitutional provision, and need not and should not reach out to decide the distinct and potentially much more far-reaching question whether the legislation also violates article XI, *section 1, subdivision (b)*, of the California Constitution (article XI, section 1(b)), which provides simply and generally that "[t]he governing body [of a county] shall provide for the number, compensation, tenure, and appointment of employees." As I shall explain, the issue whether the general "home rule" provisions of article XI, section 1(b) preclude the Legislature from adopting the legislation at issue presents a much closer question than the majority acknowledges, and I believe that traditional principles of judicial restraint should lead the court to refrain from prejudging that broader constitutional

issue when there is a narrower and fully adequate alternative ground upon which to rest its decision. Accordingly, I cannot join the majority opinion.

I

Article XI, section (1)(b), provides in relevant part: "The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county.... *The governing body shall provide for the number, compensation, tenure and appointment of employees.*" (Italics added.) *297

The majority states that the language of article XI, section (1)(b) "is quite clear and quite specific: the *county*, not the state, not someone else, shall provide for the compensation of its employees" (maj. opn., *ante*, at p. 285), and concludes that the legislation in question-Senate Bill No. 402 (1999-2000 Reg. Sess.) (enacting Code Civ. Proc., § 1299 et seq.) (hereafter Senate Bill 402)-conflicts with this language because it "compels the county to enter into mandatory arbitration with unions representing its employees, with the potential result that the arbitration panel determines employee compensation." (Maj. opn., *ante*, at p. 285.)

In my view, the issue is not nearly as simple or clear-cut as the majority suggests. Although article XI, section (1)(b) gives all counties (including noncharter counties) the authority to control the appointment and compensation of their own employees (prior to 1933, the Legislature exercised that authority over the employees of noncharter counties), other sections of article XI provide that *charter counties* and *charter cities* have similar or even broader authority to control the appointment, compensation, and dismissal of their employees. (See Cal. Const., art. XI, § § 4, subd. (f), 5, subd. (b)(4).) Despite these explicit constitutional provisions establishing broad home rule authority of charter counties and charter cities over their own public employees, over the last half-century the Legislature has enacted a host of laws that govern various aspects of the labor relations of local public entities, and numerous cases have upheld the right of the state to enact such legislation-which takes precedence over contrary rules established by local entities.

For example, the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) prohibits counties and other local entities (along with most other employers) (Gov. Code, § 12926, subd. (c)) from discriminating in employment on the basis of the categories enumerated in the act, and the provisions of that act-for example those barring discrimination on the basis of disability or marital status-obviously limit a local entity's authority over the appointment or tenure of its employees. Perhaps most relevant to the present case is the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) (MMB Act), which places upon local entities the obligation to meet and confer in good faith with their employees on *wages* and other conditions of employment, and which grants public employees a variety of remedies to enforce such protections. As the majority recognizes, in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [205 Cal.Rptr. 794, 685 P.2d 1145], this court specifically upheld the validity of the MMB Act as applied to a charter city, concluding that in light of the statewide concern addressed by the act-the establishment of "[f]air labor practices, uniform throughout the state" (*id.* at p. 600)-application of the act did not violate the home rule provisions of *298California Constitution, article XI, section 5, subdivision (b). Of course, the majority does not suggest that the provisions of article XI, section 1(b)-setting forth the home rule authority of *noncharter* counties-place any greater restrictions on the Legislature's authority than the even broader constitutional home rule provisions applicable to *charter* counties and *charter* cities.

Once it is recognized that the provisions of article XI, section 1(b) do not preclude the Legislature from promulgating a detailed collective bargaining regime that counties are required to follow in negotiating over compensation with all of their employees-the type of structure set forth in the MMB Act-it seems evident that the question whether the legislation at issue in this case violates article XI, section 1(b), is not as clear as the majority suggests. Although the majority asserts emphatically that "Senate Bill 402 is not merely procedural; it is substantive" (maj. opn., *ante*, at p. 289), that characterization of the legislation is hardly self-evident. In enacting Senate Bill 402, the Legislature did *not* undertake *itself* to set the compensation for county firefighters or police officers, but instead prescribed *a dispute resolution procedure* that is to be employed when the county and its firefighters or police officers are unable to reach agreement on economic issues that fall within the "meet and confer" requirement of the MMB Act. Furthermore, although the procedure set forth in the act calls for *binding* arbitration, the particular form of binding arbitration prescribed by the act does not afford the arbitrators free rein to resolve the dispute

by setting compensation at whatever level the arbitrators deem appropriate. Instead the act limits the arbitrators' discretion to choosing between the "last best offer" of each of the parties on each unresolved issue. (Code Civ. Proc., § 1299.6.)

It is true, of course, that the binding arbitration procedure established in Senate Bill 402 impinges directly upon the county's general authority to retain the last word on employee compensation. But it is not at all clear that this circumstance is necessarily fatal to the validity of state legislation under article XI, section 1(b). As noted above, the relevant language of this constitutional provision provides that "[t]he governing body [of the county] shall provide for the number, *compensation, tenure, and appointment* of employees." (*Ibid.*, italics added.) Thus, under article XI, section 1(b), a county's constitutionally granted authority over the compensation of its employees appears no greater than the county's authority over the appointment or tenure of its employees. Under the California Fair Employment and Housing Act (FEHA), the Fair Employment and Housing Commission (FEHC) is granted the authority to resolve a claim that a county has engaged in unlawful employment discrimination in the appointment or dismissal process (Gov. Code, § 12960 et seq.), and a decision of the FEHC against the county clearly has the effect of "trumping" the authority the county *299 otherwise would have to refuse to appoint or dismiss a person on the basis, for example, of his or her marital status or sexual orientation. (See Gov. Code, § 12940.) The circumstance that the FEHC has the authority in such instances to displace the *ultimate* decision that a county otherwise would be empowered to make regarding the appointment or tenure of a particular applicant, however, never has been viewed as casting any constitutional doubt on the application of the FEHA to counties or other local public entities. If the state properly may impinge upon a county's power to *appoint* or *dismiss* employees in order to serve the statewide concern of protecting employees from discrimination, it is not immediately apparent why the state, to serve the statewide concern of protecting the public from the widespread risks posed by strikes by firefighters or police officers, may not similarly impinge upon a county's authority to have the last word on employee *compensation*.

For these reasons, I find the question whether Senate Bill 402 violates article XI, section 1(b) to be much closer and more difficult than the majority acknowledges.

II

Moreover, as noted at the outset, there is no need for the majority to resolve the question whether Senate Bill 402 violates article XI, section 1(b), in light of the majority's conclusion that Senate Bill 402 violates the entirely distinct provisions of article XI, section 11(a). The majority's holding under article XI, section 11(a) clearly is sufficient in itself to resolve this case. And because article XI, section 11(a) is a more focussed provision than article XI, section 1(b), and is directed at the particular "evil or mischief" reflected in Senate Bill 402-which is a measure enacted by the Legislature delegating to a private body the power to perform a municipal function that otherwise would be performed by a county-that constitutional provision unquestionably provides a much narrower ground of decision than the broad and more general provisions of article XI, section 1(b).

Article XI, section 11(a) reads in full: "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions."

I agree with the majority's conclusion that in enacting Senate Bill 402 the Legislature violated this provision by delegating to a private body (the arbitration panel) the power to perform a municipal function (establishing the level of compensation for certain county employees). Contrary to the *300 argument of the Riverside Sheriff's Association, an arbitration panel cannot properly be viewed as a "public body" exempt from the restrictions of article XI, section 11(a), simply because the panel is empowered to perform a public function, because such reasoning would vitiate the fundamental purpose and scope of this constitutional provision. And I agree with the majority that the case of *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480 [96 Cal.Rptr. 553, 487 P.2d 1193] provides no support for the Riverside Sheriff's Association's argument. The decisionmaking body to which governmental functions have been delegated in the present case-unlike the body in *El Dorado*-is not charged with the responsibility of taking into account statewide or regional concerns in making its decisions, but instead is granted the authority to decide a quintessentially local question.

Accordingly, I agree with the majority that-in view of the wording of article XI, section 11(a)-the

Legislature may not compel an unwilling local public entity to submit a municipal function to binding arbitration by a private body.

III

By reaching out unnecessarily to rest its decision on the broad provisions of article XI, section 1(b), when a decision based upon the more focussed provisions of article XI, section 11(a) would suffice, the majority not only fails to heed traditional principles of judicial restraint, but also creates an unfortunate precedent that may improperly restrict the Legislature's authority in the future to fashion a remedy for statewide or regional safety or health problems resulting from strikes or other labor-related actions of local public health or safety employees. Although article XI, section 11(a), prohibits the Legislature from enlisting a *private* arbitration panel to resolve a local police or firefighter labor conflict that threatens to endanger neighboring communities, that constitutional provision would not preclude the Legislature from granting a *public* body-perhaps like the Public Employment Relations Board (Gov. Code, § 3541)-the authority to review and resolve a local labor dispute that poses a significant risk to public safety or health beyond the borders of the local public entity. In my view, it is improper to prejudge the question of the validity or invalidity of such a legislative measure that is not before us, and we should avoid an unnecessarily broad holding that may have the effect of prematurely resolving that question and restricting the options available to the other two branches of government.

MORENO, J., Concurring.

I concur in the majority's result. I write separately because I believe the majority's analysis requires some qualification. *301

The majority recognizes that the governing body of counties are expressly authorized under article XI, section 1, subdivision (b) of the California Constitution to provide for the "compensation ... of employees," and that, by necessary implication, the Legislature is not constitutionally authorized to set employee compensation. (Maj. opn., *ante*, at p. 285.) The majority further recognizes that the Legislature may nonetheless regulate to some degree the process by which such compensation is negotiated. (Maj. opn., *ante*, at pp. 287-288.) The critical distinction for the majority is between "regulating labor relations" and "depriving the county entirely of its authority to set employee salaries." (*Id.* at p. 288, italics omitted.) This distinction explains, for example, our upholding the imposition of labor relations statutes such as the Meyers-Milias-Brown Act on local public agencies (see *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [205 Cal.Rptr. 794, 685 P.2d 1145]) while holding unconstitutional a law denying certain state funds to such agencies that grant their employees cost-of-living increases (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317-318 [152 Cal.Rptr. 903, 591 P.2d 1] (*County of Sonoma*)).

Although this analysis may be useful, it should not be employed inflexibly. Even in the area of local employee compensation, the distinction between matters of local and statewide concern is not necessarily invariable. As we have stated, the " 'constitutional concept of municipal affairs ... changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state.' " (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63 [81 Cal.Rptr. 465, 460 P.2d 137].) Although California Constitution, article XI, section 1, subdivision (b) appears to preclude the Legislature from setting outright the compensation of county employees, I am not persuaded that state regulation of wage-setting procedures, even when that regulation intrudes upon the county's autonomy as much as it does in the present case, is forever forbidden. The question we left open in *County of Sonoma, supra*, 23 Cal.3d at page 318, is whether similarly intrusive legislation may nonetheless be justified by the existence of a statewide emergency, which the legislation is reasonably designed to address.

That same question is, I believe, left open in this case. There can be no doubt that satisfactory labor relations between local governments and public safety employees is a matter that may transcend local concerns. We need not decide whether some kind of statewide emergency might constitutionally justify the legislation at issue here. No such emergency has been alleged. Senate Bill No. 402 (1999-2000 Reg. Sess.) appears to be *302 prophylactic rather than responsive to an actual crisis in public safety officer wages, recruitment, or job performance. Thus, even if the presumption of unconstitutionality for legislation such as Senate Bill No. 402 may be rebutted by an adequate showing of extraordinary state interest, that presumption was not rebutted in this case. *303

For California Supreme Court Briefs See: 2002 WL 31946652 (Appellate Brief), REPLY BRIEF ON THE MERITS OF REAL PARTY IN INTEREST RIVERSIDE SHERIFF'S ASSOCIATION, (November 22, 2002)

For California Supreme Court Briefs See: 2002 WL 31946653 (Appellate Brief), ANSWER BRIEF ON THE MERITS, (October 15, 2002)

For California Supreme Court Briefs See: 2002 WL 31946654 (Appellate Brief), OPENING BRIEF OF REAL PARTY IN INTEREST RIVERSIDE SHERIFF'S ASSOCIATION, (August 15, 2002)

Cal. 2003.

COUNTY OF RIVERSIDE et al., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; RIVERSIDE SHERIFF'S ASSOCIATION, Real Party in Interest.

END OF DOCUMENT

Supreme Court of the United States.
NORTON
v.
SHELBY CO., STATE OF TENNESSEE.

Filed May 10, 1886.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

West Headnotes

Counties 154(1)
104k154(1) Most Cited Cases
After the adoption of Const. Tenn. 1870, declaring that no county should become a stockholder in any corporation except upon election first held, and the assent of three-fourths of the votes cast thereat, no action by the county court can ratify an invalid subscription to the stock of a railroad company made before its adoption, without such election first held.

Counties 154(1)
104k154(1) Most Cited Cases

Counties 183(3)
104k183(3) Most Cited Cases
Under Acts Tenn. 1867-68, c. 6, § 1, which authorizes a subscription on behalf of a county to the stock of a railroad by the county court, but requires that a majority of the justices in commission when the subscription is made shall be present, and that a majority of those present shall concur therein, a subscription which was invalid when made is not ratified by the levy of a tax to pay the bonds issued in payment of the subscription, where a majority of the justices in commission were not present when the tax was levied.

Officers and Public Employees 40
283k40 Most Cited Cases
Since Acts Tenn. 1867-68, c. 46, § § 21, 25, establishing a board of commissioners for the government of a named county, were declared void by the supreme court of the state under its constitution, which vested the administration of the county in justices of the peace, the commissioners appointed under that act were not de facto officers, for there was no office for them to fill; and hence an attempted subscription by them to the stock of a railroad company was void.

**432 **1121 D. H. Poston, W. K. Poston,* and **428 Jos. H. Choate,* for plaintiff in error.

**433 Julius A. Taylor, R. D. Jordan,* and *W. B. Glisson,* for defendant in error.

*434 FIELD, J.

This is an action upon 29 bonds, of $1,000 each, alleged to be the bonds of Shelby county, Tennessee, issued on the first of March, 1869, and payable on the first of January, 1873, with interest from January 1, 1869, at 6 per cent. per annum, payable annually on the surrender of matured interest coupons attached; and three coupons of $60 each. The following is a copy of one of the bonds, and of a coupon:

'$1,000 UNITED STATES OF AMERICA, $1,000

'Issued under and by virtue of section 6 of an act of the legislature of the state of Tennessee passed February 25, 1867, amended on the twelfth day of February, 1869, and by authority conferred upon the county commissioners of Shelby county by section 25 of an act passed March 9, 1867.

State of Tennessee.

[Vignette.]

'A special tax is levied by authority of law upon all the taxable property in the county of Shelby to meet the principal and interest of these bonds, collectible in equal annual installments running through six years, as the bonds themselves mature.

'SHELBY COUNTY RAILROAD BOND NO. 176.

1,000 Dollars.

'Be it known that the county of Shelby, state of Tennessee, is indebted to the Mississippi River Railroad Company, or bearer, in the sum of one thousand dollars, payable in the city of Memphis on the first day of January, 1873, with interest at the rate of six per cent. per annum from January 1, 1869, payable annually in said city upon surrender of the matured interest coupons hereto attached.

'This is one of three hundred $1,000 bonds, all of the same denomination and rate of interest, issued by Shelby county in payment of a subscription of three hundred thousand dollars to the Mississippi River Railroad Company, made by the county commissioners under the authority of the acts above recited, transferable by delivery, and redeemable in six years, at the rate of fifty

thousand dollars a year, commencing January 1, 1870.

*435 'Dated at the city of Memphis, county of Shelby, state of Tennessee, the first day of March, 1869.

[Seal County Court of Shelby County, Tennessee.]

'BARBOUR LEWIS,

'President of the Board of County Commissioners of Shelby County.

'JOHN LOAGUE,

'Clerk of County Court of Shelby County,'

**1122 '$60 STATE OF TENNESSEE, $60

'*Shelby County.*

'Coupon No. ___ of Bond No. 264.

'The trustee of Shelby county will pay to the bearer sixty dollars, in the city of Memphis, on the first day of January, 1875, being interest due on bond No. 264, for $1,000, of bonds issued to Mississippi River Railroad Company.

[Seal County Court of Shelby County, Tennessee.]

[Signed]

'JOHN LOAGUE,

'Clerk of Shelby County Court.'

The plaintiff contends (1) that the commissioners, by whose direction the bonds were issued, and whose president signed them, were lawful officers of Shelby county, and authorized, under the acts mentioned in the heading of the bonds, to represent and bind the county by the subscription to the railroad company, and that the bonds issued were therefore its legal obligations; (2) that if the commissioners were not officers *de jure* of the county, they were officers *de facto*, and, as such, their action in making the subscription and issuing the bonds is equally binding upon the county; and (3) that the action of the commissioners, whatever their want of authority, has been ratified by the county.

The defendant contends (1) that the commissioners were not lawful officers of the county, and that there was no such office in Tennessee as that of county commissioner; (2) that there could not be any such *de facto* officers, as *436 there was no such office known to the laws, and therefore that the subscription was made, and the bonds were issued, without authority, and are void; and (3) that the action of the commissioners was never ratified, and was incapable of ratification, by the county.

Upon the first question presented, that which relates to the lawful existence and authority of the county commissioners, we are relieved from the necessity of passing. That has been authoritatively determined by the supreme court of Tennessee, and is not open for consideration by us.

From an early period in the history of the state--indeed, from a period anterior to the adoption of her constitution of 1796--to the passage of the act of March 9, 1867, the administration of the government in local matters in each county was lodged in a county court, or 'quarterly court,' as it was sometimes called, composed of justices of the peace, elected in its different districts. The constitution of 1796 recognizes that court as an existing tribunal, and the constitution of 1834 prescribes the duties of the justices of the peace composing it. This county court alone had the power to make a county subscription to the Mississippi River Railroad Company, to issue bonds for the amount, and to levy taxes for its payment, unless the act of March 9, 1867, invested the board of commissioners with that authority. St. 1867, *c.* 48, § 6. That act created the board, and provided that it should consist of five persons, residents of the county for not less than two years, each to serve for the period of five years, and until his successor should be elected and qualified. The twenty-fifth section vested in it all the powers and duties then possessed by the quarterly court of the county, and in addition thereto the authority 'to subscribe stock in railroads, which the county court of Shelby county has been authorized by general and special law to subscribe, and under the same conditions and restrictions, and to represent such stock in all elections for directors, and provide for payment of subscriptions as made.'

The validity of this act superseding the county court was at once assailed as in violation of the constitution of the state. Within a month after its passage, WILLIAM WALKER and other *437 justices of the peace of the county, in their official character, and as citizens and tax-payers, filed a bill in chancery in the name of the state, at their relation, against the commissioners appointed, alleging that they had usurped, and were unlawfully exercising, the **1123 powers and functions of the justices, and had taken into custody the records of the county under the act, which the relators insisted was in violation of the constitution, mentioning several sections with which it conflicted; and praying that the act be adjudged void, that the attempt of the commissioners to exercise the powers of the justices be declared a usurpation, and that the commissioners be perpetually enjoined from exercising them. The case having been decided adversely to the relators, an appeal was taken to the supreme court of the state, and pending the appeal the subscription to the stock of the Mississippi River Railroad Company was made by

the commissioners, and the bonds were issued. Before the appeal was heard the supreme court of the state had under consideration a similar statute, passed on the twelfth of March, 1868, for Madison county, and extended to White county, which, in like manner, undertook to supersede the quarterly courts of those counties, and substitute in their place boards of commissioners with the same powers as those conferred upon the commissioners of Shelby county. The case in which such consideration was had was *Pope* v. *Phifer*, reported in 3 Heiskell's Reports [684] of the Supreme Court of the state. Under this act, three commissioners were appointed by the governor, being the number prescribed to constitute the board of White county. The bill was filed to restrain them from organizing as a board, to have the act declared unconstitutional, and to perpetually enjoin them from acting under it. The court states in its opinion that the question as to the validity of the act was argued with great ability by counsel on both sides, and the opinion itself shows that the question was carefully considered. The chancellor, as in the case of *State at the Relation of Walker and others* against *The Commissioners*, dismissed the bill. The supreme court reversed the decree, and perpetually enjoined the defendants from acting as a board of commissioners. It held that the act creating the board, and conferring on the commissioners appointed by *438 the governor the powers of justices of the peace of the county court, was unconstitutional and void; that the county court was one of the institutions of the state, recognized in the constitution; that the powers conferred by it upon the justices of the peace in their collective capacity were intended to be exercised by that court; and that the power to tax for purposes of the county could not, by any special or local law, be taken from the justices of the peace as a county court and conferred upon local tribunals of particular counties composed of commissioners appointed by the governor.

This decision was made in February, 1871. In June following the case mentioned above of *State at the Relation of Walker and others against The Commissioners of Shelby County* was decided in conformity with it, the supreme court holding that at the time the bill was filed the justices were entitled to the relief prayed, and that the decree dismissing the bill was erroneous, and it so adjudged and decreed. But it said that as the act under which the bill alleged that the defendants had usurped office had since then been repealed, and that they had not afterwards assumed to exercise the powers and perform the duties named in the act, it was only necessary, in addition to what was decreed above, to dispose of the costs; and that disposition was made by taxing them against the defendants, and awarding execution therefor.

In the same month the supreme court decided the case of *Butterworth* against *Shelby County*, which also involved a consideration of the validity of the act creating the board of commissioners of that county. [FN1] The action was upon county warrants issued by the board, and signed by Barbour Lewis as its president, as the bonds in this suit are signed. The court held that the act creating the board was unconstitutional, that the board was an illegal body, and that, as a necessary consequence, the warrants of the county were **1124 invalid. Judgment was accordingly rendered for the defendant. Chief Justice NICHOLSON, in delivering the opinion of the court, referred to *439 the two decisions mentioned, and said that they had 'determined that the legislature exceeded its constitutional powers in assuming to abolish the county court, and substitute in its place a board of county commissioners with the powers before belonging to the county court. The act of March 9, 1867, was therefore a nullity, and the board of commissioners appointed and organized thereunder was an unauthorized and illegal body. The act was inoperative as to the existing organization, powers, and duties of the county court. Neither the board of commissioners nor Barbour Lewis, its president, had any more powers under said act than if no act had been passed.'

Counsel for the plaintiff have endeavored to show that the adjudication in these cases has been questioned by later decisions, and therefore should have no controlling force in this litigation. A careful examination of those decisions fails to support this position. The opinion that the act was invalid because it was special legislation, applicable only to certain counties, would seem, indeed, to be thus modified. But the adjudication that the constitution did not permit the appointment of commissioners to take the place of the justices of the peace for the county, and perform the duties of the county court, stands unimpaired, and as such is binding upon us. Two of the cases, as we have seen, were brought against the commissioners, in one case, of Shelby county, and in the other, of White county, to test the validity of the acts under which they were appointed, or about to be appointed, and their right to assume and exercise the functions and powers of the justices of the peace, and hold the county court in their place. From the nature of the questions presented we cannot review or ignore this determination. Upon the construction of the constitution and laws of a state,

this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some principle of the federal constitution, or of a federal statute, or a rule of commercial or general law. In these cases no principle of the federal constitution, or of any federal law, is invaded, and no rule of general or commercial law is disregarded. The determination made relates to the existence *440 of an inferior tribunal of the state, and that depending upon the constitutional power of the legislature of the state to create it and supersede a pre-existing institution. Upon a subject of this nature the federal courts will recognize as authoritative the decision of the state court. As said by Mr. Justice BRADLEY, speaking for the court in *Claiborne Co. v. Brooks:* 'It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on the subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state.' 111 U. S. 400, 410; S. C. 4 Sup. Ct. Rep. 489. It would lead to great confusion and disorder if a state tribunal, adjudged by the state supreme court to be an unauthorized and illegal body, should be held by the federal courts, disregarding the decision of the state court, to be an authorized and legal body, and thus make the claims and rights of suitors depend, in many instances, not upon settled law, but upon the contingency of litigation respecting them being before a state or a federal court. Conflicts of this kind should be avoided, if possible, by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction.

On many subjects the decisions of the courts of a state are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive,--such as relate to the existence of her subordinate tribunals, the eligibility and election or appointment **1125 of their officers, and the passage of her laws. No federal court should refuse to accept such decisions as expressing on these subjects the law of the state. If, for instance, the supreme court of a state should hold that an act appearing on her statute book was never passed, and never became a law, the federal courts could not disregard the decision, and declare that it was a law, and enforce it as such. *South Ottawa* v. *Perkins*, 94 U. S. 260; *Post* v. *Supervisors*, 105 U. S. 667.

*441 The decision of the supreme court of Tennessee as to the constitutional existence of the board of commissioners of Shelby county is one of this class. That court has repeatedly adjudged, after careful and full consideration, that no such board ever had a lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justices of the peace of the county; and that their action in holding the county court was utterly void. This court should neither gainsay nor deny the authoritative character of that determination. It follows that in the disposition of the case before us we must hold that there was no lawful authority in the board to make the subscription to the Mississippi River Railroad Company, and to issue the bonds of which those in suit are a part.

But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers. The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment of election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. *442 It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who

holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement: An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

In *Hildreth* v. *McIntire*, 1 J. J. Marsh. 206, we have a decision from the court of appeals of Kentucky which well illustrates this doctrine. The legislature of that state attempted to abolish the court of appeals established by her constitution, and create in its stead a new court. Members of the new **1126 court were appointed, and undertook to exercise judicial functions. They dismissed an appeal because the record was not filed with the person acting as their clerk. A certificate of the dismissal signed by him was received by the lower court, and entered of record, and execution to carry into effect the original decree was ordered to issue. To reverse this order an appeal was taken to the constitutional court of appeals. The question was whether the court below erred in obeying the mandate of the members of the new court, and its solution depended upon another, whether they were judges of the court of appeals, and the person acting as their clerk was its clerk. The court said: 'Although they assumed the functions of judges and clerk, and attempted to act as such *443 their acts in that character are totally null and void, unless they had been regularly appointed under and according to the constitution. A *de facto* court of appeals cannot exist under a written constitution which ordains one supreme court, and defines the qualification and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one court of appeals in Kentucky as long as the constitution shall exist, and that must necessarily be a court *de jure*. When the government is entirely revolutionized, and all its departments usurped by force or the voice of a majority, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries, and in such a case the acts of a *de facto* executive, a *de facto* judiciary, and a *de facto* legislature must be recognized as valid. But this is required by political necessity. There is no government in action except the government *de facto*, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them to others who, sustained by a power above the forms of law, claim to act, and do act, in their stead. But when the constitution or form of government remains unaltered and supreme, there can be no *de facto* department or *de facto* office. The acts of the incumbents of such departments or office cannot be enforced conformably to the constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky as a *de facto* court of appeals. There can be no such court while the constitution has life and power. There has been none such. There might be under our constitution, as there have been, *de facto* officers; but there never was, and never can be, under the present constitution, a *de facto* office.' And the court held that the gentlemen who acted as judges of the legislative tribunal were not incumbents of *de jure* or *de facto* offices, nor were they *de facto* officers of *de jure* offices, and the order below was reversed.

In some respects the case at bar resembles this one from Kentucky. *444 Under the constitution of Tennessee there was but one county court. That was composed of the justices of the county elected in their respective districts. The commissioners appointed under the act of March 9, 1867, by the governor were not such justices, and could not hold such court, any more than the legislative tribunal of Kentucky could hold the court of appeals of that state. In *Shelby Co.* v. *Butterworth*, from the opinion in which we have already quoted, Chief Justice NICHOLSON, speaking of the claim that Barbour Lewis, the president of the board of county commissioners, was a *de facto* officer, after referring to the decisions of the supreme court of the state holding that the board of commissioners was an illegal and unconstitutional body, said: 'This left the organization of the county court in its former integrity, with its officers entitled to their offices, and creating no vacancy to be filled by the illegal action under the act of 1867. It follows that Barbour Lewis could not be a *de facto* officer, as there was no legal board of which he could be president, and as there was no vacancy in the legal organization. The warrants issued by him show the character in which he was acting, and repel the

presumption that he was a *de facto* officer. He could be, under the circumstances, **1127 as we can judicially know from the law and the pleadings in the case, nothing but a usurper. There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer *de facto*.'

Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel. But, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbents are entitled to consideration as valid acts of a *de facto* officer. Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is *445 enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by Mr. Justice MANNING, of the supreme court of Michigan, in Carleton v. People, 10 Mich. 259: 'Where there is no office there can be no officer *de facto*, for the reason that there can be none *de jure*. The county office existed by virtue of the constitution the moment the new county was organized. No act of legislation was necessary for that purpose. And all that is required when there is an office to make an officer *de facto*, is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary that his election or appointment be valid, for that would make him an officer *de jure*. The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact.'

The case of *State* v. *Carroll*, 38 Conn. 449, decided by the supreme court of Connecticut, upon which special reliance is placed by counsel, and which is mentioned with strong commendation as a land-mark of the law, in no way militates against the doctrine we have declared, but is in harmony with it. That case was this: The constitution of Connecticut provided that all judges should be elected by its general assembly. An act of the legislature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace to hold the court during his temporary sickness or absence. A justice of the peace having thus been called in, and having acted, a question arose whether the judgments rendered by him were valid. The court held that whether the law was constitutional or not, he was an officer *de facto*, and, as such, his acts were valid. The opinion of Chief Justice BUTLER is an elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment. It criticises the language of some cases, that the officer must act under color of authority conferred by a person having power, or *prima facie* power, to appoint or elect in the particular case; and it thus defines an officer *de facto*: *446 'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised--*First*, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; *second*, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; *third*, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity **1128 in its exercise, such ineligibility, want of power, or defact being unknown to the public; *fourth*, under color of an election or an appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.'

Of the great number of cases cited by the chief justice, none recognizes such a thing as a *de facto* office, or speaks of a person as a *de facto* officer, except when he is the incumbent of a *de jure* office. The fourth head refers, not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the chief justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made. One of them (Taylor v. Skrine, 3 Brev. 516) arose in South Carolina in 1815. By an act of that state of 1799 the governor was authorized to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick, or become unable to hold the court in his circuit. A

presiding judge of the court was thus appointed by the governor. Subsequently the act was declared to *447 be unconstitutional, and the question arose whether the acts of the judge were necessarily void. It was held that he was a judge *de facto*, and acting under color of legal authority, and that as such his acts were valid. Here the judge was appointed to fill an existing office, the duties of which the legal incumbent was temporarily incapable of discharging. Another case is *Cocke* v. *Halsey*, 16 Pet. 71. It there appeared that, by the constitution of Mississippi, the judges and clerks of probate were elected by the people. The legislature provided by law that, in case of the disability of the clerk, the court might appoint one. An elected clerk having left the state for an indefinite period, the judge appointed another to serve during his absence. The law authorizing the appointment was declared unconstitutional, but the acts of the clerk were deemed valid as those of an officer *de facto*. Here the office was an existing one, created by law.

To *Carleton* v. *People*, 10 Mich. 250, we have already referred. By the constitution of Michigan the laws of the legislature took effect 90 days after their passage. The legislature, on the fourth of February, passed an act creating a new county, and authorized the election of county officers in April following. The officers were elected within the 90 days, that is, before the act took effect, and they subsequently acted as such officers. The validity of their acts was questioned on the ground that there was at the time no law that authorized the election, but the offices were existing by the constitution, and as they subsequently entered upon the duties of those offices, it was held that they were officers *de facto*.

In *Clark* v. *Com.*, from the supreme court of Pennsylvania, (29 Pa. St. 129,) the question related only to the title of the officer. The constitution of that state provided for a division of the state into judicial districts, and for the election of the presiding judge of the county court for each district by the people thereof. The legislature passed a law transferring a county from one judicial district to another during the term for which the judge of the district had been elected, and while presiding judge of the district to which the county was thus transferred he held court, at which a prisoner was convicted *448 of murder. It was contended that the act of the legislature was equivalent to an appointment of a judge for that county, and therefore unconstitutional. The supreme court held that, admitting the law to be unconstitutional, the judge was an officer *de facto*, and that the prisoner could not be heard to deny it. Here, also, the office was one created by law, and the only question was as to the constitutionality of the law authorizing the judge to exercise it.

It is evident, from a consideration of these cases, that the learned chief justice, in *State* v. *Carroll*, had reference, in his fourth subdivision, as we have said, to the unconstitutionality of acts appointing the officer, and not of **1129 acts creating the office. Other cases cited by counsel will show a similar view.

In *Brown* v. *O'Connell*, 36 Conn. 432, the constitution of the state provided that the judges of the courts should be appointed by the general assembly. An act of the legislature established a police court in the city of Hartford, and provided for the appointment of judges of the court by the common council. It was held that the judge could be appointed only by the general assembly, and to that extent the act was unconstitutional. There was no question as to the validity of the act, so far as it established a police court, and the appointee of the common council was held to be a judge *de facto*.

The case of *Blackburn* v. *State*, 3 Head, 689, only goes to show that the illegality of an appointment to a judicial office does not affect the validity of the acts of the judge. The constitution of Tennessee requires a judge to be 30 years of age. A judge under that age having been appointed, it was held that he could be removed by a proper proceeding, but until that was done his acts were binding.

In *Fowler* v. *Bebee*, 9 Mass. 231, the legislature passed an act erecting the county of Hampden, and provided that the law should take effect from the first of August next ensuing. Before that date the governor, with the advice and consent of the then council, commissioned a person as sheriff of the county. There was no such office at the time his commission was issued, but when the law went into effect he acted under his commission. It was only the case of a premature appointment, *449 and it was held that he was an officer *de facto*, and that the legality of his commission could not be collaterally questioned.

None of the cases cited militates against the doctrine that, for the existence of a *de facto* officer, there must be an office *de jure*, although there may be loose expressions in some of the opinions, not called for by the facts, seemingly against this view. Where no office legally exists, the pretended officer is merely a

usurper, to whose acts no validity can be attached; and such, in our judgment, was the position of the commissioners of Shelby county, who undertook to act as the county court, which could be constitutionally held only by justices of the peace. Their right to discharge the duties of justices of the peace was never recognized by the justices, but from the outset was resisted by legal proceedings, which terminated in an adjudication that they were usurpers, clothed with no authority or official function.

It remains to consider whether the action of the commissioners in subscribing for stock of the Mississippi River Railroad Company, and issuing the bonds, of which those in suit are a part, being originally in valid, was afterwards ratified by the county. The county court, consisting of the justices of the peace, elected in their respective districts, alone had power to make a subscription and issue bonds. The sixth section of the act of February 25, 1867, to which the bonds on their face refer, provides 'that the county court of any county through which the line of the Mississippi River Railroad is proposed to run, a majority of the justices in commission at the time concurring, may make a corporate or county subscription to the capital stock of said railroad company, of an amount not exceeding two-thirds the estimated cost of grading the road-bed through the county, and preparing the same for the iron rails; the said cost to be verified by the sworn statement of the president or chief engineer of said company. And after such subscription shall have been entered upon the books of the railroad company, either by the chairman of the county court, or by any other member of the court appointed therefor, the court shall proceed, without further reference or delay, to levy an *450 assessment on all the taxable property within the county sufficient to pay said subscription; and the same shall be payable in three equal annual installments, commencing with the fiscal year in which said subscription shall be made. And it shall be lawful for county courts **1130 making subscriptions as herein provided to issue short bonds to the railroad company, in anticipation of the collection of the annual levies, if thereby construction of the work may be facilitated.' St. 1867, c. 48, § 6. On the fifth of the following November the legislature passed an act declaring 'that the subscription authorized in said sixth section to be made to the capital stock of the Mississippi River Railroad Company, by the counties along the line of said railroad, may be made at any monthly term of the county courts of said counties, or at any special term of said courts: provided, that a majority of all the justices in commission in the counties respectively shall be present when any such subscription is made; and provided, further, that a majority of those present shall concur therein.' St. 1867, c. 6, § 1.

Neither of these acts, as counsel observe, recognizes or in any way refers to the county commissioners, though the last act was passed eight months after the act creating the board of commissioners for Shelby county. Both provide that the subscription may be made by the county court, but upon the condition that a majority of all the justices in commission shall be present, and a majority of those present shall concur therein.

The county court met on the fifteenth of November, 1869, for the first time after the passage of the act of March 9, 1867, and assumed its legitimate functions as the governing agency of the county. On the eleventh of April, 1870, it again met, and established the rate of taxation for the Mississippi River Railroad bonds at 20 cents on each $100 worth of taxable property. At its meeting on the sixteenth of that month it ordered that the tax for those bonds should be 10 cents on each $100 worth of property. At the meeting on the 11th there were 22 justices of the peace present, of whom 18 voted for the tax levy, and on the 16th only *451 12 justices were present. There were in the county at that time 45 justices in commission. There were no other exeetings of the county court until after May 5, 1870, on which day the new constitution of Tennessee went into effect, which declares that 'the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election; nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority.'

By this provision of the constitution the county court, as thus seen, was shorn of any power to order a subscription to stock of any railroad company without the previous assent of three-fourths of the voters of the county cast at an election held by its qualified voters, and, of course, it could not afterwards, without such assent, give validity to a subscription previously made by the commissioners. It could not ratify the acts of an unauthorized body. To ratify is to give validity to the act of another, and implies that the person or body ratifying has at the time power to do the act ratified. As we said in

Marsh v. *Fulton Co.*, where it was contended, as in this case, that certain bonds of that county, issued without authority, were ratified by various acts of its supervisors, 'a ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified.' The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified vocers of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that *452 they could without such vote, by simple expressions of approval, or in **1131 some other indirect way, give validity to acts, when they were directly, in terms, prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition.' 10 Wall. 676, 684. See, also, *County of Davies* v. *Dickinson*, 117 U. S. ----; S. C. 6 Sup. Ct. Rep. 897; *McCracken* v. *City of San Francisco*, 16 Cal. 591, 623.

No election was held by the voters of Shelby county with reference to the subscription for stock of the Mississippi River Railroad Company after the new constitution went into effect. No subsequent proceedings, resolutions, or expressions of approval of the county court with reference to the subscription made by the county commissioners, or to the bonds issued by them, could supersede the necessity of such an election. Without this sanction the county court could, in no manner, ratify the unauthorized act, nor could it accomplish that result by acts which would estop it from asserting that no such election was had. The requirement of the law could not, in this indirect way, be evaded.

The case of *Aspinwall* v. *Commissioners of Davis Co.*, 22 How. 365, is directly in point on this subject. There the charter of the Ohio & Mississippi Railroad Company, created by the legislature of Indiana in 1848, as amended in 1849, authorized the commissioners of a county through which the road passed to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted on the first of March, 1849, that this should be done. The election was held on that day, and a majority of the voters voted that a subscription should be made. In September, 1852, the board of commissioners, pursuant to the acts and election, subscribed for 600 shares of the stock of the railroad company, amounting to $30,000, and in payment of it issued 30 bonds of $1,000 each, signed and sealed by the president of the board, and attested by the auditor of the county, and delivered the same to the company. These bonds drew interest at the rate of 6 per cent. per annum, for which coupons were attached. *453 The plaintiffs became the holders of 60 of these coupons, and upon them the suit was brought against the commissioners of the county. After the subscription was voted, but before it was made or the bonds issued, the new constitution of Indiana went into effect, which contained the following provision: 'No county shall subscribe for stock in any incorporated company unless the same be paid for at the time of such subscription, nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company.' Article 10, § 6. This provision was set up against the validity of the bonds and coupons; and the question arose whether, under the charter of the company and its amendment, the right to the county subscription became so vested in the company as to exclude the operation of the new constitution. The court held that the provisions of the charter authorizing the commissioners to subscribe conferred a power upon a public corporation which could be modified, changed, enlarged, or restrained by the legislature; that by voting for the subscription no contract was created which prevented the application of the new constitution; that the mere vote to subscribe did not of itself form a contract with the company within the protection of the federal constitution; that until the subscription was actually made no contract was executed; and that the bonds, being issued in violation of the new constitution of the state, were void. That constitution withdrew from the county commissioners all authority to make a subscription for the stock of an incorporated company, except in the manner and under the circumstances prescribed by that instrument, even though a vote for such subscription had been previously had, and a majority of the voters had voted for it. The doctrine of this case was reaffirmed in *Wadsworth* v. *Supervisors*, 102 U. S. 534.

It follows that no ratification of the subscription to the Mississippi River **1132 Railroad Company, or of the bonds issued for its payment, could be made by the county court, subsequently to the new

constitution of Tennessee, without the previous assent of three-fourths of the voters of the county, which has never been given.

*454 The question recurs whether any ratification can be inferred from the action of the county court on the eleventh and sixteenth of April, 1870, which was had before that constitution took effect. At the meeting of the court on those days a rate of tax was established to be levied for the payment of the bonds, but it appears from its records that on both days less than a majority of the justices of the county were present, and the county court, under those circumstances, could not even directly have authorized the subscription. The levy of a tax for the payment of the bonds, when a less number of justices were present than would have been necessary to order a subscription, could not operate as a ratification of a void subscription.

It is unnecessary to pursue this subject further. We are satisfied that none of the positions taken by the plaintiff can be sustained. The original invalidity of the acts of the commissioners has never been subsequently cured. It may be, as alleged, that the stock of the railroad company for which they subscribed is still held by the county. If so, the county may, by proper proceedings, be required to surrender it to the company, or to pay its value; for, independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit, and as that cannot be sustained, the judgment below must be affirmed; and it is so ordered.

FN1 This case does not appear to be reported. A copy of the opinion was furnished the court by counsel.

118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178

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Supreme Court of the United States.
CHICOT COUNTY DRAINAGE DIST.
v.
BAXTER STATE BANK et al.
No. 122.

Argued Dec. 7, 1939.
Decided Jan. 2, 1940.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by the Baxter State Bank and another against Chicot County Drainage District to recover on bonds issued by the defendant. A judgment for plaintiff was affirmed by the Circuit Court of Appeals, 103 F.2d 847, and the defendant brings certiorari.

Reversed and remanded.

West Headnotes

[1] **Federal Courts** 5
170Bk5 Most Cited Cases
(Formerly 106k260.2, 106k260)

[1] **Federal Courts** 30
170Bk30 Most Cited Cases
(Formerly 106k280(5))
The lower federal courts are all "courts of limited jurisdiction," that is with only the jurisdiction which Congress has prescribed, but nonetheless they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether they have jurisdiction to entertain the cause, and for such purpose to construe and apply the statute under which they are asked to act.

[2] **Judgment** 498
228k498 Most Cited Cases
The determinations of lower federal courts regarding whether they have jurisdiction to entertain cause are open to direct review but cannot be assailed collaterally.

[3] **Judgment** 498
228k498 Most Cited Cases
A federal District Court sitting in bankruptcy has authority to pass upon its own jurisdiction, and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action.

[4] **Judgment** 577(2)
228k577(2) Most Cited Cases
As respects question of res judicata, where the contention as to jurisdiction of lower federal court, such as District Court sitting in bankruptcy, is one involving validity of statute under which court is requested to act, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application.

[5] **Judgment** 577(2)
228k577(2) Most Cited Cases

[5] **Statutes** 63
361k63 Most Cited Cases
Where bondholders were parties to proceeding for readjustment of debts of state drainage district, wherein bankruptcy court rendered decree forever barring all claims, not presented within one year, from participating in readjustment plan or in funds paid into court, and, except for provision for presentation, enjoining bondholders from thereafter asserting any claim on bonds and bondholders failed to raise question regarding validity of statute purporting to confer jurisdiction on court and made no attempt to have decree reviewed, bondholders were precluded by doctrine of res judicata, notwithstanding the unconstitutionality of such statute, from maintaining subsequent suit on bonds and raising question of constitutionality. Gen.Acts Ark.1909, p. 829; Gen.Acts Ark.1920, Ex.Sess., p. 3742, amended Sp.Acts 1921, p. 896. Bankr.Act, § § 78-80, 11 U.S.C.A. § § 301-303.

[6] **Judgment** 713(2)
228k713(2) Most Cited Cases
Res judicata may be pleaded as a bar not only as respects matters actually presentedto sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end.

**317 *371 Messrs. E. L. McHaney, Jr., S. Lasker Ehrman, and Grover T. Owens, all of Little Rock, Ark., for petitioner.

**318 *372 Mr. G. W. Hendricks, of Little Rock, Ark., for respondents.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Respondents brought this suit in the United States District Court for the Western Division of the Eastern District of Arkansas to recover on fourteen bonds of $1,000 each, which had been issued in 1924 by the petitioner, Chicot County Drainage District, organized under statutes of Arkansas, [FN1] and had been in default since 1932.

> FN1 Act No. 405, Extra.Sess., p. 3742, General Assembly of Arkansas, approved February 25, 1920, as amended by Act No. 432 of Sp.Acts 1921, p. 896, and General Drainage Law of Arkansas, Gen.Acts 1909, p. 829, approved May 27, 1909.

In its answer, petitioner pleaded a decree of the same District Court in a proceeding instituted by petitioner to effect a plan of readjustment of its indebtedness under the Act of May 24, 1934, [FN2] providing for 'Municipal-Debt Readjustments'. The decree recited that a plan of readjustment had been accepted by the holders of more than two-thirds of the outstanding indebtedness *373 and was fair and equitable; that to consummate the plan and with the approval of the court petitioner had issued and sold new serial bonds to the Reconstruction Finance Corporation in the amount of $193,500 and that these new bonds were valid obligations; that, also with the approval of the court, the Reconstruction Finance Corporation had purchased outstanding obligations of petitioner to the amount of $705,087.06 which had been delivered in exchange for new bonds and canceled; that certain proceeds had been turned over to the clerk of the court and that the disbursing agent had filed his report showing that the Reconstruction Finance Corporation had purchased all the old bonds of petitioner other than the amount of $57,449.30. The decree provided for the application of the amount paid into court to the remaining old obligations of petitioner; that such obligations might be presented within one year, and that unless so presented they should be forever barred from participating in the plan of readjustment or in the fund paid into court. Except for the provision for such presentation, the decree canceled the old bonds and the holders were enjoined from thereafter asserting any claim thereon.

> FN2 48 Stat. 798, 11 U.S.C.A. ss 301--303. Originally this provision was limited to two years but it was extended to January 1, 1940, by Act approved April 10, 1936, 49 Stat. 1198, 11 U.S.C.A. s 302.

Petitioner pleaded this decree, which was entered in March, 1936, as res judicata. Respondents demurred to the answer. Thereupon the parties stipulated for trial without a jury.

The evidence showed respondents' ownership of the bonds in suit and that respondents had notice of the proceeding for debt readjustment. The record of that proceeding, including the final decree, was introduced. The District Court ruled in favor of respondents and the Circuit Court of Appeals affirmed. 8 Cir., 103 F.2d 847. The decision was placed upon the ground that the decree was void because, subsequent to its entry, this Court in a *374 proceeding relating to a municipal district in Texas had declared the statute under which the District Court had acted to be unconstitutional. Ashton v. Cameron County District, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309. In view of the importance of the question we granted certiorari. October 9, 1939. 308 U.S. 532, 60 S.Ct. 84, 84 L.Ed. 449.

The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton v. Shelby County, 118 U.S. 425, 442, 6 S.Ct. 1121, 1125, 30 L.Ed. 178; Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett, 228 U.S. 559, 566, 33 S.Ct. 581, 584, 57 L.Ed. 966. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. **319 The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,--with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. [FN3]

Without attempting *375 to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of res judicata as it now comes before us.

> FN3 See Field, 'The Effect of an Unconstitutional Statute'; 42 Yale Law Journal 779; 45 Yale Law Journal 1533; 48 Harvard Law Review 1271; 25 Virginia Law Review 210.

First. Apart from the contention as to the effect of the later decision as to constitutionality, all the elements necessary to constitute the defense of res judicata are present. It appears that the proceedings in the District Court to bring about a plan of readjustment were conducted in complete conformity to the statute. The Circuit Court of Appeals observed that no question had been raised as to the regularity of the court's action. The answer in the present suit alleged that the plaintiffs (respondents here) had notice of the proceeding and were parties, and the evidence was to the same effect, showing compliance with the statute in that respect. As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing the defense of res judicata are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it. Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L.Ed. 195; Case v. Beauregard, 101 U.S. 688, 692, 25 L.Ed. 1004; Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 319, 325, 47 S.Ct. 600, 601, 604, 71 L.Ed. 1069; Grubb v. Public Utilities Commission, 281 U.S. 470, 479, 50 S.Ct. 374, 378, 74 L.Ed. 972.

*376 [1][2] Second. The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.

[3] In the early case of McCormick v. Sullivant, 10 Wheat. 192, 6 L.Ed. 300, where it was contended that the decree of the federal district court did not show that the parties to the proceedings were citizens of different States and hence that the suit was coram non judice and the decree void, this Court said: 'But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, **320 taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities'. Id., 10 Wheat, page 199, 6 L.Ed. 300. See, also, Skillern's Executors v. May's Executors, 6 Cranch 267, 3 L.Ed. 220; Des Moines Navigation Co. v. Iowa Homestead Co., 123 U.S. 552, 557, 559, 8 S.Ct. 217, 219, 220, 31 L.Ed. 202; Dowell v. Applegate, 152 U.S. 327, 340, 14 S.Ct. 611, 616, 38 L.Ed. 463; Evers v. Watson, 156 U.S. 527, 533, 15 S.Ct. 430, 432, 39 L.Ed. 520; *377Cutler v. Huston, 158 U.S. 423, 430, 431, 15 S.Ct. 868, 870, 871, 39 L.Ed. 1040. This rule applies equally to the decrees of the District Court sitting in bankruptcy, that is, purporting to act under a statute of Congress passed in the exercise of the bankruptcy power. The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action. Stoll v. Gottlieb, 305 U.S. 165, 171, 172, 59 S.Ct. 134, 137, 83 L.Ed. 104.

[4] Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application. In the

present instance it is suggested that the situation of petitioner, Chicot County Drainage District, is different from that of the municipal district before the court in the Ashton case. Petitioner contends that it is not a political subdivision of the State of Arkansas but an agent of the property owners within the District. See Drainage District No. 7 of Poinsett County v. Hutchins, 184 Ark. 521, 42 S.W.2d 996, [FN4] We do not refer to that phase of the case as now determinative but merely as illustrating the sort of question which the District Court might have been called upon to resolve had the validity of the Act of Congress in the present application been raised. As the question of validity was one which had to be determined by a judicial decision, if determined at all, no reason appears why it should not be regarded as determinable by the District Court like any other question affecting its jurisdiction. There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding *378 to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. Stoll v. Gottlieb, supra. [FN5]

FN4 See Drainage District No. 2 of Crittenden County, Ark., v. Mercantile-Commerce Bank, 8 Cir., 69 F.2d 138; In re Drainage District No. 7 of Poinsett County, Ark., D.C., 21 F.Supp. 798.

FN5 See, also, Miller v. Tyler, 58 N.Y. 477, 480; Drinkard v. Oden, 150 Ala. 475, 477, 478, 43 So. 578; Pulaski Avenue, 220 Pa. 276, 279, 280, 69 A. 749; People v. Russel, 283 Ill. 520, 524, 119 N.E. 617; Beck v. State, 196 Wis. 242, 250, 219 N.W. 197.

[5][6] The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end'. Grubb v. Public Utilities Commission, supra (281 U.S. 470, 50 S.Ct. 378, 74 L.Ed. 972); Cromwell v. County of Sac, supra.

The judgment is reversed and the cause is remanded to the District Court with direction to dismiss the complaint.

It is so ordered.

Reversed and remanded.

308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329

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contemplation, as inoperative as though it had never been passed."[5] Since then courts have attempted to outdo one another in stating this doctrine in a novel and incisive manner. Some have said of an unconstitutional statute that "it is an empty legislative declaration without force or vitality,"[6] others have paid their compliments to legislative bodies by characterizing such an enactment as "of no more force or validity than a piece of blank paper."[7] Some have spoken of such a law as simply a statute "in form" which under every circumstance or condition "lacks the force of law."[8] Still another court has spoken of an unconstitutional statute as "fatally smitten at its birth."[9] No distinction is drawn between statutes violating some procedural technicality and those violating important substantive prohibitions; a defect in title is as fatal as is a violation of due process.

It is no exaggeration to say that this theory that an unconstitutional statute is void ab initio is the traditional doctrine of American courts as to the effect of an unconstitutional statute. As it is usually stated it is a doctrine or rule of uncompromising and general application, and from it one would little suspect the flexibility it has developed in judicial practice, or the compromises that have been made to harmonize it with judicial decisions.

It should be stated here that the doctrine, as thus broadly phrased, is not now a general or universal rule governing the effect of unconstitutionality. The rule may not even yet be as flexible as it should be, but it is no longer the sole rule on the effect of an invalid statute. In some instances all courts, federal and state, decide cases by giving effect to unconstitutional statutes, and giving effect to them directly, as such, for the case under consideration; in other instances all courts agree that effect shall be given to such statutes by use of other legal rules or doctrines, such as estoppel, de facto, or clean hands in equity. In the chapters that follow each of these statements is illustrated in detail.

I. THEORIES OF THE EFFECT OF UNCONSTITUTIONAL STATUTES

There are several rules or views, not just one, as to the effect of an unconstitutional statute. All courts have applied them all at

[5] Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. Ed. 178 (1886).
[6] Carr v. State, 127 Ind. 204, 26 N. E. 778 (1890).
[7] Ex parte Bockhorn, 62 Tex. Cr. 651, 138 S. W. 706 (1911).
[8] Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454 (1903).
[9] Ex parte Bockhorn, *supra*, note 7.

various times and in differing situations. Not all courts agree, however, upon the applicability of any particular rule to a specific case. It is this lack of agreement that causes the confusion in the case law of the subject.

A. The Void ab Initio Theory

The void ab initio theory of the effect of an invalid statute is, as was indicated above, that the statute should be eliminated entirely from the consideration of a case. Not only is the statute eliminated from the case as law but also as one of the facts in the situation. This theory gives no weight to the fact that the statute has been enacted by the legislature, approved by the governor, and relied upon by the people until it was declared invalid by a court.

There are numerous instances in constitutional law where this rule works well and is soundly applied. For example, if a person is arrested, accused, tried, and convicted under a statute which upon appeal is held to be unconstitutional, it is usually proper to permit him to go his way, a free man, so far as this case and statute are concerned. The same holding would be justified if the statute had been held invalid prior to the commission of the act in this case.[10] This would be true though he pleaded guilty to violating the statute.[11] Some question might arise over the subsequent attempt to try him for the violation, by his one act, of another valid statute that also made it a crime, and if the void ab initio theory were applied strictly, the first trial would not be considered a jeopardy, and the subsequent trial would be viewed as the first jeopardy. Double jeopardy would not be violated, therefore, under the strict void ab initio theory.[12] To so hold might, however, raise a serious question whether such an application of the void ab initio theory would not

[10] See Norwood v. State, 136 Miss. 272, 101 So. 366 (1924); State v. Greer, 88 Fla. 249, 102 So. 739 (1924); Moore v. State, 26 Okla. Cr. Rep. 394, 224 Pac. 372 (1924).
[11] Norwood v. State, *supra*, note 10; State v. Greer, *supra*, note 10.
[12] See Barton v. State, 89 Tex. Cr. 387, 23 S. W. 989 (1921), suggesting that lunacy adjudication is not a bar to subsequent prosecution if the adjudication is authorized by an invalid act. In State v. Oleson, 26 Minn. 507, 5 N. W. 959 (1880), the members of the court apparently disagreed on the incidental question of double jeopardy if one prosecuted under an invalid ordinance were again to be prosecuted for the same act. Justice Berry said, in dictum: "As the conviction set up in bar of the indictment was under an ordinance invalid and void as respects the offense charged in the indictment, it was a conviction without any authority of law whatever — a conviction for an offense which was not an offense; or, in other words, it was not a conviction at all, and hence the defendant was not, in contemplation of law, put in jeopardy of punishment for the offense for which she is indicted, either by the so-called conviction under the ordinance, or by the prosecution which led to it." See Chapter 4, note 100.

C

CAROLINE WINGERTER, Respondent,
v.
CITY AND COUNTY OF SAN FRANCISCO, Appellant.

Supreme Court of California.
S. F. No. 1859.

November 21, 1901.

ESTATES OF DECEASED PERSONS--FEES PAID UNDER MISTAKE OF LAW -- UNCONSTITUTIONALITY OF AD VALOREM FEES--ACTION BY DISTRIBUTEE.

Fees paid by an executor to the county clerk on the appraised value of the property of the deceased testator, under the act of March 28, 1895, which was subsequently held unconstitutional by this court, as to such fees, cannot be recovered back from the city and county because of such subsequent decision. The payment was according to the understanding of the parties as to the law prevailing at the time, and the subsequent decision by this court does not create such a mistake of law as a court will rectify.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

*547 Franklin K. Lane, City and County Attorney, and Hugo E. Asher, Assistant, for Appellant.

Otto tum Suden, for Respondent.

HARRISON, J.

An act of the legislature, approved March 28, 1895, entitled "An act to establish the fees of county, township, and other officers, and of jurors and witnesses in this state" (Stats. 1895, p. 267), directed the county clerk, upon the filing of the inventory and appraisement in the administration of an estate, to charge and collect the sum of one dollar for each thousand dollars of the appraised valuation in excess of three thousand dollars. The executor of the last will and testament of Charles J. Wingerter filed the inventory and appraisement of the estate of his testator with the county clerk of San Francisco, August 12, 1895, and paid to that officer the sum of $325 as the fee for filing the same. June 2, 1897, the estate of the said testator was distributed to the plaintiff herein. In May, 1897, this court held that the above provision of the act of March 28, 1895, was unconstitutional. (*Fatio v. Pfister*, 117 Cal. 83.) The present action was brought by the plaintiff in August, 1898, to recover the amount so paid *548 for filing the inventory, alleging in her complaint that it was paid under a mutual mistake of the executor and the clerk in believing that the statute was constitutional and valid. A demurrer to the complaint on the part of the defendant was overruled by the superior court, and the present appeal is from the judgment entered thereon.

Section 1578 of the Civil Code, upon which the plaintiff relies for recovery, is contained in the chapter relating to "consent," in the article upon contracts, and is explanatory of section 1567, which declares that an apparent consent is not real or free if obtained through "mistake." A contract thus obtained may be rescinded (sec. 1689), or its enforcement may be defended at law or enjoined in equity. The section cannot be invoked to sustain an action for the recovery of taxes or other public debts voluntarily paid under a statute which is afterwards declared to be unconstitutional. In *Cooley v. County of Calaveras*, 121 Cal. 482, it was said: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." Under the rule there declared, the plaintiff is not entitled to a recovery. The mistake relied on in *Rued v. Cooper*, 119 Cal. 463, cited on behalf of the plaintiff, was held not to be a mistake of law, and the decision was placed upon the ground that by virtue of section 1542 of the Civil Code the release given to the plaintiff did not include the claim sued upon.

The judgment is reversed.

Garoutte, J., and Van Dyke, J., concurred.

Cal. 1901.

CAROLINE WINGERTER, Respondent, v. CITY AND COUNTY OF SAN FRANCISCO, Appellant.

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C

B. E. CAMPBELL, Respondent,
v.
EDWARD RAINEY, as Superintendent of Banks, etc., Appellant.
Civ. No. 961.

District Court of Appeal, Fourth District, California.

November 29, 1932.

HEADNOTES

(1) BANKS AND BANKING--ASSESSMENTS--INVALID STATUTE--MISTAKE OF LAW--FINDINGS.
In this action by a stockholder of an insolvent bank to recover moneys paid on an assessment imposed by the State Superintendent of Banks, based on the fact that subsequent to the payment of said moneys the statute under which the assessment was levied upon plaintiff was held to be unconstitutional, the mistake of the parties at the time said moneys were paid in believing and assuming that said statute and the assessment levied pursuant thereto were valid, that defendant had authority to receive the moneys and that plaintiff was required to pay the same, was purely and entirely of law, and in the absence of the existence of any other mistake the trial court erred in finding that the mistake was one of both law and fact.

(2) ID.--MISTAKE OF LAW--RECOVERY OF MONEYS.
Where the assessment was levied and the moneys were paid thereon in accordance with the understanding of the law prevailing at that time, the fact that the statute was subsequently held to be unconstitutional was not such a mistake of law as would furnish a basis for the recovery of said moneys.

See 20 Cal. Jur. 974; 21 R. C. L. 162 (7 Perm. Supp., p. 5027).

(3) ID.--ANTICIPATED ATTACHMENT--COMPULSION--EVIDENCE--FINDINGS.
In said action, where it appeared that a suit for the recovery of assessments had been instituted against a number of stockholders of the insolvent bank prior to the making of any payments by plaintiff and that plaintiff was a defendant in said suit, but he had not been served with process and no attachment was levied upon any of his property until after he had failed to keep up the installment payments he had agreed to make, and plaintiff's own testimony negatived the exercise of any compulsion and showed that the possibility of an attachment and sale of his property occurred to him without any suggestion to that effect having been made to him by defendant or his predecessor or assistant, the trial court erred in finding that there was any compulsion under which the payments were made.

(4) ID.--JUDICIAL PROCEEDINGS--COMPENSATION.
When resort to judicial proceedings is required to enforce collection of a tax or assessment, the payment of such tax or assessment is not deemed made under compulsion, and an action for its recovery will not lie. *748

SUMMARY

APPEAL from a judgment of the Superior Court of Imperial County. A. C. Finney, Judge. Reversed.

The facts are stated in the opinion of the court.

COUNSEL

Elbert W. Davis, J. H. Hoffman, Whitelaw & Whitelaw and Sullivan, Roche, Johnson & Barry for Appellant.

C. L. Brown for Respondent.

JENNINGS, J.

This action was instituted by plaintiff, a stockholder in the Farmers & Merchants Bank of Imperial, to recover from defendant Superintendent of Banks of the State of California a certain sum of money paid by said plaintiff on account of an assessment imposed by said defendant upon the stockholders of the bank after the bank had become insolvent and defendant's predecessor in office had taken possession of the property and business of the bank and was proceeding to liquidate its affairs. Defendant's predecessor took possession of the bank's property and business on October 10, 1927. On this date plaintiff was the owner of sixty shares of stock of the

bank. Thereafter and during the process of liquidation, defendant's predecessor levied an assessment upon the stockholders of the bank in accordance with the provisions of chapter 496 of the Statutes of 1917, page 581, as amended by chapter 420 of the Statutes of 1925, page 905. The assessment levied upon plaintiff amounted to $6,000. Of this amount plaintiff paid the sum of $2,515.87. On April 18, 1929, the Supreme Court of California held that the statute by virtue of whose provisions the assessment was levied upon plaintiff was unconstitutional. (*Wood v. Hamaguchi*, 207 Cal. 79 [277 Pac. 113, 63 A. L. R. 861].) Thereafter no further payment was made by plaintiff on account of said assessment and on April 25, 1930, he instituted the present action to recover the sum of $2,515.87 paid by him as aforesaid. From a judgment permitting recovery of the said sum defendant appeals.

Appellant sets forth certain specifications of error which it is contended were committed by the trial court and which, it is claimed, entitled him to a reversal of the judgment. *749

[1] The first particular in which it is contended that the court erred is in finding that there was any mistake of fact which contributed to the making of payments by respondent on account of the aforesaid assessment levied against him. The court's finding in this regard is in the following language:

"That the said plaintiff and the said defendant, at the time of the payment and the receipt of said money each believed and assumed that defendant had authority to so receive said money, and that the plaintiff was required to pay said money, and they each based their belief that the said money should be paid and received as aforesaid upon and under the provisions of those portions of Chapter 496 of the Statutes of 1917, page 581, as amended by Chapter 420, of Statutes of 1925, page 905, authorizing the making and levying of an assessment of the stock of the stockholders of the banking corporation then in the hands of the superintendent of banks of the State of California in liquidation.

"That both plaintiff and defendant were mistaken both as to the law and fact when they assumed and believed that said assessment was valid and that said money should be paid thereunder and the said plaintiff and defendant were also mistaken as to both fact and law as to the validity of the said assessment, and as to the duty of plaintiff to pay the same and the right of the defendant to receive said money. That plaintiff did not discover such mistake of fact and law, or that he was not required to pay said money, until on or about the 18th day of April, 1929."

The very language of this finding shows that, although the court therein found that both parties proceeded under a mutual mistake of both law and fact, the mistake defined in said finding was a mistake purely and entirely of law. It is apparent that the mistake under which the parties labored consisted in the assumption that the statute, under which the proceedings for the levy and collection of the assessment were taken, was a valid statute. In this it developed they were mistaken as the statute was subsequently held to be unconstitutional and therefore invalid. The record fails to disclose the existence of any mistake other than the mistake described in the above-quoted finding. It follows, therefore, *750 that the court erred in finding that the mistake was one of both law and fact.

[2] In this connection, respondent contends that a mutual mistake of law establishes a sufficient basis for recovery. This contention is sufficiently answered by the decisions in *Cooley v. County of Calaveras*, 121 Cal. 482 [53 Pac. 1075, 1077], and *Wingerter v. San Francisco*, 134 Cal. 547 [66 Pac. 730, 86 Am. St. Rep. 294]. Decidedly apropos to the contention thus advanced is the following language from the former case: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." This language was quoted with approval in the Wingerter case.

[3] The second specification of error relied upon by appellant is that the court erred in finding that there was any compulsion under which the payment was made. The finding to this effect is said to be entirely lacking in evidentiary support and contrary to the uncontroverted evidence presented at the trial of the action. The finding which is said to be vulnerable to the attack thus made is in the following language:

"That at the time of the said payment plaintiff herein fully believed that unless he so paid said assessment that defendant would bring an action against him to recover the amount of said assessment and would seize and attach the property of plaintiff and tie up and interfere with his business thereby, and cause plaintiff great damage and loss because of such action, and that plaintiff so paid said money because of such business exigency and under an apprehension on his part of being stopped in his business and suffer

great damages if the same was not paid, and said money was so paid under compulsion."

The evidence with respect to the feature of compulsion consists of the testimony of respondent and that of Frank V. Boardwell, assistant superintendent of banks of the state of California during the time respondent's payments were made. The latter witness testified that at no time prior to the making of an agreement by respondent to pay the assessment in installments did he threaten to take respondent's property or to attach it. Respondent testified that before *751 he paid any money on account of the assessment a demand for payment was made upon him; that he had a conversation with Boardwell prior to making any payment; that Boardwell stated to him that they would compel him to pay the assessment in full but that nothing was said to him about taking his property; that he consulted an attorney and became convinced that the state banking department would attach his property and would sell it and force collection of the assessment from the proceeds of the sale, thus increasing the amount he would be compelled to pay by reason of the additional expense that would be incurred in prosecuting the action and subjecting his property to sale. It is undisputed that an action for the recovery of assessments had been instituted against a number of stockholders of the insolvent bank prior to the making of any payment by respondent and that respondent was a defendant in said action but had not been served with process and further that no attachment was levied upon any property of respondent until after he had failed to keep up the installment payments he had agreed to make.

The problem which is presented is whether, from the abovementioned evidence, the court was warranted in finding that respondent's payments on account of the assessment were made under compulsion.

In this connection respondent places much reliance upon the decision in *Young v. Hoagland*, 212 Cal. 426 [298 Pac. 996, 75 A. L. R. 654]. In this case the board of directors of a corporation had levied an assessment on stock of the corporation. Thereafter, at a stockholders' meeting the board was removed and a new board was elected. The new board rescinded the assessment theretofore levied but the old board maintained that the stockholders' meeting was not legally called and refused to surrender their offices. The old board refused to recognize the order of the new board rescinding the assessment and proceeded to take steps necessary to its enforcement and threatened to sell all stock of the corporation upon which the assessment was not paid. Plaintiff, not knowing whether the old board had been legally removed and the new board legally elected, and not desiring to run the risk of having his stock sold, paid the assessment and sued to recover such payment. The trial court found that the payment was made under compulsion and rendered *752 judgment in plaintiff's favor. The judgment was affirmed on appeal, the Supreme Court holding that the question of whether plaintiff in making the payment acted as a reasonably prudent person under the circumstances disclosed by the evidence, was a question of fact for the trial court and that the evidence justified the trial court's conclusion that the payment was made under compulsion. It is not difficult to differentiate the situation presented in the cited case from that disclosed by the record herein. In the case of *Young v. Hoagland, supra*, so far as appears, it was not necessary for the old board of directors to bring any action in order to enforce collection of the assessment which they had levied. Having levied it, they proposed to enforce its collection by an immediate sale of the stock of those shareholders who did not voluntarily make payment. A stockholder could, it is true, bring an action to enjoin the threatened sale, but this would impose upon him some vexation and expense. Whether a reasonably prudent person, confronted by these circumstances, would institute such an action or refuse payment or pay the levied assessment is obviously a pure question of fact to be determined by the trier of facts. If the court or jury found that payment under the circumstances was what might be expected of the person of ordinary prudence the evidence was ample to justify the finding. But the respondent herein was faced by no such problem as confronted the stockholder in the case of *Young v. Hoagland, supra*. He had been advised that collection of the assessment would be enforced but no threat of seizure of his property or of its attachment had been made. The possibility of an attachment and sale of his property appears to have occurred to him without any suggestion to that effect having been made to him by appellant or his predecessor or assistant. In the final analysis, respondent seeks to apply the subjective rather than the objective test to his action and to say that, because he thought that collection of the assessment could be enforced and in its enforcement his property might be seized and sold, therefore he acted under compulsion. But the compulsion thus claimed was a compulsion generated entirely without any assistance from appellant. The testimony of respondent thoroughly negatives the exercise of any compulsion upon respondent. The statute under which the assessment was made contained no

selfexecuting*753 provision for enforcing collection of unpaid assessments. It simply provided in section 3 that if any stockholder shall fail to pay an assessment levied against him in full upon the date specified in the order of the Superintendent of Banks a right of action shall immediately accrue to recover the amount of the assessment or any balance remaining unpaid. It is thus apparent that a resort to judicial proceedings was required for the enforcement of collection of any unpaid assessment. [4] The rule is well established that when resort to judicial proceedings is required to enforce collection of a tax or assessment the payment of such tax or assessment is not deemed made under compulsion and an action for its recovery will not lie (*Trower v. City and County of San Francisco*, 152 Cal. 479 [92 Pac. 1025, 15 L. R. A. (N. S.) 183]; *Lewis v. San Francisco*, 2 Cal. App. 112 [82 Pac. 1106]).

Since we are of the opinion that the mistake which induced the partial payment by respondent of the assessment levied against him was, under the circumstances shown by the record, a mistake purely of law and that the payment was not made under compulsion, consideration of the two other points made by appellant, viz., that the action was barred by the statute of limitations and that the court erred in making no findings relative to appellant's cross-complaint seeking recovery of the balance of the assessment which respondent had agreed to pay, is rendered unnecessary.

The judgment is reversed.

Barnard, P. J., and Marks, J., concurred.

Cal.App.4.Dist.,1932.

Campbell v. Rainey

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Briefs and Other Related Documents

Supreme Court of California
Bill LOCKYER, as Attorney General, etc., Petitioner,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Respondents.
Barbara Lewis et al., Petitioners,
v.
Nancy Alfaro, as County Clerk, etc., Respondent.
Nos. S122923, S122865.

Aug. 12, 2004.

Background: The Attorney General and three city residents filed petitions for writs of mandate, and requests for an immediate stay, alleging that actions of city officials in issuing marriage licenses to same-sex couples and solemnizing and registering the marriages of such couples were unlawful, and Supreme Court consolidated the two cases for decision.

Holdings: The Supreme Court, George, C.J., held that:

(1) city mayor exceeded scope of his authority by requesting that county clerk and county recorder determine what changes were necessary to render marriage licensing forms nondiscriminatory as to gender and sexual orientation;

(2) a local executive official, who is charged with the ministerial duty of enforcing a statute, does not possess the authority to disregard the terms of a statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the governing statute is unconstitutional;

(3) city and county officials lacked authority to issue marriage licenses to, solemnize marriages of, and register certificates of marriage for same-sex couples; and

(4) marriages conducted between same-sex couples in violation of the applicable statutes were void and of no legal effect.

Petition granted with directions.

Moreno, J., filed concurring opinion.

Kennard, J., filed concurring and dissenting opinion.

Werdegar, J., filed concurring and dissenting opinion.

West Headnotes

[1] **Marriage** 2
253k2 Most Cited Cases
Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated, except as restricted by the Constitution. West's Ann.Cal.Fam.Code § § 300-310.

[2] **Marriage** 2
253k2 Most Cited Cases

[2] **Municipal Corporations** 65
268k65 Most Cited Cases
Marriage is a matter of statewide concern rather than a municipal affair. West's Ann.Cal. Const. Art. 11, § § 4, 5, 6.

[3] **Marriage** 25(3)
253k25(3) Most Cited Cases

[3] **Marriage** 31
253k31 Most Cited Cases
Under the relevant statutes, the only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are the county clerk and the county recorder. West's Ann.Cal.Health & Safety Code § § 102100, 102180, 102200, 102295, 103125.

[4] **Marriage** 25(3)
253k25(3) Most Cited Cases

[4] **Marriage** 31
253k31 Most Cited Cases
A mayor has no authority to expand or vary the authority of a county clerk or county recorder to grant marriage licenses or register marriage certificates under the governing state statutes, or to direct those officials to act in contravention of those statutes. West's Ann.Cal.Health & Safety Code § § 102100, 102180, 102200, 102295, 103125.

[5] **Marriage** 17.5(1)
253k17.5(1) Most Cited Cases

[5] Municipal Corporations 168
268k168 Most Cited Cases
City mayor exceeded scope of his authority by requesting county clerk and county recorder to "determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation" based on his asserted "sworn duty to uphold the California Constitution, including specifically its equal protection clause." West's Ann.Cal. Const. Art. 1, § 7; West's Ann.Cal.Fam.Code § § 300, 355; West's Ann.Cal.Fam.Code § 359 (1996); West's Ann.Cal.Health & Safety Code § § 102100, 102180, 102200, 102295, 103125.

[6] Marriage 25(4)
253k25(4) Most Cited Cases

[6] Marriage 32
253k32 Most Cited Cases
Duties of county clerk and county recorder in issuing marriage licenses and recording certificate of registry of marriage are mandatory, once statutory procedural and substantive prerequisites have been satisfied, and thus discharge of such duties is ministerial rather than discretionary. West's Ann.Cal.Health & Safety Code § § 102100, 102180, 102200, 102295, 103125.

[7] Officers and Public Employees 110
283k110 Most Cited Cases
A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists.

[8] Constitutional Law 79
92k79 Most Cited Cases

[8] Officers and Public Employees 110
283k110 Most Cited Cases
Pursuant to state common law and practical considerations, a local executive official, who is charged with the ministerial duty of enforcing a statute, does not possess the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the governing statute is unconstitutional.

[9] Constitutional Law 48(1)
92k48(1) Most Cited Cases
A statute, once duly enacted, is presumed to be constitutional.
See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 58.

[10] Constitutional Law 48(3)
92k48(3) Most Cited Cases
The unconstitutionality of a statute must be clearly shown, and doubts as to its constitutionality will be resolved in favor of its validity.

[11] Officers and Public Employees 103
283k103 Most Cited Cases
When a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute.

[12] Municipal Corporations 57
268k57 Most Cited Cases

[12] Municipal Corporations 63.1
268k63.1 Most Cited Cases

[12] Municipal Corporations 64
268k64 Most Cited Cases
In establishing a governmental structure for the purpose of managing municipal affairs, the Legislature, through statutes, or local entities, through charter provisions and the like, may combine executive, legislative, and judicial functions in a manner different from the structure that the California Constitution prescribes for state government. West's Ann.Cal. Const. Art. 3, § 3.5.

[13] Marriage 17.5(1)
253k17.5(1) Most Cited Cases
Unconstitutionality of state marriage statutes limiting marriage to couple comprised of a man and a woman under state equal protection clause was not so patent or clearly established that actions of city and county officials in issuing marriage licenses to same-sex couples, and solemnizing and registering the marriages of such couples, would fall within narrow exception, applicable when it would be absurd or unreasonable to require public official to comply with statute that was clearly unconstitutional, to general rule that a local executive official, who is charged with the ministerial duty of enforcing a statute, does not possess the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's

opinion that the governing statute is unconstitutional. West's Ann.Cal. Const. Art. 1, § 7; West's Ann.Cal.Fam.Code § § 300, 355; West's Ann.Cal.Fam.Code § 359 (1996); West's Ann.Cal.Health & Safety Code § § 102100, 102180, 102200, 102295, 103125.

[14] Marriage 17.5(1)
253k17.5(1) Most Cited Cases
City and county officials lacked authority to refuse to perform their ministerial duty in conformity with current state marriage statutes, and, based on view that statutory limitation of marriage to couple comprised of a man and a woman violated state equal protection clause, to alter form prescribed by State Registrar of Vital Statistics, issue marriage licenses to, solemnize marriages of, and register certificates of marriage for same-sex couples. West's Ann.Cal. Const. Art. 1, § 7; West's Ann.Cal.Fam.Code § § 300, 355; West's Ann.Cal.Fam.Code § 359; West's Ann.Cal.Health & Safety Code § § 102100, 102180, 102200, 102295, 103125.
See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2003) ¶ ¶ 19:6.5, 19:24-24.1 (CAFAMILY Ch. 19-A).

[15] States 18.3
360k18.3 Most Cited Cases
Federal supremacy clause does not itself grant a state or local official the authority to refuse to enforce a statute that the official believes to be unconstitutional. U.S.C.A. Const. Art. 6, cl. 2.

[16] Mandamus 176
250k176 Most Cited Cases
As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case, and a court is not necessarily limited by the prayer sought in the mandate petition but may grant the relief it deems appropriate.

[17] Marriage 54(2)
253k54(2) Most Cited Cases
All same-sex marriages authorized, solemnized, or registered by city and county officials in contravention of statute defining marriage as a "personal relationship arising out of a civil contract between a man and a woman" and the legislative history of this provision demonstrating that the purpose of this limitation was to "prohibit persons of the same sex from entering lawful marriage" were void and of no legal effect from their inception, despite fact that affected same-sex couples were not parties to mandate proceeding challenging such marriages, as validity of marriages was purely legal question, and numerous amicus curiae briefs were filed on behalf of such couples, so that their legal arguments in support of validity of existing marriages were heard and fully considered. West's Ann.Cal.Fam.Code § 300.

***227 *1065 **461** Bill Lockyer, Attorney General, Andrea Lynn Hoch, Chief Assistant Attorney ***228** General, Louis R. Mauro, Assistant Attorney General, Kathleen A. Lynch, Zackery Morazzini, Hiren Patel, Timothy M. Muscat, Douglas J. Woods and Christopher E. Krueger, Deputy Attorneys General, for Petitioner Bill Lockyer, as Attorney General of the State of California.

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Divine Queen Mariette Do-Nguyen as Amicus Curiae on behalf of Petitioner Bill Lockyer, as Attorney General of the State of California.

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Dennis J. Herrera, City Attorney, Therese M. Stewart, Chief Deputy City Attorney, Ellen Forman, Wayne K. Snodgrass, Thomas S. Lakritz, K. Scott Dickey, Kathleen S. Morris and Sherri Sokeland

Kaiser, Deputy City Attorneys; Howard Rice Nemerovski Canady Falk & Rabkin, Bobbie J. Wilson, Pamela K. Fulmer, Amy E. Margolin, Sarah M. King, Kevin H. Lewis, Ceide Zapparoni, **462 Glenn M. Levy and Chandra Miller Fienen, San Francisco, CA, for Respondents.

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Ann Miller Ravel, County Counsel (Santa Clara) and Martin H. Dodd, Assistant County Counsel, as Amici Curiae on behalf of Respondents.

Dana McRae, County Counsel (Santa Cruz), Shannon M. Sullivan and Jason M. Heath, Assistant County Counsel, as Amici Curiae on behalf of Respondents.

Bingham McCutchen, John R. Reese, San Francisco, CA, Matthew S. Gray, Walnut Creek, CA, Susan Baker Manning, Huong T. Nguyen and Danielle Merida, San Francisco, CA, for Bay Area Lawyers for Individual Freedom as Amicus Curiae on behalf of Respondents.

***229 National Center for Lesbian Rights, Shannon Minter, Courtney Joslin; Heller Ehrman White & McAuliffe, Stephen V. Bomse, Richard DeNatale, Hilary E. Ware, San Francisco, CA; ACLU of Southern California, Martha A. Matthews, Los Angeles, CA; Lambda Legal Defense and Education Fund, Jon W. Davidson, Jennifer C. Pizer, New York, NY; Steefel, Levitt & Weiss, Dena L. Narbaitz, Clyde J. Wadsworth; ACLU Foundation of Northern California, Tamara Lange, San Francisco, CA, Alan I. Schlosser; Law Office of David C. Codell, David C. Codell and Aimee Dudovitz, Los Angeles, CA, for Del Martin and Phyllis Lyon, Sarah Conner and Gillian Smith, Margot McShane and Alexandra D'Amario, Dave Scott Chandler and Jeffrey Wayne Chandler, Theresa Michelle Petry and Cristal Rivera-Mitchel, Lancy Woo and Cristy Chung, Joshua Rymer and Tim Frazer, Jewell Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Our Family Coalition and Equality California as Amici Curiae on behalf of Respondents.

Roger Jon Diamond, Santa Monica, CA, as Amicus Curiae on behalf of Respondents.

GEORGE, C.J.

We assumed jurisdiction in these original writ proceedings to address an important but relatively narrow legal issue--whether a local executive official who is charged with the ministerial duty of enforcing a state *1067 statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional.

In the present case, this legal issue arises out of the refusal of local officials in the City and County of San Francisco to enforce the provisions of California's marriage statutes that limit the granting of a marriage license and marriage certificate only to a couple comprised of a man and a woman.

The same legal issue and the same applicable legal principles could come into play, however, in a multitude of situations. For example, we would face the same legal issue if the statute in question were among those that restrict the possession or require the registration of assault weapons, and a local official, charged with the ministerial duty of enforcing those statutes, refused to apply their provisions because of the official's view that they violate the Second Amendment of the federal Constitution. In like manner, the same legal issue would be presented if the statute were one of the environmental measures that impose restrictions upon a property owner's ability to obtain a building permit for a development that interferes with the public's access to the California coastline, and a local official, charged with the ministerial **463 duty of issuing building permits, refused to apply the statutory limitations because of his or her belief that they effect an uncompensated "taking" of property in violation of the just compensation clause of the state or federal Constitution.

Indeed, another example might illustrate the point even more clearly: the same legal issue would arise if the statute at the center of the controversy were the recently enacted provision (operative January 1, 2005) that imposes a ministerial duty upon local officials to accord the same rights and benefits to registered domestic partners as are granted to spouses (see Fam.Code, § 297.5, added by Stats.2003, ch. 421, § 4), and a local official--perhaps an officeholder in a locale where domestic partnership ***230** rights are unpopular--adopted a policy of refusing to recognize or accord to registered domestic partners the equal treatment mandated by statute, based solely upon the official's view (unsupported by any judicial determination) that the statutory provisions granting such rights to registered domestic partners are unconstitutional because they improperly amend or repeal the provisions of the voter-enacted initiative measure commonly known as Proposition 22, the California Defense of Marriage Act (Fam.Code, § 308.5) without a confirming vote of the electorate, in violation of article II, section 10, subdivision (c) of the California Constitution.

As these various examples demonstrate, although the present proceeding may be viewed by some as presenting primarily a question of the substantive *1068 legal rights of same-sex couples, in actuality the legal issue before us implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders. In short, the legal question at issue--the scope of the authority entrusted to our public officials--involves the determination of a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being "a government of laws, and not of men" (or women). [FN1]

FN1. The phrase "a government of laws, and not of men" was authored by John Adams (Adams, Novanglus Papers, No. 7 (1774), reprinted in 4 Works of John Adams (Charles Francis Adams ed. 1851) p. 106), and was included as part of the separation of powers provision of the initial Massachusetts Constitution adopted in 1780. (Mass. Const.(1780) Part The First, art. XXX.) The separation of powers provision of that state's Constitution remains unchanged to this day, and reads in full: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men.*" (Italics added.)

As indicated above, that issue--phrased in the narrow terms presented by this case--is whether a local executive official, charged with the ministerial duty of enforcing a statute, has the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the governing statute is unconstitutional. As we shall see, it is well established, both in California and elsewhere, that--subject to a few narrow exceptions that clearly are inapplicable here--a local executive official does *not* possess such authority.

This conclusion is consistent with the classic understanding of the separation of powers doctrine--that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. It is true, of course, that the separation of powers doctrine does not create an absolute or rigid division of functions. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52, 51 Cal.Rptr.2d 837, 913 P.2d 1046.) Furthermore, legislators and executive officials may take into account constitutional considerations in making discretionary decisions within their authorized sphere of action--such as whether to enact or veto proposed legislation or exercise prosecutorial discretion. When, however, a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the statute in performing a mandated act, the official generally has no ***231** authority to disregard **464 the statutory mandate based on the official's own determination that the statute is unconstitutional. (See, e.g., *Kendall v. United States* (1838) 37 U.S. (12 Pet.) 524, 613, 9 L.Ed. 1181 ["To contend that the obligation imposed on the president to see the *1069 laws faithfully executed implies a power to forbid their execution is a novel construction of the constitution, and entirely inadmissible"].)

Accordingly, for the reasons that follow, we agree with petitioners that local officials in San Francisco exceeded their authority by taking official action in

violation of applicable statutory provisions. We therefore shall issue a writ of mandate directing the officials to enforce those provisions unless and until they are judicially determined to be unconstitutional and to take all necessary remedial steps to undo the continuing effects of the officials' past unauthorized actions, including making appropriate corrections to all relevant official records and notifying all affected same-sex couples that the same-sex marriages authorized by the officials are void and of no legal effect.

To avoid any misunderstanding, we emphasize that the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue. We hold only that in the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples, and marriages conducted between same-sex couples in violation of the applicable statutes are void and of no legal effect. Should the applicable statutes be judicially determined to be unconstitutional in the future, same-sex couples then would be free to obtain valid marriage licenses and enter into valid marriages.

I

The events that gave rise to this proceeding began on February 10, 2004, when Gavin Newsom, the Mayor of the City and County of San Francisco and a respondent in one of the consolidated cases before us, [FN2] sent a letter to ***1070** Nancy Alfaro, identified in the letter as the San Francisco County Clerk, [FN3] requesting that she "determine *****232** what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation." The mayor stated in his letter that "[t]he Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit ****465** discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage," and explained that it is his "belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination." The mayor indicated that the request to the county clerk was made "[p]ursuant to [his] sworn duty to uphold the California Constitution, including specifically its equal protection clause...." [FN4]

FN2. Petitioner in the *Lockyer* matter is Bill Lockyer, the Attorney General of California. The petition in *Lockyer* names as respondents the City and County of San Francisco, Gavin Newsom in his official capacity as Mayor of the City and County of San Francisco, Mabel S. Teng in her official capacity as Assessor-Recorder of the City and County of San Francisco, and Nancy Alfaro in her official capacity as the County Clerk of the City and County of San Francisco.
Petitioners in the *Lewis* matter are Barbara Lewis, Charles McIlhenny, and Edward Mei, San Francisco residents and taxpayers. The petition in *Lewis* names as respondent Nancy Alfaro in her official capacity as the County Clerk of the City and County of San Francisco.
For convenience, in this opinion we generally shall refer to the Attorney General and petitioners in *Lewis* collectively as "petitioners" and to respondents in both *Lockyer* and *Lewis* collectively as "the city" or "the city officials."

FN3. The letter from Mayor Newsom identified Alfaro as the San Francisco County Clerk. In its answer to the petition for writ of mandate in *Lockyer*, filed in this court on March 18, 2004, however, the city alleges "that Daryl M. Burton is the San Francisco County Clerk, and that Nancy Alfaro is the Director of the County Clerk's Office, to whom all of the responsibilities and privileges of County Clerk have been delegated." The answer further alleges that "as Burton's delegate, Nancy Alfaro is the designated 'commissioner of civil marriages' for San Francisco." Alfaro has filed a declaration stating that she is the Director of the County Clerk's Office for the City and County of San Francisco and that "[i]n that capacity I perform all the duties, and hold all the responsibilities of, the County Clerk. These duties include the issuance of all marriage licenses." Petitioners do not contend that Alfaro is not the official authorized to perform the duties assigned by the applicable statutes to the county clerk, and thus we shall consider Alfaro the county clerk for purposes of this proceeding.

FN4. The letter read in full: "Upon taking the Oath of Office, becoming the Mayor of the City and County of San Francisco, I swore to uphold the Constitution of the State of California. Article I, Section 7, subdivision (a) of the California Constitution provides that '[a] person may not be ... denied equal protection of the laws.' The California courts have interpreted the equal protection clause of the California Constitution to apply to lesbians and gay men and have suggested that laws that treat homosexuals differently from heterosexuals are suspect. The California courts have also stated that discrimination against gay men and lesbians is invidious. The California courts have held that gender discrimination is suspect and invidious as well. The Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage. It is my belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination.

"Pursuant to my sworn duty to uphold the California Constitution, including specifically its equal protection clause, I request that you determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation."

In response to the mayor's letter, the county clerk designed what she describes as "a gender-neutral application for public marriage licenses, and a gender-neutral marriage license," to be used by same-sex couples. The newly designed form altered the official state-prescribed form for the "Application *1071 for Marriage License" and the "License and Certificate of Marriage" by eliminating the terms "bride," "groom," and "unmarried man and unmarried woman," and by replacing them with the terms "first applicant," "second applicant," and "unmarried individuals." The revised form also contained a new warning at the top of the form, advising applicants that "[b]y entering into marriage you may lose some or all of the rights, protections and benefits you enjoy as a domestic partner" and that "marriage of gay and lesbian couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer," and encouraging same-sex couples "to seek legal advice regarding the effect of entering into marriage." [FN5]

FN5. The warning reads in full: "Please read this carefully prior to completing the application: [¶] By entering into marriage you may lose some or all of the rights, protections, and benefits you enjoy as a domestic partner, including, but not limited to those rights, protections, and benefits afforded by State and local government, and by your employer. If you are currently in a domestic partnership, you are urged to seek legal advice regarding the potential loss of your rights, protections, and benefits before entering into marriage. [¶] Marriage of gay and lesbian couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer. If you are a same-gender couple, you are encouraged to seek legal advice regarding the effect of entering into marriage."

***233 The county clerk, using the altered forms, began issuing marriage licenses to same-sex couples on February 12, 2004, and the county recorder thereafter registered marriage certificates submitted on behalf of same-sex couples who had received licenses from the city and had participated in marriage ceremonies. The declaration of the county clerk, filed in this court on March 5, 2004, indicates that as of that date, the clerk had issued more than approximately 4,000 marriage licenses to same-sex couples. In more recent filings, the city has indicated that approximately 4,000 same-sex marriages have been performed under licenses issued by the County Clerk of the City and County of San Francisco.

On February 13, 2004, two separate actions were filed in San Francisco County Superior Court seeking to halt the city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples. (*Thomasson v. Newsom* (Super. Ct. S.F. City and County, 2004, No. CGC-04-428794)); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. **466 Ct. S.F. City and County, 2004, No. CPF-04-50943 (hereafter *Proposition 22 Legal Defense*).) In each case, a request for an immediate stay of the city's actions was denied by the superior court after a hearing. [FN6]

FN6. On February 17, 2004, the superior court, in addition to declining to grant the request for an immediate stay, issued an alternative writ in *Proposition 22 Legal Defense,* directing the city to cease and desist issuing marriage licenses to same-sex couples or performing marriage ceremonies for such couples, or show cause why the city has not done so, and set a hearing on the show cause order for March 29, 2004. On February 19, 2004, the city filed a cross-complaint for declaratory relief against the State of California in *Proposition 22 Legal Defense,* seeking a declaration that the California statutes that deny the issuance of marriage licenses to same-sex couples are unconstitutional.

***1072** On February 27, 2004, the Attorney General filed in this court a petition for an original writ of mandate, prohibition, certiorari, and/or other relief, and a request for an immediate stay. The petition asserted that the actions of the city officials in issuing marriage licenses to same-sex couples and solemnizing and registering the marriages of such couples are unlawful, and that the problems and uncertainty created by the growing number of these marriages justify intervention by this court. The petition pointed out that despite a directive issued by the state Registrar of Vital Statistics, the San Francisco County Recorder had not ceased the practice of registering marriage certificates submitted by same-sex couples on forms other than those approved by the State of California, and that officials of the federal Social Security Administration had raised questions regarding that agency's processing of name-change applications resulting from California marriages--not confined to single-sex marriages--because of the uncertainty as to whether certain marriage certificates issued in California are valid under state law. Noting that "[t]he Attorney General has the constitutional duty to see that the laws of the state are uniformly and adequately enforced" (see Cal. Const., art. V, § 13), the petition maintained that the existing "conflict and uncertainty, and the potential for future ambiguity, instability, *****234** and inconsistent administration among various jurisdictions and levels of government, present a legal issue of statewide importance that warrants immediate intervention by this Court." The petition requested that this court issue an order (1) directing the local officials to comply with the applicable statutes in issuing marriage licenses and certificates, (2) declaring invalid the same-sex marriage licenses and certificates that have been issued, and (3) directing the city to refund any fees collected in connection with such licenses and certificates.

Anticipating that the respondent city officials likely would oppose the petition by arguing that the applicable state laws are unconstitutional, the petition maintained that such a claim could not justify the officials' issuance of same-sex marriage licenses in violation of state law "because article III, section 3.5 of the California Constitution prohibits administrative agencies from declaring state laws unconstitutional in the absence of an appellate court determination." The petition asserted that "[t]he county is a political subdivision of the state charged with administering state government, and local registrars of vital statistics act as state officers. The state's agents at the local level simply cannot refuse to enforce state law."

***1073** Although the Attorney General's petition acknowledged that the court could grant the relief requested in the petition without reaching the substantive question of the constitutionality of the California statutes limiting marriage to a man and a woman, the petition urged that we also resolve the substantive constitutional issue at this time, arguing that "[a]s the issues presented are pure legal issues, and there is no need for the development of a factual record, these issues are ready for this Court's review."

On February 25, 2004, two days prior to the filing of the petition in *Lockyer,* the petition in *Lewis* was filed in this court. In *Lewis,* three residents and taxpayers in the City and County of San Francisco sought a writ of mandate to compel the county clerk to cease and desist issuing marriage licenses to couples other than those who meet state law marriage requirements and on forms that do not comply with state law license requirements, and also sought an immediate stay ****467** pending the court's determination of the petition.

After receiving the petitions in *Lockyer* and *Lewis,* we requested that the city file an opposition to the petition in each case on or before March 5, 2004. The city filed its opposition to the petitions on March 5, arguing that the provisions of article III, section 3.5 of the California Constitution do not apply to local officials and that, in any event, under the supremacy clause of the United States Constitution, California Constitution article III, section 3.5 could not properly be applied to preclude a local official from refusing to enforce a statute that the official believes violates the federal Constitution. With regard to the question of the constitutionality of California's statutory ban on same-sex marriages, the

opposition maintained that "the issue is one best left to the lower courts in the first instance to undertake the extensive fact-finding that will be necessary." [FN7]

> FN7. The petition in *Lewis*--filed by parties who maintain that the existing California marriage statutes are constitutional--similarly took the position that "[t]he constitutionality of the marriage laws is an issue best left to full development in the lower courts."

On March 11, 2004, we issued an order in both *Lockyer* and *Lewis* directing the city officials to show cause why a writ of mandate should not issue requiring the officials to apply and abide by the current California marriage statutes in the absence ***235** of a judicial determination that the statutory provisions are unconstitutional. Pending our determination of these matters, we directed the officials to enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions. We also stayed all proceedings in the two pending San Francisco County Superior Court cases (the *Proposition 22 Legal Defense* action and the *Thomasson v. Newsom* action), but specified that the stay "does not ***1074** preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes."

Our March 11 order also specified that the return to be filed by the city officials in each case was to be limited "to the issue whether respondents are exceeding or acting outside the scope of their authority in refusing to enforce the provisions of Family Code sections 300, 301, 308.5, and 355 in the absence of a judicial determination that such provisions are unconstitutional," and that in addressing this issue, the return "should discuss not only the applicability and effect of article III, section 3.5 of the California Constitution" but also any other constitutional or statutory provisions or legal doctrines that bear on the question whether the city officials acted outside the scope of their authority in refusing to comply with the applicable statutes in the absence of a judicial determination that the statutes are unconstitutional.

Our March 11 order further established an expedited briefing schedule and indicated that the court would hear oral argument in these matters at its late May 2004 or June 2004 oral argument calendar. After receiving the briefs filed by the parties and numerous amici curiae, we requested that the parties file supplemental letter briefs addressing several questions relating to the validity of the marriage licenses and certificates of registry of marriage that already had been issued or registered by city officials to or on behalf of same-sex couples. The supplemental briefs were timely filed, and the cases were argued before this court on May 25, 2004. After oral argument, we filed an order consolidating the two cases for decision.

II

[1] It is well settled in California that "the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated...." (*McClure v. Donovan* (1949) 33 Cal.2d 717, 728, 205 P.2d 17.) "The regulation of marriage and divorce is solely within the province of the Legislature, except as the same may be restricted by the Constitution." (*Beeler v. Beeler* (1954) 124 Cal.App.2d 679, 682, 268 P.2d 1074; see, e.g., *Estate of DePasse* (2002) 97 Cal.App.4th 92, 99, 118 Cal.Rptr.2d 143.) In view of the primacy of the Legislature's role in this area, we begin by setting forth the relevant statutes relating to marriage that have some bearing on the issue before us. As we shall ****468** see, the Legislature has dealt with the subject of marriage in considerable detail.

As applicable to the issues presented by this case, the relevant statutes dealing with marriage are contained in the Family Code and the Health and Safety Code.

***1075** The provisions regarding the validity of marriage are set forth in Family Code sections 300 to 310.

Section 300 provides in full: "*Marriage is a personal relation arising out of a civil contract between a man and a woman,* to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized ***236** by this division, except as provided by Section 425 [[FN8]] and Part 4 (commencing with Section 500).[[FN9]]" (Italics added.)

> FN8. Family Code section 425 provides: "If no record of the solemnization of a marriage previously contracted is known to exist, the parties may purchase a License and Certificate of Declaration of Marriage from the county clerk in the parties' county of residence." Family Code section 350

provides that "[b]efore ... declaring a marriage pursuant to Section 425, the parties shall first obtain a marriage license from a county clerk." As the Court of Appeal explained in *Estate of DePasse, supra*, 97 Cal.App.4th 92, 104, 118 Cal.Rptr.2d 143, "[t]he purpose of the [section 425] procedure is to create a record of an otherwise unrecorded marriage, thus focusing on the registration requirement, as opposed to the licensing requirement." The section 425 procedure has no bearing on the issues presented by this case.

FN9. Part 4 of division 3 of the Family Code (§ § 500-536) governs confidential marriages. With respect to the issue presented in this case, the provisions governing confidential marriages parallel the provisions governing ordinary marriages. (Compare, e.g., Fam.Code, § 505 [specifying form of confidential marriage license] with Fam.Code, § 355 [specifying form of ordinary marriage license].)

Section 301 provides: "*An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 or older,* and not otherwise disqualified, *are capable of consenting to and consummating marriage.*" (Italics added.)

Section 308.5 provides: "*Only marriage between a man and a woman is valid or recognized in California.*" (Italics added.)

In the opposition filed in this court, the city takes the position that neither section 301 nor section 308.5 is relevant to the question whether current California statutes limit marriages performed in California to marriages between a man and a woman, [FN10] but the city concedes that section 300, both *1076 by its terms and its purpose, imposes such a limitation on marriages performed in California. [FN11] Because we agree that section 300 clearly establishes that current California statutory law limits marriage to couples comprised of a man and a woman, we need not and do not ***237 address the scope or effect of sections 301 and 308.5 in this case.

FN10. With respect to section 301--which, as noted above, provides that "an unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, ... are capable of consenting to and consummating marriage"--the opposition filed in this court maintains that "the statute is silent as to whom an unmarried male and an unmarried female may marry, and thus is irrelevant." Petitioners maintain, by contrast, that section 301 clearly contemplates that a marriage will be consummated between an unmarried male and unmarried female.
With regard to section 308.5--which provides that "[o]nly marriage between a man and woman is valid or recognized in California"--the opposition maintains that, in light of the provision's history, "[t]his statute is irrelevant to the case at hand because it addresses only out-of-state marriages." Petitioners assert, by contrast, that by specifying that only marriage between a man and woman is "valid" or "recognized" in California, section 308.5 addresses both in-state and out-of-state marriages.

FN11. The language in Family Code section 300 specifying that marriage is a relation "between a man and a woman" was adopted by the Legislature in 1977, when the provision was set forth in former section 4100 of the Civil Code. (Stats.1977, ch. 339, § 1, p. 1295, introduced as Assem. Bill 607 (1977-1978 Reg. Sess.).) The legislative history of the measure makes its objective clear. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 ["The purpose of the bill is to prohibit persons of the same sex from entering lawful marriage"].) The provisions of Civil Code former section 4100 were moved to Family Code section 300 when the Family Code was enacted in 1992. (Stats.1992, ch. 162, § 10, p. 474.)

The Family Code provisions relating to marriage licenses and to the certificate of **469 registry of marriage are set forth in Family Code sections 350 to 360. These statutes provide that "before entering a marriage, ... the parties shall first obtain a marriage license from a county clerk" (Fam.Code, § 350), and the provisions state what information must be contained on the license (Fam.Code, § 351) and place the responsibility on the county clerk to ensure that the statutory requirements for obtaining a marriage license are satisfied. (Fam.Code, § 354.) The statutes also specifically provide that the forms for (1) the application for a marriage license, (2) the marriage license, and (3) the certificate of registry of

marriage that are to be used by the county clerk and provided to the applicants "shall be prescribed by the State Department of Health Services." (Fam.Code, § § 355, 359.) [FN12]

"*Before entering a marriage*, or declaring a marriage pursuant to Section 425, *the parties shall first obtain a marriage license from a county clerk.*" (Italics added.)

FN12. Family Code section 350 provides:

Section 351 provides: "The marriage license shall show all of the following: [¶] (a) The identity of the parties to the marriage. [¶] (b) The parties' real and full names, and places of residence. [¶] (c) The parties' ages."

Section 354 provides: "(a) Each applicant for a marriage license may be required to present authentic identification as to name. [¶] (b) For the purpose of ascertaining the facts mentioned or required in this part, if the clerk deems it necessary, the clerk may examine the applicants for a marriage license on oath at the time of the application. The clerk shall reduce the examination to writing and the applicants shall sign it. [¶] (c) If necessary, the clerk may request additional documentary proof as to the accuracy of the facts stated. [¶] (d) Applicants for a marriage license shall not be required to state, for any purpose, their race or color." (Italics added.)

Section 355 provides: "(a) The forms for the application for a marriage license and the marriage license shall be prescribed by the State Department of Health Services, and shall be adapted to set forth the facts required in this part. [¶] (b) The form for the application for a marriage license shall include an affidavit on the back, which the applicants shall sign, affirming that they have received the brochure provided for in Section 358. [¶] (c) The affidavit required by subdivision (b) shall state:

AFFIDAVIT

I acknowledge that I have received the brochure titled _____

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Signature of Bride Date

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Signature of Groom Date

[End of section 355.]" (Italics added.)

Section 359 provides: "(a) Applicants for a marriage license shall obtain from the county clerk issuing the license, a certificate of registry of marriage. [¶] (b) The contents of the certificate of registry are as provided in Division 9 (commencing with Section 10000) of the Health and Safety Code. [¶] (c) The certificate of registry shall be filled out by the applicants, in the presence of the county clerk issuing the marriage license, and shall be presented to the person solemnizing the marriage. [¶] (d) The person solemnizing the marriage shall complete the registry and shall cause to be entered on the certificate of registry the signature and address of one witness to the marriage ceremony. [¶] (e) The certificate of registry shall

be returned by the person solemnizing the marriage to the county recorder of the county in which the license was issued within 30 days after the ceremony. [¶] (f) As used in this division, 'returned' means presented to the appropriate person in person, or postmarked, before the expiration of the specified time period." (Italics added.)

***1077** Provisions regarding the solemnization of marriage are set forth in Family Code sections 400 to 425. These statutes contain a list of the numerous persons who may solemnize a marriage under California *****238** law (Fam.Code, § 400), and require the person solemnizing a marriage (1) to require the applicants to present the marriage license to him or her prior to solemnization (Fam.Code, § 421), (2) to sign and endorse upon or attach to the marriage license a statement, "in the form prescribed by the State Department of Health Services," setting forth specified information (Fam.Code, § 422), and (3) to return the marriage license, with the requisite endorsement, to the county recorder of the county in which the license was issued within 30 days after the marriage ceremony. ****470** (Fam.Code, § 423.) [FN13]

FN13. Family Code section 421 provides in relevant part: "Before solemnizing a marriage, the person solemnizing the marriage shall require the presentation of the marriage license...."
Section 422 provides in relevant part: "The person solemnizing a marriage shall make, sign, and endorse upon or attach to the marriage license a statement, *in the form prescribed by the State Department of Health Services,* showing all of the following: [¶] (a) The fact, date (month, day, year), and place (city and county) of solemnization. [¶] (b) The names and places of residence of one or more witnesses to the ceremony. [¶] (c) The official position of the person solemnizing the marriage...." (Italics added.)
Section 423 provides: "The person solemnizing the marriage shall return the marriage license, endorsed as required in Section 422, *to the county recorder of the county in which the license was issued* within 30 days after the ceremony." (Italics added.)

The Health and Safety Code contains numerous additional provisions prescribing in detail the procedures governing marriage licenses and marriage ***1078** certificates as part of the state's registration and maintenance of vital statistics. These statutes designate the California Director of Health Services as the State Registrar of Vital Statistics (Health & Saf.Code, § 102175) and provide that "[e]ach live birth, fetal death, death, and *marriage* that occurs in this state shall be registered as provided in this part *on the prescribed certificate forms* ...." (Health & Saf.Code, § 102100, italics added.) The statutes also specify that "[t]he State Registrar is charged with the execution of this part in this state, *and has supervisory power over local registrars, so that there shall be uniform compliance with all the requirements of this part.* " (Health & Saf.Code, § 102180, italics added), that "[t]he Attorney General will assist in the enforcement of this part upon request of the State Registrar" (Health & Saf.Code, § 102195), and that "[t]he State Registrar *shall prescribe and furnish all record forms for use in carrying out the purpose of this part, ... and no record forms or formats other than those prescribed shall be used.*" (Health & Saf.Code, § 102200, italics added.) [FN14] The code also contains a specific provision pertaining to all of the official forms related to marriage, which expressly provides that "[*t*]he forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate shall be prescribed by the State Registrar." (Health & Saf.Code, § 103125, italics added.)

FN14. The Health and Safety Code contains a number of additional provisions that demonstrate the state's overriding interest in the uniform application of the state's marriage laws. (See, e.g., Health & Saf.Code, § § 102205, 102215.)

The relevant Health and Safety Code statutes also specify that "[t]he county recorder is the local registrar of marriages and shall perform all the duties of the local registrar of marriages" (Health & Saf.Code, § 102285), and that "[e]ach local registrar is hereby charged with the enforcement of this part in his or her registration district *under the supervision and direction of the State Registrar and shall make an immediate report to the State* *****239** *Registrar of any violation of this law coming to his or her knowledge.*" (Health & Saf.Code, § 102295, italics added.) The statutes also provide that "[t]he local registrar of marriages shall carefully examine each certificate before acceptance for registration and, if it is incomplete or unsatisfactory, he or she shall require any further information to be furnished as may be necessary to make the record satisfactory before acceptance for registration." (Health & Saf.Code, § 102310.)

Pursuant to the foregoing provisions, the State Registrar of Vital Statistics (who, as noted, is also the California Director of Health Services) has prescribed a form--Department of Health Services Form VS-117--which serves as the application for license to marry, the license to marry, and the certificate of registry of marriage. One of the principal California family law practice guides describes the relevant portions of the form as follows: "The *1079 first three sections of the form (Groom Personal Data, Bride Personal Data, and Affidavit) constitute the application for license to marry. The personal data sections are filled out by the court clerk, using information and/or documents provided by the applicants. The bride and groom must both sign the application (*see* **471 lines 23 [entitled Signature of Groom], 24 [entitled Signature of Bride]) after the personal data sections have been completed. The fourth section of the form (lines 25A-25F) constitutes the license to marry. This section is to be completed by the clerk." (1 Kirkland et al., Cal. Family Law: Practices and Procedure (2d ed. 2003) Validity of Marriage, Forms, § 10.100[1], p. 10-80.)

The city acknowledges that the county clerk altered the form prescribed by the State Registrar of Vital Statistics by replacing references to "bride," "groom," and "unmarried man and unmarried woman" with references to "first applicant," "second applicant," and "unmarried individuals," that the county clerk further issued marriage licenses to same-sex couples, and that the county recorder registered certificates of registry of marriage for such couples, despite the knowledge of these officials that the current California statutes do not authorize such actions. The city defends the actions of these officials on the ground that they were based on the belief that the statutory restriction in California law limiting marriage to a man and a woman is unconstitutional. The principal question before us is whether the local officials exceeded or acted outside of their authority in taking these actions.

III

In light of several questions raised by the briefs filed by the city in this court, we begin with a brief discussion of the respective roles of state and local officials with regard to the enforcement of the marriage statutes (in particular, the issuance of marriage licenses and the registering of marriage certificates), and of the nature of the duties of local officials under the applicable statutes.

A

[2] As is demonstrated by the above review of the relevant statutory provisions, the Legislature has enacted a comprehensive scheme regulating marriage in California, establishing the substantive standards for eligibility for marriage and setting forth in detail the procedures to be followed and the public officials who are entrusted with carrying out these procedures. In light of both the historical understanding reflected in this statutory scheme and the statutes' repeated emphasis on the importance of having uniform rules and procedures apply throughout the ***240 state to the subject of marriage, *1080 there can be no question but that marriage is a matter of "statewide concern" rather than a "municipal affair" (see Cal. Const., art. XI, § § 4, 5, 6; see, e.g., *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17, 283 Cal.Rptr. 569, 812 P.2d 916), and that state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.

[3][4] Furthermore, the relevant statutes also reveal that the only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are *the county clerk* and *the county recorder*. The statutes do not authorize the mayor of a city (or city and county, as is San Francisco) or any other comparable local official to take any action with regard to the process of issuing marriage licenses or registering marriage certificates. Although a mayor may have authority under a local charter to supervise and control the actions of a county clerk or county recorder with regard to other subjects, a mayor has no authority to expand or vary the authority of a county clerk or county recorder to grant marriage licenses or register marriage certificates under the governing state statutes, or to direct those officials to act in contravention of those statutes. (See, e.g., *Coulter v. Pool* (1921) 187 Cal. 181, 187, 201 P. 120 ["A public officer is a public agent and as such acts only on behalf of his principal.... The most general characteristic of a public officer ... is that a public duty is delegated and entrusted to him, as agent, *the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting*" (Italics added)]; *Sacramento v. Simmons* (1924) 66 Cal.App. 18, 24-25, 225 P. 36 [when state statute designated local health officers as local registrars of vital statistics, "to the extent [such officials] are discharging such duties they are acting as state officers. *They are state officers performing state functions and are under the* ***472 *exclusive jurisdiction of the state registrar of vital statistics.*" (italics added)]; *Boss v. Lewis* (1917) 33 Cal.App. 792, 794, 166 P. 843 [city clerk, when acting as local registrar of vital statistics under state law, is state officer].)

[5] Accordingly, to the extent the mayor purported to "direct" or "instruct" the county clerk and the county recorder to take specific actions with regard to the issuance of marriage licenses or the registering of marriage certificates, we conclude he exceeded the scope of his authority. (See, e.g., *Sacramento v. Simmons,*

supra, 66 Cal.App. 18, 24-28, 225 P. 36.) [FN15] Furthermore, if the county clerk or the county recorder acted in this case in contravention of the ***1081** applicable statutes solely at the behest of the mayor and not on the basis of the official's own determination that the statutes are unconstitutional, such official also would appear to have acted improperly by abdicating the statutory responsibility imposed directly on him or her as a state officer. (See, e.g., *****241** *California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 874, 19 Cal.Rptr.2d 357, disapproved on another point in *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 305, fn. 5, 105 Cal.Rptr.2d 636, 20 P.3d 533 ["An executive or administrative officer can no more abdicate responsibility for executing the laws than the Legislature can be permitted to usurp it"].)

> FN15. In the mayor's February 10 letter to the county clerk, the mayor simply "request[ed]" the clerk to determine what changes should be made to the forms and documents used to apply for and issue marriage licenses. In the opposition and supplemental opposition filed in this court, however, the city states that the mayor "directed the County Clerk's Office to arrange for the issuance of marriage licenses to same-sex couples" and that "Alfaro was not the decisionmaker with respect to San Francisco's issuance of marriage licenses to same-sex couples. She and the other employees within the County Clerk's Office issued marriage licenses to such couples because Mayor Newsom told them to do so."

Although it is not clear that the county clerk and the county recorder acted on the basis of each individual official's own opinion or determination as to the unconstitutionality of the applicable statutes (see fn. 15, *ante*), and the actions of these officials might be vulnerable to challenge on that ground alone, it is nonetheless appropriate in this case to address the question whether a public official may refuse to enforce a statute when he or she determines the statute to be unconstitutional. The city maintains that when, as here, a public official has asserted in a mandate proceeding that a statutory provision that the official has refused to enforce is unconstitutional, a court may not issue a writ of mandate to compel the official to perform a ministerial duty prescribed by the statute unless the court first determines that the statute is constitutional. If, however, the controlling rule of law requires such an official to carry out a ministerial duty dictated by statute unless and until the statute has been judicially determined to be unconstitutional, it follows that such an official cannot *compel* a court to rule on the constitutional issue by refusing to apply the statute and that a writ of mandate properly may issue, without a judicial determination of the statute's constitutionality, directing the official to comply with the statute unless and until the statute has been judicially determined to be unconstitutional. Accordingly, in deciding whether a writ of mandate should issue, it is appropriate to determine whether the city officials were obligated to comply with the ministerial duty prescribed by statute without regard to their view of the constitutionality of the statute.

B

[6][7] In addition, we believe it is appropriate to clarify at the outset that, under the statutes reviewed above, the duties of the county clerk and the county recorder at issue in this case properly are characterized as *ministerial* rather than discretionary. When the substantive and procedural requirements ***1082** established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same ****473** token, when the statutory requirements have not been met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage. As we stated recently in *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916, 129 Cal.Rptr.2d 811, 62 P.3d 54: " 'A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists.' "

Thus, the issue before us is whether under California law the authority of a local executive official, charged with the ministerial duty of enforcing a state statute, includes the authority to disregard the statutory requirements when the official is of the opinion the provision is unconstitutional*****242** but there has been no judicial determination of unconstitutionality.

IV

[8] In the opposition and supplemental opposition filed in this court, the city maintains that a local executive official's general duty and authority to apply the law includes the authority to refuse to apply a statute whenever the official believes it to be unconstitutional, even in the absence of a judicial determination of unconstitutionality and even when the duty prescribed by the statute is ministerial. The city asserts that such

authority flows from every public official's duty "to conform [his or her] acts to constitutional norms." The Attorney General argues, by contrast, that it is well established that a duly enacted statute is presumed to be constitutional, and he maintains that "the prospect of local governmental officials unilaterally defying state laws with which they disagree is untenable and inconsistent with the precepts of our legal system."

As we shall explain, we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional. [FN16]

> FN16. As indicated, the issue presented in this case is purely whether a local official may refuse to apply a statute solely on the basis of the official's view that the statute is unconstitutional. There is no claim here that the officials acted as they did because of questions regarding the proper interpretation of the applicable statutes or because of doubts as to which of two or more competing statutory provisions to apply. (Cf. *Burlington Northern & Santa Fe Ry. Co. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887-889, 5 Cal.Rptr.3d 503.) Here, the officials acknowledge that the current California statutes limit marriage to a union between a man and a woman, and concede that they refused to apply the relevant statutory provisions solely because of a belief that this statutory requirement is unconstitutional.

***1083 A**

In the initial petitions filed in this matter, petitioners relied primarily on the provisions of article III, section 3.5 of the California Constitution (hereafter generally referred to as article III, section 3.5) in maintaining that the challenged actions of the local officials were improper.

Article III, section 3.5 provides in full: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. [¶] (b) To declare a statute unconstitutional. [¶] (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Article III, section 3.5 does not define the term "administrative agency" as used in this constitutional provision. Petitioners maintain that in light of the purpose of the provision, the term "administrative agency" should be interpreted to include local executive officials, particularly local officials who ****474** are acting as state officers in carrying out a function prescribed by state statute.

Article III, section 3.5 was proposed by the Legislature and placed before the voters as Proposition 5 at the June 6, 1978 *****243** election, and was adopted by the electorate. The ballot argument in favor of Proposition 5, contained in the election brochure distributed to voters prior to the election, stated in part: "Every statute is enacted only after a long and exhaustive process, involving as many as four open legislative committee meetings where members of the public can express their views. If the agencies question the constitutionality of a measure, they can present testimony at the public hearing during legislative consideration. Committee action is followed by full consideration by both houses of the Legislature. [¶] Before the Governor signs or vetoes a bill, he receives analyses from the agencies which will be called upon to implement its provisions. If the Legislature has passed the bill over the objections of the agency, the Governor is not likely to ignore valid apprehensions of his department, as he is Chief Executive of the State and is ***1084** responsible for most of its administrative functions. [¶] Once the law has been enacted, however, it does not make sense for an administrative agency to refuse to carry out its legal responsibilities because the agency's members have decided the law is invalid. Yet, administrative agencies are so doing with increasing frequency. These agencies are all part of the Executive Branch of government, charged with the duty of enforcing the law. [¶] The Courts, however, constitute the proper forum for determination of the validity of State statutes. There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform. [¶] Proposition 5 would prohibit the State agency from refusing to act under such circumstances, unless an appellate court has ruled the statute is invalid. [¶] We urge you to support this Proposition 5 in order to insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts. Your passage of Proposition 5 will help preserve the concept of the separation of powers so wisely adopted by our founding fathers." (Ballot Pamp. Primary Elec. (June 6, 1978) argument in favor of Prop. 5, p. 26.) Petitioners maintain that the rationale set forth in this ballot argument applies to local executive officials as well as state

administrative agencies, and thus that the term "administrative agency" as used in the provision properly should be construed to apply to local executive officials.

The city vigorously contests petitioners' suggested interpretation of article III, section 3.5, maintaining that this provision is addressed only to state, not local, administrative agencies, and that in any event the local officials here at issue are not an "administrative agency" within the meaning of article III, section 3.5. The city concedes there may be some anomaly in article III, section 3.5's application only to state administrative agencies and not to local executive officials, but insists such an anomaly "would not be license to rewrite Section 3.5 and give it a meaning nobody had in mind when it was passed." The city argues that "[t]he voters were responding to a specific problem [involving state administrative agencies] when they enacted Section 3.5, and they chose specific means to address that problem. In the end, if some in hindsight question the wisdom of that choice, the answer lies in amending California's Constitution, not judicially rewriting it." In sum, the city asserts that the existing terms of article III, section 3.5 cannot properly be interpreted to include local executive officials.

Although one Court of Appeal decision contains language directly supporting petitioners' argument that article III, section 3.5's reference to administrative agencies properly is interpreted to include local executive officials such as county clerks ***244(*Billig v. Voges* (1990) 223 Cal.App.3d 962, 969, 273 Cal.Rptr. 91 (*Billig*)), the city maintains that the question of the proper scope of article III, section 3.5 never was raised in *Billig*, and further that the *1085 pertinent language in *Billig* clearly is dictum. Accordingly, the city argues, the appellate court's decision in *Billig* cannot properly be viewed as resolving **475 the issue whether article III, section 3.5 applies to local officials. [FN17]

> FN17. In *Billig, supra*, 223 Cal.App.3d 962, 273 Cal.Rptr. 91, the plaintiffs had submitted a referendum petition to the city clerk, but the clerk refused to process the petition or submit it to the city council because the petition did not include the full text of the challenged ordinance, as required by section 4052 of the Elections Code. The plaintiffs then sought a writ of mandate in superior court against the clerk, claiming that this official's authority was limited to determining whether there were sufficient signatures on the petition and did not extend to rejecting a petition for noncompliance with section 4052. The trial court ruled against the plaintiffs and the Court of Appeal affirmed.

The appellate court explained in *Billig* that the city clerk's duty "is limited to the ministerial function of ascertaining whether the *procedural* requirements for submitting a petition have been met" (*Billig, supra*, 223 Cal.App.3d at pp. 968-969, 273 Cal.Rptr. 91), and found that Elections Code section 4052 "involves purely procedural requirements for submitting a referendum petition. Therefore a city clerk who refuses to accept a petition for noncompliance with the statute is only performing a ministerial function involving no exercise of discretion." (*Billig*, at p. 969, 273 Cal.Rptr. 91.)

Stating that the city clerk lacked discretion *not* to enforce the statutory provision, the Court of Appeal discussed article III, section 3.5 and observed: "Administrative agencies, *including public officials in charge of such agencies,* are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.) [Elections Code] [s]ection 4052 has not been declared unconstitutional by an appellate court in this state. Consequently, *the offices of city clerks throughout the state* are mandated by the [C]onstitution to implement and enforce the statute's procedural requirements. In the instant case, respondent had the clear and present ministerial duty to refuse to process appellants' petition because it did not comply with the procedural requirements of section 4052." (*Billig, supra*, 223 Cal.App.3d at p. 969, 273 Cal.Rptr. 91, italics added.)

Although the italicized language in *Billig* supports petitioners' position with regard to the scope of article III, section 3.5, there is no indication that any party in *Billig* raised the argument that article III, section 3.5 applies only to *state* agencies and not to *local* agencies or officials, and thus the court in *Billig* had no occasion to resolve that issue. Moreover, in any event the discussion of article III, section 3.5 in *Billig* clearly was dictum, because an analysis and resolution of the scope of that constitutional provision not only was unnecessary to the decision in *Billig*, but arguably was entirely irrelevant. The plaintiffs in *Billig* had *not* asked the city clerk to refrain from applying Elections Code section 4052 on the ground that the statute was unconstitutional, and the city clerk's decision not to accept the petition did *not* involve consideration of whether he had the authority to determine the provision's constitutionality; moreover, the plaintiffs did not raise any

constitutional challenge to section 4052 in the trial court or on appeal. Instead, the plaintiffs in *Billig* simply argued that the applicable provisions of section 4052 did not authorize *a city clerk* (as opposed to a court) to reject a petition for noncompliance with that statute, and that only a court was authorized to disqualify a petition for nonconformance with the requirements of section 4052.
Because the provisions of article III, section 3.5 did not bear on the question before the court in *Billig*, we believe it would be inappropriate to accord much significance to the cited language in that decision.

As we shall explain, we have determined that we need not (and thus do not) decide in this case whether the actions of the local executive officials here at issue fall within the scope or reach of article III, section 3.5, because *1086 we conclude that prior to the adoption of article III, section 3.5, it already was established under California law--as in the overwhelming majority of other states (see, *post*, 17 Cal.Rptr.3d at ***245 pp. 260-263, 95 P.3d at pp. 486-490)--that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute. Because the adoption of article III, section 3.5 plainly *did not grant or expand* the authority of local executive officials to determine that a statute is unconstitutional and to act in contravention of the statute's terms on the basis of such a determination, we conclude that the city officials do not possess this authority and that the actions challenged in the present case were unauthorized and invalid.

B

We begin with a few basic legal principles that were well established prior to the adoption of article III, section 3.5 in 1978.

[9][10] First, one of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, "is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity." (**4767 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 58, pp. 102-103 [citing, among numerous other authorities], *In re Madera Irrigation District* (1891) 92 Cal. 296, 308, 28 P. 272; *San Francisco v. Industrial Acc. Com.* (1920) 183 Cal. 273, 280, 191 P. 26; *People v. Globe Grain and Mill. Co.* (1930) 211 Cal. 121, 127, 294 P. 3.)

[11] Second, it is equally well established that when, as here, a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute. "It is well settled in this state and elsewhere, that when a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of the power." (*Cowell v. Martin* (1872) 43 Cal. 605, 613-614; see, e.g., *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 797, 322 P.2d 449; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347, 129 Cal.Rptr. 824["[a]dministrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or by statute"].)

The city has not identified any provision in the California Constitution or in the applicable statutes that purports to grant the county clerk or the county recorder (or any other local official) the authority to determine the constitutionality of the statutes each public official has a ministerial duty to enforce. Instead, the city's position appears to be that a public executive official's duty *1087 to follow the law (including the Constitution) includes the implied or inherent authority to refuse to follow an applicable statute whenever the official personally believes the statute to be unconstitutional, even though there has been no judicial determination of the statute's unconstitutionality and despite the existence of the rule that a duly enacted statute is presumed to be constitutional.

As we shall see, the California authorities that were in place prior to the adoption of article III, section 3.5, do not support the city's position.

C

Although in this case we need not determine the scope of article III, section 3.5, the historical background that led to the proposal and adoption of that constitutional provision in 1978 nonetheless provides a useful starting point for our analysis. As this court explained in *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002, 251 Cal.Rptr. 299, 760 P.2d 495, "[a]rticle III, section 3.5, ***246 ... was placed on the ballot by a unanimous vote of the Legislature in apparent response to this court's decision in *Southern Pac. Transportation v. Public Utilities Com.* (1976) 18 Cal.3d 308, 134 Cal.Rptr. 189, 556 P.2d 289 [hereafter *Southern Pacific*], in which the majority held that the Public Utilities Commission had the power to declare a state statute unconstitutional." Accordingly, the decision in *Southern Pacific* is an appropriate place to begin.

In *Southern Pacific*, the plaintiff railroad company sought review of two decisions of the Public Utilities Commission (PUC) in which the PUC held that section 1202.3 of the Public Utilities Code, a statute enacted in

1971, was unconstitutional. Section 1202.3 was one of a number of statutes in the Public Utilities Code dealing with railroad crossings. With respect to private or farm railroad crossings, Public Utilities Code section 7537(1) granted "the owner of adjoining lands the right to *private* or *farm* crossings necessary or convenient for egress or ingress" (*Southern Pacific, supra,* 18 Cal.3d at p. 311, 134 Cal.Rptr. 189, 556 P.2d 289), (2) provided that the railroad must maintain the crossings, and (3) granted the PUC the authority to fix and assess the cost of such crossings. With respect to railroad crossings on *public* or *publicly used roads,* Public Utilities Code section 1202 gave the PUC the exclusive power "to regulate *public* or *publicly used* road or highway crossings, including locating, maintaining, protecting, and closing them" (*Southern Pacific, supra,* 18 Cal.3d at p. 312, 134 Cal.Rptr. 189, 556 P.2d 289), and further granted the PUC the authority to allocate costs among the railroad and the affected public entities responsible for maintaining the public or publicly used road, including any costs involved in closing a crossing.

****477** Public Utilities Code section 1202.3, the statute at issue in *Southern Pacific,* provided, in turn, that in any proceeding under ***1088** Public Utilities Code section 1202 "involving a *publicly used* road or highway not on a publicly maintained road system," the PUC could apportion costs to the public entity if the PUC found "(a) express dedication and acceptance of the road or (b) a judicial determination of implied dedication." (*Southern Pacific, supra,* 18 Cal.3d at p. 312, 134 Cal.Rptr. 189, 556 P.2d 289.) If neither condition was found, section 1202.3 provided that the PUC "shall order the crossing abolished by physical closing." Section 1202.3 further provided that "the railroad shall in no event be required to bear improvement costs 'in excess of what it would be required to bear in connection with the improvement of a public street or highway crossing.' " (*Southern Pacific, supra,* 18 Cal.3d at pp. 312-313, 134 Cal.Rptr. 189, 556 P.2d 289.)

In *Southern Pacific,* the PUC concluded in an administrative proceeding that Public Utilities Code section 1202.3 was unconstitutional because it unlawfully delegated the state's police power to private litigants by granting private litigants absolute discretion to require the closing of a railroad crossing merely by commencing a proceeding under Public Utilities Code section 1202. The PUC's conclusion was based in part on its determination that under section 1202.3, once the PUC found that there had been neither an express dedication and acceptance of the publicly used road, nor a judicial determination of an implied dedication of the road, the PUC had no alternative but to order the crossing closed and to require the railroad to pay for the closing. (*Southern Pacific, supra,* 18 Cal.3d at p. 313, 134 Cal.Rptr. 189, 556 P.2d 289.)

*****247** On review, this court unanimously disagreed with the PUC's constitutional determination. Observing that Public Utilities Code section 1202.3 provided, in its introductory phrase, that the statute applied "in any proceeding under Section 1202," the court in *Southern Pacific* reasoned that "the Legislature has declared that section 1202.3 is an exception to the former section and that the provisions for cost allocation and closing crossings in the latter section *are only applicable when the commission would otherwise have ordered improvement of a crossing pursuant to the former section.* The standard for compelling crossing improvement implicit in section 1202 is obviously public convenience and necessity, including safety concerns [citations], and this standard must be read into section 1202.3. [¶] Thus, before the commission may close a crossing under section 1202.3, it must not only find public use and lack of requisite dedication, but also find that necessity and convenience preclude continued use of the crossing in its existing condition. Such findings--rather than mere commencement of a proceeding under section 1202--are the basis for closing a crossing under section 1202.3. [¶] The function of the private litigant within the statutory framework is merely to call the commission's attention to the need for improving or closing a crossing and perhaps to urge action on the commission." (*Southern Pacific, supra,* 18 Cal.3d at p. 314, 134 Cal.Rptr. 189, 556 P.2d 289, italics added.)

***1089** As noted, in *Southern Pacific* all of the justices of this court agreed that the PUC had erred in concluding that Public Utilities Code section 1202.3 was unconstitutional. Although the briefs filed in this court in *Southern Pacific* did not raise any question regarding the authority of the PUC to determine the constitutionality of section 1202.3, [FN18] and the majority in *Southern Pacific* did not address that question in the text of the opinion, Justice Mosk authored a vigorous concurring and dissenting opinion in *Southern Pacific,* arguing strongly that neither the PUC nor any other administrative agency "may declare a duly enacted statute unconstitutional," and that "it is incongruous for the will of the people of the state, reflected by their elected legislators, to be thwarted by a governmental body which exists only to implement that will." (*Southern Pacific, supra,* 18 Cal.3d at p. 315, 134 Cal.Rptr. 189, 556 P.2d 289 (conc. & dis. opn. of Mosk, J.).)

> FN18. Indeed, in the petition filed in this court, the petitioner in *Southern Pacific* expressly stated that it did "not question the authority of the Commission, which has quasi judicial powers and is a court of special jurisdiction, to

declare and hold a statute to be unconstitutional."

**478 Justice Mosk's concurring and dissenting opinion in *Southern Pacific* acknowledged that a prior California decision—*Walker v. Munro* (1960) 178 Cal.App.2d 67, 2 Cal.Rptr. 737 (hereafter *Walker*)—had held that an administrative agency that has been granted judicial or quasi-judicial power by the California Constitution (a type of entity commonly referred to as a "constitutional agency") [FN19] has the authority to consider the constitutionality of a statute in the course of its quasi-judicial proceedings. Justice Mosk suggested, however, that *Walker* had been "indirectly ***248 criticized and implicitly disapproved" (*Southern Pacific, supra,* 18 Cal.3d at p. 316, 134 Cal.Rptr. 189, 556 P.2d 289 (conc. & dis. opn. of Mosk, J.)) in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251, 115 Cal.Rptr. 497, 524 P.2d 1281 (hereafter *State of California v. Superior Court (Veta)*), and he took issue with "the debatable premise that any and all 'judicial power' inherently entails the authority to declare a law unconstitutional." (*Southern Pacific, supra,* 18 Cal.3d at p. 317, 134 Cal.Rptr. 189, 556 P.2d 289.) Relying upon language in numerous decisions of the United States Supreme Court indicating that an administrative agency or executive official has no power to adjudicate constitutional issues (*id.* at p. 316, 134 Cal.Rptr. 189, 556 P.2d 289), and decisions from other jurisdictions holding "that administrative agencies lack the powers appropriated in this case" (*ibid.*), Justice Mosk concluded that the extensive powers granted by the California Constitution to the PUC did not include the power to declare a statute unconstitutional and to refuse to apply it.

FN19: See, e.g., *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 320, 314 P.2d 807 ("[The Department of Alcoholic Beverage Control] is a constitutional agency that has succeeded to some of the powers of the State Board of Equalization in alcoholic beverage control matters. Being an agency upon which the Constitution has conferred limited judicial powers, its decisions on factual matters must be affirmed if there is substantial evidence to support them").

*1090 The majority in *Southern Pacific* responded to Justice Mosk's concurring and dissenting opinion in a lengthy footnote. (See *Southern Pacific, supra,* 18 Cal.3d 308, 311-312, fn. 2, 134 Cal.Rptr. 189, 556 P.2d 289.) The initial portion of the footnote contains some broad language that could be read to support the conclusion that the duty of any administrative agency or public official to obey the Constitution affords such agency or official the authority to determine the constitutional validity of statutes the agency or official is charged with enforcing. The majority in *Southern Pacific,* however, ultimately rested its holding that the PUC had the authority to determine the constitutional validity of statutes on the circumstance that the California Constitution grants broad judicial or quasi-judicial power to the PUC.

The majority in *Southern Pacific* stated in this regard: "[T]he Constitution and statutes of this state grant the commission wide administrative, legislative, and judicial powers. [Citations.] The Legislature has limited the judiciary from interfering with the commission by restricting review to the Supreme Court and by additionally restricting review to determining 'whether the commission has regularly pursued its authority, *including* a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.' (Italics added; [citations].) Public Utilities Code section 1732 provides corporations and individuals may not raise matters in any court not presented to the commission on petition for rehearing, reflecting, when read with the judicial review sections, legislative determination that all issues must be presented to the commission. *Under the broad powers granted it, the commission may determine the validity of statutes.*" (*Southern Pacific, supra,* 18 Cal.3d at pp. 311-312, fn. 2, 134 Cal.Rptr. 189, 556 P.2d 289, italics added.)

This review of the decision in *Southern Pacific* demonstrates that there was a significant disagreement in this court on the particular question *whether a so-called constitutional agency* (like the PUC), *that has been granted the authority to exercise quasi-judicial power by the California Constitution,* has the authority to determine that a statute the agency is called upon to apply is unconstitutional and need not be followed. We are **479 unaware, however, of any case, either prior to or subsequent to *Southern Pacific,* that suggests that under the California Constitution *a local executive official such as a county clerk,* who is charged with the *ministerial* duty to enforce a statute, has the authority ***249 to exercise judicial power by determining whether a statute is unconstitutional.

The case of *Walker, supra,* 178 Cal.App.2d 67, 2 Cal.Rptr. 737, cited (and criticized) in Justice Mosk's concurring and dissenting opinion in *Southern Pacific,* appears to be the first case in California to address the question whether an administrative agency has the authority to determine the constitutionality of a *1091 statute that the agency is required to enforce. In *Walker,* the plaintiffs were retail liquor dealers who had been charged in an administrative proceeding before the Department of Alcoholic Beverage Control with violating

the fair trade provisions of the California Alcoholic Beverage Control Act. While the administrative proceeding was pending, the plaintiffs filed a declaratory judgment action in superior court against the administrative officials, seeking a declaration that the fair trade provisions of the Alcoholic Beverage Control Act were unconstitutional, and an order enjoining the officials from enforcing those provisions. The trial court in *Walker* granted summary judgment in favor of the defendants, relying upon the circumstance that the same constitutional issue had been raised in the pending administrative proceeding and upon the trial court's conclusion "that it is more expeditious and proper that the Department rule on the question before the court is required to rule on it." (178 Cal.App.2d at p. 70, 2 Cal.Rptr. 737.)

On appeal, the plaintiffs argued that the exhaustion of remedies doctrine upon which the trial court had relied was inapplicable, because the Department of Alcoholic Beverage Control "does not have the power ... to decide constitutional questions." (*Walker, supra,* 178 Cal.App.2d at p. 73, 2 Cal.Rptr. 737.) In rejecting this contention, the Court of Appeal in *Walker* began by referring to the applicable provision of the California Constitution that empowers the Alcoholic Beverage Control Appeals Board to review questions " 'whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in light of the whole record.' (Cal. Const., art. XX, § 22.)" (178 Cal.App.2d at p. 73, 2 Cal.Rptr. 737.) The court in *Walker* then observed: "The department and the Appeals Board are thus constitutional agencies *upon which limited judicial powers have been conferred.* [Citations.]" (*Ibid.*, italics added.)

In response to the plaintiffs' claim in *Walker* that the department only could make findings of fact and that the appeals board only was empowered "to review certain questions of law, which are only procedural" (*Walker, supra,* 178 Cal.App.2d at p. 74, 2 Cal.Rptr. 737), the court in *Walker* stated: "However, there does not appear to be any basis for so limiting the grant of power to the Appeals Board. The Appeals Board may determine whether the department acted within its jurisdiction. In *United Insurance Co. v. Maloney* [(1954)] 127 Cal.App.2d [155,] 157 [273 P.2d 579], the court stated: 'A charge of unconstitutional action goes to the very jurisdiction of the administrative officer or body to entertain the proceeding....' [Citation.] This would also seem applicable to a charge that the statute which the agency is seeking to enforce is unconstitutional." (*Walker, supra,* 178 Cal.App.2d at p. 74, 2 Cal.Rptr. 737.)

***1092** Accordingly, in concluding that the administrative agency in that case had the authority to determine, at least in the first instance, the question whether the fair trade statutes were unconstitutional, the court in *Walker* specifically relied upon the *****250** circumstance that the Alcoholic Beverage Control Appeals Board had been granted the authority by the California Constitution to exercise limited judicial power. [FN20]

> FN20. The significance attached by the court in *Walker* to the California Constitution's grant of judicial power to the Alcoholic Beverage Control Appeals Board is confirmed by the distinction the *Walker* decision drew between the case before it and a then recent decision of the California Supreme Court that was heavily relied upon by the plaintiffs. The court in *Walker* explained: "*County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 322 P.2d 449, referred to extensively by plaintiffs, is not in point. There the county of Alpine brought an action to determine its boundaries with defendant counties. Judgment of dismissal was reversed. Defendants asserted that the county of Alpine had not exhausted an administrative remedy before the State Lands Commission. But the court held that the agency [the State Lands Commission] was empowered only to 'survey and mark' boundaries.... [*I*]*t was without jurisdiction to make judicial determinations* of boundaries and therefore the county of Alpine could properly maintain its action." (*Walker, supra,* 178 Cal.App.2d at p. 73, 2 Cal.Rptr. 737, italics added.)

****480** As noted in Justice Mosk's concurring and dissenting opinion in *Southern Pacific,* this court held in *State of California v. Superior Court (Veta), supra,* 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281, some years after the appellate court's decision in *Walker,* that a plaintiff seeking a declaration that the California Coastal Zone Conservation Act of 1972 was unconstitutional was not required to pursue that constitutional claim before the Coastal Zone Conservation Commission prior to bringing a court action. (12 Cal.3d at pp. 250-251, 115 Cal.Rptr. 497, 524 P.2d 1281.) Although there is some language in *Veta* critical of *Walker,* the two cases nonetheless are clearly and easily distinguishable, because the Coastal Zone Conservation Commission, unlike the Alcoholic Beverage Control Appeals Board, had not been granted any judicial power by the California Constitution. Thus, the holding in *State of California v. Superior Court (Veta)* that the commission lacked authority to pass on the

constitutionality of the statute establishing its status and functions was not inconsistent with the *Walker* decision.

In light of the foregoing review of the relevant case law, we believe that after this court's decision in *Southern Pacific, supra,* 18 Cal.3d 308, 134 Cal.Rptr. 189, 556 P.2d 289 the state of the law in this area was clear: administrative agencies that had been granted judicial or quasi-judicial power by the California Constitution possessed the authority, in the exercise of their administrative functions, to determine the constitutionality of statutes, but agencies that had not been granted such power under the California Constitution lacked such authority. (See *Hand v. Board of Examiners in Veterinary Medicine* (1977) 66 Cal.App.3d 605, 617-619, 136 Cal.Rptr. 187.) Accordingly, these decisions recognize that, under ***1093** California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution. [FN21]

> FN21. In this regard it is worth noting that article III, section 3 of the California Constitution explicitly provides: "The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others *except as permitted by this Constitution.*" (Italics added.)

Given the foregoing decisions and their reasoning, it appears evident that under California law as it existed prior to the adoption of article III, section 3.5 of the California Constitution, *a local executive official,* such as a county clerk or county *****251** recorder, possessed no authority to determine the constitutionality of a statute that the official had a ministerial duty to enforce. If, in the absence of a grant of judicial authority from the California Constitution, an administrative agency that was required by law to reach its decisions only after conducting court-like quasi-judicial proceedings did not generally possess the authority to pass on the constitutionality of a statute that the agency was required to enforce, it follows even more so that a local executive official who is charged simply with the ministerial duty of enforcing a statute, and who generally acts without any quasi-judicial authority or procedure whatsoever, did not possess such authority. As indicated above, we are unaware of any California case that suggests such a public official has been granted judicial or quasi-judicial power by the California Constitution. [FN22]

> FN22. The city, in a footnote contained in its reply brief to several amicus curiae briefs, maintains that the actions of its officials did not constitute the exercise of judicial powers, citing a brief passage in this court's decision in *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 993, 4 Cal.Rptr.2d 837, 824 P.2d 643 (*Lusardi*) (the Director of the Department of Industrial Relations' "determination that a project is a public work ... cannot be accurately characterized as 'judicial,' because it does not encompass the conduct of a hearing or a binding order for any type of relief"). In *Lusardi,* however, the director, unlike the city officials here, acted to enforce a statutory provision; he did not defy or disregard a statutory provision on the basis of his own determination that the statute was unconstitutional. *Lusardi* clearly provides no support for the city's position.

****481** [12] The city, in arguing that article III, section 3.5 does not apply to local officials, relies upon the statement in *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 36, 112 Cal.Rptr. 805, 520 P.2d 29, that the separation of powers clause in article III "is inapplicable to the government below the state level." [FN23] The city might well argue that this language in *Strumsky* also renders inapposite the line of California cases ***1094**(*Southern Pacific, supra,* 18 Cal.3d 308, 134 Cal.Rptr. 189, 556 P.2d 289; *State of California v. Superior Court (Veta), supra,* 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281; and *Walker, supra,* 178 Cal.App.2d 67, 2 Cal.Rptr. 737) that we have just discussed. The city fails to recognize, however, that the decision in *Strumsky* emphatically did *not* hold that under the California Constitution local executive officials are free to exercise judicial power. On the contrary, in *Strumsky* this court expressly *overruled* a line of earlier California decisions that had held (for purposes of determining the appropriate standard of judicial review of a decision of a local administrative agency) that such an agency could exercise judicial power; the opinion in *Strumsky* concluded instead that a local administrative agency has *no* authority under the California Constitution to exercise judicial power. (*Strumsky, supra,* 11 Cal.3d at pp. 36-44, 112 Cal.Rptr. 805, 520 P.2d 29.) In light of this holding in *Strumsky,* it appears clear that a local executive official who makes decisions-- *****252** without the benefit of even a quasi-judicial proceeding--has no authority to exercise judicial power, such as by determining the constitutionality of applicable statutory provisions.

> FN23. The statement in numerous California decisions that the separation of powers provision of article III is inapplicable to government below

> the state level means simply that, in establishing a governmental structure for the purpose of managing municipal affairs, the Legislature (through statutes) or local entities (through charter provisions and the like) may combine executive, legislative, and judicial functions in a manner different from the structure that the California Constitution prescribes for state government. (See, e.g., *Wulzen v. Board of Supervisors* (1894) 101 Cal. 15, 25-26, 35 P. 353; *People v. Provines* (1868) 34 Cal. 520, 532-540.) As explained hereafter, the statement does *not* mean that a local executive official has the inherent authority to exercise judicial power.

Accordingly, we conclude that at the time article III, section 3.5 was adopted, it was clear under California law that a local executive official did not have the authority to determine that a statute is unconstitutional or to refuse to enforce a statute in the absence of a judicial determination that the statute is unconstitutional. [FN24]

> FN24. In a somewhat related context, this court held in *Farley v. Healey* (1967) 67 Cal.2d 325, 62 Cal.Rptr. 26, 431 P.2d 650 that an acting registrar of voters, who refused to determine whether sufficient signatures had been submitted to qualify a local initiative measure for the ballot because of his conclusion that the content of the initiative was not a proper subject for a local initiative, "exceeded his authority in undertaking to determine whether the proposed initiative was within the power of the electorate to adopt." (67 Cal.2d at p. 327, 62 Cal.Rptr. 26, 431 P.2d 650.) We explained that under the applicable charter provision, the registrar's "duty is limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met. *It is not his function to determine whether a proposed initiative will be valid if enacted or whether a proposed declaration of policy is one to which the initiative may apply. These questions may involve difficult legal issues that only a court can determine.* Given compliance with the formal requirements for submitting an initiative, the registrar must place it on the ballot unless he is directed to do otherwise by a court on a compelling showing that a proper case has been established for interfering with the initiative power." (*Ibid.*, italics added.)

The adoption of article III, section 3.5, of course, effectively overruled the majority's holding in *Southern Pacific* and largely embraced the reasoning set forth in Justice Mosk's concurring and dissenting opinion, amending the California Constitution to provide that "[a]n administrative agency, *including an administrative agency created by the Constitution or an initiative statute, has no power ... [t]o* ... refuse to enforce a statute on the basis of its being unconstitutional unless an appellate court has made a determination that such ***1095** statute is unconstitutional." ****482** (Italics added.) As we already have noted, we need not and do not decide in this case what effect the adoption of article III, section 3.5 has on the authority of local executive officials, because it is abundantly clear that this constitutional amendment did not *expand* the authority of such officials so as to permit them to refuse to enforce a statute solely on the basis of their view that the statute is unconstitutional. Accordingly, we conclude that under California law a local executive official generally lacks such authority.

D

In support of its contrary claim that, as a general matter, California law long has recognized that an executive public official has the authority to refuse to comply with a ministerial statutory duty whenever the official personally believes the statute is unconstitutional, the city relies upon a line of California decisions that have reviewed the validity of statutes or ordinances authorizing the issuance of bonds, the letting of public contracts, or the disbursement of public funds in mandate actions filed against public officials who refused to comply with a ministerial duty. As the city accurately notes, numerous California decisions addressing these three subjects have held that "mandate is the proper remedy to compel a public officer to perform ministerial acts such as issuance of bonds [and that] the constitutionality of the law authorizing a bond issuance may be determined in a proceeding for such a writ." *****253**(*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 579-580, 131 Cal.Rptr. 361, 551 P.2d 1193 [bond]; see, e.g., *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 598, 116 Cal.Rptr. 361, 526 P.2d 513 [bond]; *Metropolitan Water District v. Marquardt* (1963) 59 Cal.2d 159, 170-171, 28 Cal.Rptr. 724, 379 P.2d 28 [public contract]; *City of Whittier v. Dixon* (1944) 24 Cal.2d 664, 666, 151 P.2d 5 [warrant]; *Golden Gate Bridge etc. Dist. v. Felt* (1931) 214 Cal. 308, 315-320, 5 P.2d 585 [bond]; *Los Angeles Co. F.C. Dist. v. Hamilton* (1917) 177 Cal. 119, 121, 169 P. 1028 [bond]; *Denman v. Broderick* (1896) 111 Cal. 96, 99, 105, 43 P. 516 [warrant].)

In each of the foregoing cases, the mandate action was instituted after a public official who was under a statutory duty to perform a ministerial act that was a necessary step in the issuance of the bond, the letting of the contract, or the disbursement of public funds (such as affixing the

official's signature to the bond or contract, or issuing a warrant) refused to perform that act based upon the official's ostensible doubts as to the constitutional validity of the statute authorizing the bond, contract, or public expenditure. The city emphasizes that in none of these cases did the court criticize such a public official for declining to perform his or her ministerial act, but instead concluded that the public official's refusal to act was an appropriate means of ***1096** bringing the constitutional question of the validity of the bond, contract, or expenditure of public funds before the court for resolution. The city maintains that these decisions demonstrate that the general rule in California always has been that *every* public official is free to determine the constitutional validity of the statutory provisions that he or she has a ministerial duty to enforce or execute, and free to refuse to perform the ministerial act if he or she in good faith believes the statute to be unconstitutional. The city argues that the line of decisions we have analyzed above--holding, prior to the adoption of article III, section 3.5, that only administrative agencies constitutionally authorized to exercise judicial power have the authority to determine the constitutional validity of statutes-- involved *a limited exception* applicable only to administrative agencies.

We believe the city's argument misconceives the state of the law prior to the adoption of article III, section 3.5. As we have discussed above, the general rule established by California decisions at the time *Southern Pacific, supra,* 18 Cal.3d 308, 134 Cal.Rptr. 189, 556 P.2d 289, was decided was that, among administrative agencies, only one that had been granted judicial power under the California Constitution possessed the authority to determine the constitutionality of a statute it was charged with enforcing and to decline to apply the statute if the agency determined it was unconstitutional. As already ****483** explained, if a nonconstitutional administrative agency that rendered its decisions after an extensive quasi-judicial procedure--in which the arguments for and against constitutionality could be fully presented and considered in a quasi-judicial fashion--lacked authority to determine constitutional issues, it clearly would be anomalous to permit an ordinary executive official (who carries out his or her official action without the benefit of any sort of quasi-judicial procedures) to determine the constitutionality of a statute and to refuse to apply it based simply upon the official's own good faith belief that the statute is unconstitutional. Thus, the general rule in California--and, as we shall discuss below, in most jurisdictions--was (and continues to be) that an executive official does not possess such authority.

It is the line of public finance cases upon which the city relies that involves the exceptional *****254** situation. As the applicable decisions make clear, the public official in each of those cases was permitted to refuse to perform a ministerial act when he or she had doubts about the validity of the underlying bond, contract, or public expenditure, both in order to ensure that a mechanism was available for obtaining a timely *judicial* determination of the validity of the bond issue, contract, or public expenditure--a determination often essential to the marketability of bonds or to the contracting parties' willingness to go forward with the contract (see, e.g., *Golden Gate Bridge etc. Dist. v. Felt, supra,* 214 Cal. 308, 315, 5 P.2d 585), or to avoid irreparable loss of public funds [FN25]--and in recognition of the circumstance that, in this specific context, the public official frequently faced potential *personal* liability (as distinguished from the potential liability of a governmental entity) if the bond, contract, or public expenditure ultimately was found to be invalid. (See, e.g., *Golden Gate* ***1097***Bridge etc. Dist. v. Felt, supra,* 214 Cal. at pp. 316-317, 5 P.2d 585; *Denman v. Broderick, supra,* 111 Cal. 96, 105, 43 P. 516.)

> FN25. The public finance cases upon which the city relies generally preceded the adoption of California's validation statutes, which currently permit a public agency to file an in rem action in order to obtain a judicial determination of the validity of bonds, warrants, contracts, obligations, or similar evidences of indebtedness. (See Code Civ. Proc., § 860 et seq. [initially adopted in 1961 (Stats.1961, ch. 1479, § 1, p. 3331)].) The current statutes provide that such actions "shall be given preference over all other civil actions ... to the end that such actions shall be speedily heard and determined." (Code Civ. Proc., § 867.)

Although the city points to language in some of these decisions that could be read to support the city's broad position here, the *holdings* in these cases clearly are limited to a public official's ability to refuse to perform a ministerial act necessary for the execution of a bond issue or public contract, or the disbursement of public funds, where such refusal permits a judicial determination prior to the actual sale of the bonds, the carrying out of the contract, or the disbursement of public funds, and where the official's personal liability frequently is at stake. Contrary to the city's contention, the circumstance that a public official may refuse to perform a ministerial act in that context does not signify that in all other contexts every public official is free to refuse to perform a ministerial act based upon the official's view that the statute the officer is statutorily obligated to apply is unconstitutional.

The city attempts to bring the present matter within the reach of the foregoing cases by arguing that if the city officials enforced California's current marriage laws limiting marriage to a man and a woman, the officials would face possible personal liability for monetary damages under state or federal law if the marriage statutes subsequently were determined to be unconstitutional. The city's argument in this regard clearly lacks merit.

First, as a matter of state law, Government Code section 820.6 explicitly provides that "[i]f a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid, or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable." Thus, the officials clearly would not have incurred liability under California law simply for following the current marriage statutes and declining to issue marriage licenses ****484** or register marriage certificates in contravention of those statutes. Second, under federal ***1098** law, a local public official generally is immunized from liability for official acts so long as the official's conduct "does not violate *clearly established* statutory or constitutional *****255** rights of which a reasonable person would have known" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396, italics added; see *Anderson v. Creighton* (1987) 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523), and, as we discuss below (see, *post*, 17 Cal.Rptr.3d pp. 258-260, 95 P.3d pp. 486-489), in this instance there simply is no plausible argument that the city officials would have violated "clearly established" constitutional rights by continuing to enforce California's current marriage statutes in the absence of a judicial determination that the statutes are unconstitutional. (Cf. *LSO, Ltd. v. Stroh* (9th Cir.2000) 205 F.3d 1146, 1160 [finding state officials were not entitled to qualified immunity when "no reasonable official could have believed" that application of the statute at issue was constitutional in light of prior controlling judicial decisions].) Finally, even if the city officials were to be sued in their personal capacity for actions taken pursuant to statute and in the scope of their employment, under Government Code section 825 the officials would be entitled to have their public employer provide a defense and pay any judgment entered in such an action, whether the action was based on a state law claim or a claim under the federal civil rights statutes. (See *Williams v. Horvath* (1976) 16 Cal.3d 834, 842-848, 129 Cal.Rptr. 453, 548 P.2d 1125.) Accordingly, there is no merit to the city's contention that the actions of the city officials that are challenged here can be defended as necessary to avoid the incurring of personal liability on the part of such officials.

E

Some academic commentators, while confirming that as a general rule executive officials must comply with duly enacted statutes even when the officials believe the provisions are unconstitutional, have suggested that there may be room to recognize an exception to this general rule in instances in which a public official's refusal to apply the statute would provide the most practical or reasonable means of enabling the question of the statute's constitutionality to be brought before a court. (See, e.g., May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative* (1994) 21 Hastings Const. L.Q. 865, 994-996.) [FN26] As we have just seen, the line of public finance cases relied upon by the city may be viewed as an example of ***1099** just such a limited exception, and there are a number of other California decisions in which a constitutional challenge to a statute or other legislative enactment has been brought before a court for judicial resolution by virtue of a public entity's refusal to comply with the statute, under circumstances in which the public entity had a personal stake or interest *****256** in the constitutional issue and the public entity's action was the most practicable or reasonable method of obtaining a judicial determination of the validity of the statute. (See, e.g., *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 132 Cal.Rptr.2d 713, 66 P.3d 718 [impingement on county's home rule authority]; *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 5-10, 227 Cal.Rptr. 391, 719 P.2d 987 [impingement on county's taxing authority].)

FN26. A number of law review articles suggest that the federal Constitution should be interpreted as permitting the President of the United States to refuse to enforce a statute that the President believes is unconstitutional. (See, e.g., Easterbrook, *Presidential Review* (1990) 40 Case W. Res. L.Rev. 905.) Other scholars, however, have made a strong argument that the history of the proceedings of the constitutional convention that drafted the federal Constitution, and in particular the Founders' explicit rejection of a proposal for an absolute presidential veto, refutes such an interpretation. (See, e.g., May, *Presidential Defiance of 'Unconstitutional Laws: Reviving the Royal Prerogative*, *supra*, 21 Hastings Const. L.Q. 865, 872-895.) To date, no court has accepted the contention that the President possesses such authority. (See, e.g., *Ameron, Inc. v. U.S. Army Corps of Eng'rs* (3d Cir.1986) 787 F.2d 875, 889 & fn. 11 ["This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even

refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best"].)

****485** Although it may be appropriate in some circumstances for a public entity or public official to refuse or decline to enforce a statute as a means of bringing the constitutionality of the statute before a court for judicial resolution, it is nonetheless clear that such an exception does not justify the actions of the local officials at issue in the present case. Here, there existed a clear and readily available means, other than the officials' wholesale defiance of the applicable statutes, to ensure that the constitutionality of the current marriage statutes would be decided by a court. If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure-- a lawsuit brought by a couple who has been denied a license under existing statutes--is the procedure that was utilized to challenge the constitutionality of California's antimiscegenation statute in *Perez v. Sharp* (1948) 32 Cal.2d 711, 198 P.2d 17, and the procedure apparently utilized in all of the other same-sex marriage cases that have been litigated recently in other states. (See, e.g., *Baehr v. Lewin* (1993) 74 Haw. 530, 852 P.2d 44; *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309, 798 N.E.2d 941; *Baker v. State of Vermont* (1999) 170 Vt. 194, 744 A.2d 864.) The city cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here. [FN27]

FN27. As noted above, after several mandate actions were filed against the city in superior court challenging the actions of the city officials, the city filed a cross-complaint in one of the actions, seeking a declaratory judgment that the marriage statutes are unconstitutional insofar as they limit marriage to a union between a man and a woman. (See, *ante,* 17 Cal.Rptr.3d p. 233, fn. 6, 95 P.3d p. 466, fn. 6.) We have no occasion in this case to determine whether the city properly could maintain a declaratory judgment action in this setting, but we note that in another context the Legislature specifically has authorized a public official who questions the constitutionality or validity of an enactment to bring a declaratory judgment action rather than act in contravention of the statute. (See Rev. & Tax.Code, § 538; see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79-80, 124 Cal.Rptr.2d 519, 52 P.3d 695.)

***1100** Accordingly, the city cannot defend the challenged actions on the ground that such actions were necessary to obtain a judicial determination of the constitutionality of California's marriage statutes.

F

The city also relies on the circumstance that each of the city officials in question took an oath of office to "support and defend" the state and federal Constitutions, [FN28] suggesting that a public official *****257** would violate his or her oath of office were the official to perform a ministerial act under a statute that the official personally believes violates the Constitution. In our view, this contention clearly lacks merit.

FN28. Article XX, section 3 of the California Constitution provides in relevant part: "Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: [¶] 'I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.' "

As Justice Mosk explained in his concurring and dissenting opinion in *Southern Pacific, supra,* 18 Cal.3d 308, 319, 134 Cal.Rptr. 189, 556 P.2d 289, a public official "faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid." A public official does not honor his or her oath to defend the Constitution by taking action in contravention of the restrictions of his or her office or authority and justifying such action by reference to his or her personal constitutional views. For example, it is clear that a justice of this court or of an intermediate appellate court does not act ****486** in contravention of his or her oath of office when the justice follows a controlling constitutional decision of a higher court even though the justice personally believes that the controlling decision was wrongly decided and that the Constitution actually

requires the opposite result. On the contrary, the oath to support and defend the Constitution requires a public official to act within the constraints of our constitutional system, not to disregard presumptively valid statutes and take action in violation of such statutes on the basis of the official's own ***1101** determination of what the Constitution means. [FN29] (See also *State v. State Board of Equalizers* (1922) 84 Fla. 592, 94 So. 681, 682-683 ["The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is ... without merit. The fallacy in it is that every act of the legislature is presumed constitutional until judicially *****258** declared otherwise, and the oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined"].) [FN30]

FN29. The brief footnote discussion in *Board of Education v. Allen* (1968) 392 U.S. 236, 241, footnote 5, 88 S.Ct. 1923, 20 L.Ed.2d 1060, relied upon by the city, does not conflict with this conclusion. In *Allen*, officials of a local public school district brought a court action challenging the validity, under the establishment clause of the First Amendment, of a state statute that required the school district to loan books free of charge to all students in the district, including students attending private religious schools. In the footnote in question, the court in *Allen* noted that no one had questioned the standing of the local district and its officials "to press their claim in this Court," and then stated that "[b]elieving [the statute in question] to be unconstitutional, [the officials] are in the position of having to choose between violating their oath [to support the United States Constitution] and taking a step--refusal to comply with [the applicable statute]--that would likely bring their expulsion from office and also a reduction in state funding for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation." (*Allen*, 392 U.S. at p. 241, fn. 5, 88 S.Ct. 1923, quoting *Baker v. Carr* (1962) 369 U.S. 186, 204, 82 S.Ct. 691.) The footnote's reference to the officials' oath to support the Constitution indicates no more than that the public officials' belief that the statute was unconstitutional afforded them standing *to bring a court action* to challenge the statute. The footnote in *Allen* does not hold that the federal Constitution, or a public official's oath to support the federal Constitution, authorizes a state official to undertake official action forbidden by a state statute based solely on the official's belief that the statute is unconstitutional, and, as discussed below (*post*, 17 Cal.Rptr.3d pp. 265-267, 95 P.3d pp. 492-494), numerous federal authorities refute that proposition.

FN30. The city also obliquely suggests that the general rule requiring a public official to perform a ministerial duty prescribed by statute, despite the official's personal view that the statute is unconstitutional, is contrary to the teaching of the Nuremberg trials, which rejected the "I was just following orders" defense. In response to a similar claim, the federal district court in *Haring v. Blumenthal* (D.D.C.1979) 471 F.Supp. 1172, 1178, footnote 15, cogently observed: "Plaintiff's comparison of his situation with that of the Nuremberg defendants is grossly simplistic. The Nuremberg defendants could have escaped liability by failing to seek and retain positions which exposed them to the execution of objectionable activity; and, should plaintiff feel sufficiently strongly about the matter, he may do likewise. Beyond that, plaintiff's analogy demonstrates primarily that debates and dialogues on public issues have become so debased in recent years that such terms as genocide, war crime, crimes against humanity, and the like are bandied about with considerable abandon in connection with almost every conceivable controversial issue of public policy. There is not the slightest similarity between the crimes committed under the aegis of a violent dictatorship and the implementation of laws adopted under a system of government which offers free elections, freedom of expression, and an independent judiciary as safeguards against excesses and as a guarantee of the ultimate rule of a sovereign citizenry." We agree.

***1102 G**

The city further contends that a general rule requiring an executive official to comply with an existing statute unless and until the statute has been judicially determined to be unconstitutional is impractical and would lead to intolerable circumstances. The city posits a hypothetical example of a public official faced with a statute that is identical in all respects to another statute that a court already has determined is unconstitutional, and suggests it would be absurd to require the official to apply the clearly invalid statute in that instance. For support, the city points to a passage in the majority opinion in *Southern Pacific*, which asks rhetorically: "[W]hen the United States Supreme Court, for example, ****487** repudiates the separate but equal doctrine established by the statutes of

one state, should the school boards of other states continue to apply identical statutes until a court declares them invalid [?]" (*Southern Pacific, supra,* 18 Cal.3d 308, 311, fn. 2, 134 Cal.Rptr. 189, 556 P.2d 289.)

[13] Whatever force this argument might have in a case in which a governing decision previously has found an identical statute unconstitutional or in which the invalidity of the statute is so patent or clearly established that no reasonable official could believe the statute is constitutional, [FN31] the argument plainly is of no avail here. Although we have no occasion in this case to determine the constitutionality of the current California marriage statutes, we can say with confidence that the asserted invalidity of those statutes certainly is not so patent or clearly established that no reasonable official could believe that the current California marriage ***259 statutes are valid. Indeed, the city cannot point to any judicial decision that has held a statute limiting marriage to a man and a woman unconstitutional under the California or federal Constitution. Instead, the city relies on state court decisions from Massachusetts, Vermont, and Hawaii, that, in interpreting their own state constitutions, assertedly have found similar statutory restrictions to violate provisions of their state's own constitution. (See *Goodridge v. Department of Pub. Health, supra,* 440 Mass. 309, 798 N.E.2d 941; *1103*Baker v. State of Vermont, supra,* 170 Vt. 194, 744 A.2d 864; *Baehr v. Lewin, supra,* 74 Haw. 530, 852 P.2d 44.) [FN32] A significant number of **488 other state and federal courts, however, have reached a contrary conclusion and have upheld the constitutional validity of such a restriction on marriage under both the federal Constitution and other state constitutions. (See, e.g., *Baker v. Nelson* (1971) 291 Minn. 310, 191 N.W.2d 185, 186-187, app. dism. for want of substantial federal question (1972) 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 [federal Constitution]; [FN33] *1104***260*Standhardt v. Super. Ct., supra,* 206 Ariz. 276, 77 P.3d 451, 454-465 [federal and Arizona Constitutions]; *Dean v. District of Columbia* (D.C.Ct.App.1995) 653 A.2d 307, 361-364 (opns. of Terry, J. & Steadman, J.) [federal Constitution]; *Jones v. Hallahan* (Ky.Ct.App.1973) 501 S.W.2d 588, 590 [federal Constitution]; *Singer v. Hara* (1974) 11 Wash.App. 247, 522 P.2d 1187, 1189-1197 [federal and Washington Constitutions]; *Adams v. Howerton* (C.D.Cal.1980) 486 F.Supp. 1119, 1124-1125, affd. (9th Cir.1982) 673 F.2d 1036, cert. den. (1982) 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 [federal Constitution].) Although the state court decisions from Massachusetts, Vermont, and Hawaii relied upon by the city surely would be of interest to a California court faced with the question whether the current California marriage statutes violate the California Constitution, a California court would be equally interested in the decisions of the courts that have reached a contrary conclusion (and in the reasoning of the minority opinions in the state court decisions relied upon by the city [see *Goodridge v. Department of Pub. Health, supra,* 440 Mass. 309, 798 N.E.2d 941, 974-1005 (dis. opns. of Spina, J., Sosman, J., & Cordy, J.); *Baehr v. Lewin, supra,* 74 Haw. 530, 852 P.2d 44, 70-73 (dis. opn. of Heen, J.)]. In light of the absence of any California authority directly on point and the sharp division of judicial views expressed in the out-of-state decisions that have considered similar constitutional challenges, this plainly is not an instance in which the invalidity of the California marriage statutes is so patent or clearly established that no reasonable official could believe that the statutes are constitutional. Therefore, this case does not fall within any narrow exception that may apply to instances in which it would be absurd or unreasonable to require a public official to comply with a statute that any reasonable official would conclude is unconstitutional.

FN31. See, for example, *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 474, 201 Cal.Rptr. 424 (holding that article III, section 3.5 of the California Constitution did not require public community college officials to continue to apply a statute requiring public employees to sign an anti-Communist-Party loyalty oath when comparable statutes had been held unconstitutional by both federal and state supreme court decisions) and *LSO, Ltd. v. Stroh, supra,* 205 F.3d 1146, 1160 (holding that no reasonable official could have believed that a statute prohibiting exhibition of nonobscene erotic art on any premises holding a liquor license could constitutionally be applied in light of a then recent United States Supreme Court decision).

FN32. Of the three decisions cited by the city, the Massachusetts decision in *Goodridge v. Department of Pub. Health, supra,* 440 Mass. 309, 798 N.E.2d 941, appears to be the only one squarely to hold that a state constitution precludes the state from withholding the status of marriage from same-sex couples. In *Baker v. State of Vermont, supra,* 170 Vt. 194, 744 A.2d 864, the court summarized its conclusion under the "common benefits" clause of the Vermont Constitution, as follows: "The State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some

equivalent statutory alternative rests with the Legislature." (744 A.2d at p. 867; see also *id.* at pp. 886-887.) The Vermont Legislature subsequently enacted a civil union statute. (Vt. Stat. Ann., tit. 15, § § 1201-1207 (supp.2001).)

In *Baehr v. Lewin, supra*, 74 Haw. 530, 852 P.2d 44, the Hawaii Supreme Court held that the trial court in that case had erred in granting judgment on the pleadings against three same-sex couples who had sued for declaratory and injunctive relief after being denied marriage licenses, concluding that the plaintiffs were entitled to go forward with their action and that, under the equal protection clause of the Hawaii Constitution, the state would have to demonstrate a compelling interest to justify the statutory classification. (852 P.2d at p. 68.) Following the decision in *Baehr*, the voters in Hawaii amended the Hawaii Constitution to limit marriage to unions between a man and a woman, and, in light of that amendment, the Hawaii Supreme Court thereafter ordered entry of judgment in favor of the defendants in the *Baehr* litigation. (See *Baehr v. Miike* (1999) 92 Hawai'i 634, 994 P.2d 566 [full order reported at 1999 Haw.Lexis 391].)

In addition to relying upon *Goodridge*, *Baker*, and *Baehr*, the city points to a passage in the dissenting opinion of Justice Scalia in *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508, in which he expressed the view that the reasoning of the majority opinion in *Lawrence*--holding a Texas sodomy statute unconstitutional--would lead to the conclusion that a statute precluding same-sex marriages also would be unconstitutional. (*Lawrence v. Texas, supra*, 539 U.S. at pp. 604- 605, 123 S.Ct. 2472 (dis. opn. by Scalia, J.)) The majority opinion in *Lawrence*, however, expressly stated that "[t]he present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Lawrence, supra*, 539 U.S. at p. 578, 123 S.Ct. 2472). In light of this very specific disclaimer in the majority opinion in *Lawrence*, we conclude that the city cannot plausibly claim that the *Lawrence* decision clearly establishes that a state statute limiting marriage to a man and a woman is unconstitutional under the federal Constitution. (See also *Standhardt v.Super. Ct.* (Ariz.Ct.App.2003) 206 Ariz. 276, 77 P.3d 451, 454-460, 464- 465 [post-*Lawrence* case rejecting claim that *Lawrence* indicates the federal Constitution guarantees the right to same-sex marriage].)

FN33. Petitioners in *Lewis* maintain that because the United States Supreme Court summarily dismissed the appeal in *Baker v. Nelson* for want of a substantial federal question and because such a summary dismissal is treated as a decision on the merits (see *Mandel v. Bradley* (1977) 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199; *Hicks v. Miranda* (1975) 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223), the summary dismissal in *Baker v. Nelson* definitively establishes that, under current federal law, a statute limiting marriage to a man and a woman does not violate the federal Constitution. The city, on the other hand, cites a number of decisions stating that when there have been subsequent doctrinal developments in the United States Supreme Court that undermine the holding in a summary dismissal, the lower courts are not bound to follow the summary dismissal as controlling authority (see, e.g., *Tenafly Eruv Ass'n v. Borough of Tenafly* (3d Cir.2002) 309 F.3d 144, 173, fn. 33; *Lecates v. Justice of the Peace Court No. 4 of Delaware* (3d Cir.1980) 637 F.2d 898, 904), and the city argues that there have been such doctrinal developments in subsequent high court decisions that undermine the holding in *Baker v. Nelson*. We find no need to resolve this dispute here, because whatever the current effect of the summary dismissal in *Baker v. Nelson*, the case before us clearly does not present an instance in which the invalidity of the current California marriage statutes is so patent or clearly established that no reasonable official could believe that the statutes are constitutional.

H

[14] Accordingly, we conclude that, under California law, the city officials had no authority to refuse to perform their ministerial duty in conformity with the current California marriage statutes on the basis of their view that the ***1105** statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional.

It is worth noting that the California rule generally precluding an executive official from refusing to perform a ministerial duty imposed by statute on the basis of the official's determination or opinion that the statute is unconstitutional is consistent with the ****489** general rule applied in the overwhelming *****261** majority of cases from other jurisdictions. (See generally Annot., Unconstitutionality of Statute as Defense to Mandamus Proceeding (1924) 30 A.L.R. 378, 379["[t]he weight of authority [holds] that a public officer whose duties are of

a ministerial character cannot question the constitutionality of a statute as a defense to a mandamus proceeding to compel him to perform some official duty, where in the performance of such duty his personal interests or rights will not be affected, and he will not incur any personal liability, or violate his oath of office"]; Annot. (1940) 129 A.L.R. 941 [supplementing 30 A.L.R. 378]; see also Note (1928) 42 Harv. L.Rev. 1071.) [FN34]

FN34. Our review of the decisions of our sister states and the District of Columbia reflects that of the 33 jurisdictions in which decisions have been found addressing this subject, 26 appear to have recognized and endorsed the proposition that, as a general rule, an executive official who is charged with a ministerial duty to enforce a statute has no authority to refuse to apply the statute, in the absence of a judicial determination that the statute is unconstitutional, on the ground that the official believes the statute is unconstitutional, although many of the jurisdictions, like California, also recognize an exception for bond or other public finance cases, in which an official is permitted to refuse to apply a statute as a means of obtaining a timely judicial determination of the legality of the bond or public expenditure. (See *Denver Urban Renewal Authority v. Byrne* (Colo.1980) 618 P.2d 1374, 1379- 1380 [foll. *Ames v. People* (1899) 26 Colo. 83, 56 P. 656, 658]; *Levitt v. Attorney General* (1930) 111 Conn. 634, 151 A. 171, 176; *Panitz v. District of Columbia* (D.C.Cir.1940) 112 F.2d 39, 41-42 [applying District of Columbia law]; *Fuchs v. Robbins* (Fla.2002) 818 So.2d 460, 463-464 [foll. *State v. State Board of Equalizers, supra,* 84 Fla. 592, 94 So. 681, 682-684]; *Taylor v. State* (1931) 174 Ga. 52, 162 S.E. 504, 508-509; *Howell v. Board of Comm'rs* (1898) 6 Idaho 154, 53 P. 542, 543; *People ex rel. Atty. Gen. v. Salomon* (1870) 54 Ill. 39, 44- 46; *Bd. of Sup'rs of Linn Cty. v. Dept. of Revenue* (Iowa 1978) 263 N.W.2d 227, 232-234 [foll. *Charles Hewitt & Sons Co. v. Keller* (1937) 223 Iowa 1372, 275 N.W. 94, 95-97]; *Tincher v. Commonwealth* (1925) 208 Ky. 661, 271 S.W. 1066, 1068; *Dore v. Tugwell* (1955) 228 La. 807, 84 So.2d 199, 201-202 [foll. *State v. Heard* (La.1895) 18 So. 746, 749- 752]; *Smyth v. Titcomb* (1850) 31 Me. 272, 285; *Maryland Classified Emp. Ass'n v. Anderson* (1977) 281 Md. 496, 380 A.2d 1032, 1035-1037; *Assessors of Haverhill v. New England Tel. & Tel. Co.* (1955) 332 Mass. 357, 124 N.E.2d 917, 920-921; *State v. Steele County Bd. of Com'rs* (1930) 181 Minn. 427, 232 N.W. 737, 738-739; *St. Louis County v. Litzinger* (Mo.1963) 372 S.W.2d 880, 881-882 [foll. *State v. Becker* (1931) 328 Mo. 541, 41 S.W.2d 188, 190-191]; *State v. McFarlan* (1927) 78 Mont. 156, 252 P. 805, 808; *State v. Sedillo* (1929) 34 N.M. 1, 275 P. 765, 765-767; *Attorney General v. Taubenheimer* (1917) 178 A.D. 321, 321, 164 N.Y.S. 904, 904; *Dept. of State Highways v. Baker* (1940) 69 N.D. 702, 290 N.W. 257, 260-262; *State v. Griffith* (1940) 136 Ohio St. 334, 25 N.E.2d 847, 848-849; *State ex rel. Cruce v. Cease* (1911) 28 Okla. 271, 114 P. 251, 252-253; *Commonwealth v. Mathues* (1904) 210 Pa. 372, 59 A. 961, 964-969; *State v. Burley* (1908) 80 S.C. 127, 61 S.E. 255, 257; *Thoreson v. State Board of Examiners* (1899) 19 Utah 18, 57 P. 175, 177-179; *City of Montpelier v. Gates* (1934) 106 Vt. 116, 170 A. 473, 476-477; *Capito v. Topping* (1909) 65 W.Va. 587, 64 S.E. 845, 846; *Riverton Valley D. Dist. v. Board of County Com'rs* (1937) 52 Wyo. 336, 74 P.2d 871, 873.)

Of the seven states that may be viewed as adopting the minority position, most have addressed the issue only in the context of actions either relating to matters affecting the expenditure of public funds or where the rights or interests of the public officer or public entity were directly at stake. (See *State v. Steinwedel* (1932) 203 Ind. 457, 180 N.E. 865, 866- 868 [public expenditure]; *Toombs v. Sharkey* (1925) 140 Miss. 676, 106 So. 273, 277 [public expenditure]; *Van Horn v. State* (1895) 46 Neb. 62, 64 N.W. 365, 371-372 [county reorganization]; *State v. Slusher* (1926) 119 Or. 141, 248 P. 358, 359-360 [tax collection]; *Holman v. Pabst* (Tex.Civ.App.1930) 27 S.W.2d 340, 342-343 [local election procedure]; *Hindman v. Boyd* (1906) 42 Wash. 17, 84 P. 609, 612 [local election procedure]; *State v. Tappan* (1872) 29 Wis. 664, 9 Am. Rep. 622, 635 [tax collection].) A number of the out-of-state cases discuss a separate line of cases that address the issue whether a public official or public entity has "standing" to bring a court action--for example, a declaratory judgment action--challenging the constitutionality of a statute the official or entity is obligated to comply with or enforce. (See, e.g., *Fuchs v. Robbins, supra,* 818 So.2d 460, 463-464; *Bd. of Sup'rs of Linn Cty. v. Dept. of Revenue, supra,* 263 N.W.2d 227, 233-234; see also *City of Kenosha v. State* (1967) 35 Wis.2d 317, 151 N.W.2d 36, 42-43.) Although the standing issue involves some of the same

> considerations that are applicable to the issue we face here, from a separation of powers perspective, conduct by an executive official that simply asks a court to determine the constitutionality of a statute would appear to raise much less concern than an executive official's unilateral refusal to enforce a statute based on the official's opinion that the statute is unconstitutional.

***262 *1106** Although there are numerous out-of-state cases that address this issue, one of the most quoted decisions is *State v. Heard, supra,* 18 So. 746, 752, where the court, after an extensive **490 review of the then existing authorities from various jurisdictions, concluded: "[E]xecutive officers of the State government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal, until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so the most inextricable confusion would inevitably result, and 'produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government.' 'It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it.' " (See also *Department of State Highways v. Baker, supra,* 69 N.D. 702, 290 N.W. 257, 259 ["There is no question as to the general rule that a subordinate ministerial officer to whom no injury can result and to whom no violation of duty can be imputed by reason of compliance with the statute may not question the constitutionality of the statute imposing such duty"]; *State v. Becker, supra,* 328 Mo. 541, 41 S.W.2d 188, 190 ["It is well settled in this state and in a great majority of our sister states that, as a general rule, a ministerial officer cannot defend his refusal to perform a duty prescribed by a statute on the ground that such statute is unconstitutional"]; ***1107** *State v. Steele County Board of Com'rs, supra,* 181 Minn. 427, 232 N.W. 737, 738 [although "[t]he authorities are in conflict," "[t]he better doctrine, supported by the weight of authority, is that an official so charged with the performance of a ministerial duty will not be allowed to question the constitutionality of such a law.... Officials acting ministerially are not clothed with judicial authority.... Their authority is the command of the statute, and it is the limit of their power"]; *State v. State Board of Equalizers, supra,* 84 Fla. 592, 94 So. 681, 683 ["It is contended that an *individual* may refuse to obey a law that he believes to be unconstitutional, and take a chance on its fate in the courts. He does this, however, 'at his peril'; the 'peril' being to suffer the consequences, such as fine or imprisonment, or both, if the courts should hold the act to be constitutional. [¶] A *ministerial officer* refusing to enforce a law because in his opinion it is unconstitutional takes no such risk. He does nothing 'at his peril,' because he subjects himself to no penalty if his opinion as to the unconstitutionality of an act is not sustained by the courts. [¶] It is the doctrine of nullification, pure and simple, and whatever may have been said of the soundness of that doctrine when sought to be applied by states to acts of Congress, the most ardent ***263** followers of Mr. Calhoun never extended it to give to ministerial officers the right and power to nullify a legislative enactment" (italics added)].)

I

In addition to the California decisions reviewed above and the weight of judicial authority from other jurisdictions, consideration of the practical consequences of a contrary rule further demonstrates the unsoundness of the city's position.

To begin with, most local executive officials have no legal training and thus lack the relevant expertise to make constitutional determinations. Although every individual (lawyer or nonlawyer) is, of course, free to form his or her own opinion of what the Constitution means and how it should be interpreted and applied, a local executive official has no authority to impose his or her personal view on others by refusing to comply with a ministerial duty imposed by statute. (See, e.g., *Southern Pacific, supra,* 18 Cal.3d 308, 321, 134 Cal.Rptr. 189, 556 P.2d 289 (conc. & dis. opn. of Mosk, J.) ["Certainly attorneys have no monopoly on wisdom, but a person trained for three or more years in a college of law and then tempered with at least a decade of experience within the judicial system is likely to be far better equipped to make difficult constitutional judgments than a lay administrator with no background in the law"].) [FN35]

> FN35. Several amici curiae point out that nonattorney public officials are able to seek legal advice from a county counsel or city attorney (see Gov.Code, § § 27640, 41801) and assert that such nonattorney officials presumably will do so before disobeying a statute on the ground it is unconstitutional. County counsel and city attorneys, however, also are executive officers who, like a nonattorney public official, have not been granted judicial power and thus also lack the authority to determine that a statute is unconstitutional and that it should not be followed. A nonattorney public official generally will be in no position to critically

> evaluate legal advice obtained from such counsel regarding the question of a statute's constitutionality. Outside the very narrow category of instances in which legal counsel can advise that the invalidity of the statute is so patent or clearly established that *any* reasonable public official would conclude that the statute in question is unconstitutional (see, *ante,* 17 Cal.Rptr.3d pp. 258-260, 95 P.3d pp. 486-488), whenever a nonattorney official defies a statutory mandate on the basis of a county counsel's or city attorney's legal advice, the official's refusal to apply the statute actually will rest upon legal counsel's judgment on a debatable constitutional question, rather than upon the judgment of the official on whom the statute imposes a ministerial duty. Furthermore, a nonattorney official is under no obligation to act in accordance with a legal opinion (often given confidentially) provided by a county counsel or city attorney.

***1108 **491** Second, if, as the city maintains, a local official were to possess the authority to act on the basis of his or her own constitutional determination, such an official generally would arrive at that determination without affording the affected individuals any due process safeguards and, in particular, without providing any opportunity for those supporting the constitutionality of the statutes to be heard. In its opposition to the initial petition filed in this case, the city urged this court not to immediately accept jurisdiction over the substantive question of the constitutionality of California's marriage laws at this time, because that question properly could be determined only after a full presentation of evidence before a trial court. The city officials themselves, however, made their own constitutional determination without conducting any such evidentiary hearing or taking other measures designed to protect the rights of those who maintain that the statute is constitutional. Thus, despite the settled rule that a duly enacted statute is presumed to be constitutional, under the city's proposed rule a local executive official *****264** would be free to determine that a statute is unconstitutional and refuse to enforce it, without providing even the most rudimentary of due process procedures--notice and an opportunity to be heard--to anyone directly affected by the official's action.

Third, there are thousands of elected and appointed public officials in California's 58 counties charged with the ministerial duty of enforcing thousands of state statutes. If each official were empowered to decide whether or not to carry out each ministerial act based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide. (Cf. *Haring v. Blumenthal, supra,* 471 F.Supp. 1172, 1178-1179 ["Unless and until the Congress, or a court of competent jurisdiction ..., determines that a particular tax exemption ruling is invalid, the employees of the [Internal Revenue] Service ... are obliged to implement that ruling. Not merely the concept of a uniform tax policy but the effectiveness of the government of the United States as a functioning entity would be ***1109** in jeopardy if each employee could take it upon himself to decide which particular laws, regulations, and policies are legal or illegal, and to base his official actions upon that private determination"].) Although in the past the multiplicity of public officials performing similar ministerial acts under a single statute never has posed a problem in this regard, that is undoubtedly true only because most officials never imagined they had the authority to determine the constitutionality of a statute that they have a ministerial duty to enforce. Were we to hold that such officials possess this authority, it is not difficult to anticipate that private individuals who oppose enforcement of a statute and question its constitutionality would attempt to influence ministerial officials in various locales to exercise--on behalf of such opponents--the officials' newly recognized authority. The circumstance that many local officials have no legal training would only exacerbate the problem. As a consequence, the uneven enforcement of statutory ****492** mandates in different local jurisdictions likely would become a significant concern.

Fourth, the confused state of affairs arising from diverse actions by a multiplicity of local officials frequently would continue for a considerable period of time, because under the city's proposed rule a court generally could not order a public official to comply with the challenged statute until the court actually had determined that it was constitutional. In view of the many instances in which a constitutional challenge to a statute entails lengthy litigation, the lack of uniform treatment afforded to similarly situated citizens throughout the state often would be a long-term phenomenon.

These practical considerations simply confirm the soundness of the established rule that an executive official generally does not have the authority to refuse to comply with a ministerial duty imposed by statute on the basis of the official's opinion that the statute is unconstitutional. [FN36]

> FN36. Despite the suggestion in Justice Werdegar's concurring and dissenting opinion (*post,* 17 Cal.Rptr.3d at pp. 286-289, 95 P.3d at

> pp. 509-513), this established rule does not represent any sort of broad claim of *judicial* power over the *executive* branch, but on the contrary reflects the general duty of an *executive* official, in carrying out a ministerial function authorized by statute, not to assume the authority to supersede or contravene the directions of the *legislative* branch or to exercise the traditional function of the *judicial* branch.

***265 V

The city further claims; however, that even if *California law* does not recognize the authority of a local official to refuse to comply with a statutorily mandated ministerial duty absent a judicial determination that the statute is unconstitutional, under the federal supremacy clause (U.S. Const., art. VI, § 2) California lacks the power to require a public official to comply with a state statute that the official believes violates the federal Constitution. *1110 Although in the present case the mayor's initial letter to the county clerk relied solely upon the asserted unconstitutionality of the California marriage statutes under the *California* Constitution, the city, in the opposition filed in this court, for the first time advanced the position that the action taken by the city officials was based, at least in part, on their belief that the California statutes violate the *federal* Constitution, and the city now rests its supremacy clause claim on this newly asserted belief. Putting aside the question of the bona fides of this belatedly proffered rationale, we conclude that, in any event, the federal supremacy clause provides no support for the city's argument.

To begin with, the principal cases upon which the city relies--*Ex Parte Young* (1908) 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 and *LSO, Ltd. v. Stroh, supra,* 205 F.3d 1146--are readily distinguishable from the present case. Those cases stand only for the proposition that the circumstance that a state official is acting pursuant to the provisions of an applicable state statute does not necessarily shield the official (or the public entity on whose behalf the official acts) either from an injunction or a monetary judgment issued by a federal court, where the federal court subsequently determines that the state statute violates the federal Constitution. [FN37] The city has not cited any case holding that the federal Constitution prohibits a state from defining the authority of a state's executive officials in a manner that requires such officials to comply with a clearly applicable statute unless and until such a statute is judicially determined to be unconstitutional, nor any case holding that the federal Constitution compels a state to permit every executive official, state or local, to refuse to enforce an applicable statutory provision whenever the official personally believes the statute violates the federal Constitution.

> FN37. As explained above (*ante,* 17 Cal.Rptr.3d pp. 254-255, 95 P.3d pp. 483-484), under the circumstances in this case there is no plausible basis for suggesting that the city officials would have subjected themselves to personal liability had they acted in conformity with the terms of the current California marriage statutes.

[15] Furthermore, numerous pronouncements by the United States Supreme Court directly refute the city's contention that the supremacy clause or any other provision of the federal Constitution embodies such a principle. To begin with, the high court's position on the proper role of federal executive **493 officials with regard to constitutional determinations is instructive. In *Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 152-153, 64 S.Ct. 474, 88 L.Ed. 635, for example, in response to the plaintiff's contention that under one proposed reading of the applicable statute "the [federal Price] Administrator [an executive official] would have to decide whether the state regulation is constitutional before he should recognize it," the United States Supreme *1111 Court stated: "We cannot give weight to this view of [the Price Administrator's] functions, which we think it unduly magnifies. *State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly* ***266 *no power to adjudicate constitutional issues is conferred on the Administrator.... We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of a contrary judicial determination.*" (Italics added; see also *Weinberger v. Salfi* (1975) 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 ["[T]he constitutionality of a statutory requirement [is] a matter which is beyond [the Secretary of Health, Education, and Welfare's] jurisdiction to determine"]; *Johnson v. Robison* (1974) 415 U.S. 361, 368, 94 S.Ct. 1160, 39 L.Ed.2d 389 ["[a]djudication of the constitutionality of congressional amendments has generally been thought beyond the jurisdiction of administrative agencies"]; *Oestereich v. Selective Service Board* (1968) 393 U.S. 233, 242, 89 S.Ct. 414, 21 L.Ed.2d 402 (conc. opn. of Harlan, J.) [same]; cf. *Thunder Basin Coal Co. v. Reich* (1994) 510 U.S. 200, 215, 114 S.Ct. 771, 127 L.Ed.2d 29.) In light of the high court's repeated statements that federal executive officials generally lack authority to determine the constitutionality of statutes, the city's claim that the federal supremacy clause itself grants a state or local official the authority to refuse to enforce a statute that the official believes is unconstitutional is plainly untenable.

Furthermore, there are several earlier United States

Supreme Court cases that even more directly refute the city's contention. *Smith v. Indiana* (1903) 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125 was a case, arising from the Indiana state courts, in which a county auditor had refused to grant a statutorily authorized exemption to a taxpayer because the auditor believed the exemption violated the federal Constitution. A mandate action was filed against the auditor, and the state courts permitted the auditor to raise and litigate the asserted unconstitutionality of the statute as a defense in the mandate action, ultimately determining that the exemption was constitutionally permissible and directing the auditor to grant the exemption. The auditor appealed the state court decision upholding the constitutionality of the state statute to the United States Supreme Court.

In its opinion in *Smith*, the high court observed that "there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution" (*Smith v. Indiana, supra*, 191 U.S. at p. 148, 24 S.Ct. 51), but it recognized that a state court "has the power ... to assume jurisdiction in such a case if it chooses to do so." (*Ibid.*) At the same time, however, the court in *Smith* stated explicitly that "the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it ... *is a purely* ***1112** *local question* " (*ibid.*, italics added)--that is, purely a question of state (not federal) law--a conclusion that directly refutes the city's claim that federal law requires a state to recognize the authority of a ministerial official to refuse to comply with a statute whenever the official believes it violates the federal Constitution. Moreover, in *Smith* itself the United States Supreme Court went on to hold that although the state court in that case had permitted the auditor to litigate the constitutionality of the state statute, the auditor did not have a sufficient personal interest in the litigation to support jurisdiction in the United States Supreme Court; thus the high court dismissed the auditor's appeal without reaching the question of the constitutionality of the underlying ***267** statute. [FN38] A few years later, the high ****494** court followed its decision in *Smith*, dismissing a similar appeal by a state auditor in *Braxton County Court v. West Virginia* (1908) 208 U.S. 192, 197, 28 S.Ct. 275, 52 L.Ed. 450.

> FN38. The court in *Smith* explained in this regard: "It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so.... He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers...." (*Smith v. Indiana, supra*, 191 U.S. at pp. 148-149, 24 S.Ct. 51.)

In light of the foregoing high court decisions, we conclude that the California rule set forth above does not conflict with any federal constitutional requirement.

VI

The city contends, however, that even if we conclude that its officials lacked the authority to refuse to enforce the marriage statutes, we still cannot issue the writ of mandate sought by petitioners without first determining whether California's current marriage statutes are constitutional, in light of the general proposition that courts will not issue a writ of mandate to require a public official to perform an unconstitutional act. As the Florida Supreme Court explained in a similar context, however, "[i]t is no answer to say that the courts will not require a ministerial officer to perform an unconstitutional act. That aspect of the case is not before us. We must first determine the power of the ministerial officer to refuse to perform a statutory duty because *in his opinion* the law is unconstitutional. When we decide that, we do not get to the question of the constitutionality of the act, and it will not be decided." (*State v. State Board of Equalizers, supra*, 84 Fla. 592, 94 So. 681, 684.) Accordingly, because we have concluded that the city officials have no authority to refuse to apply the current marriage statutes in the absence of a judicial determination that these statutes are unconstitutional, we conclude that the requested writ of mandate should issue.

*1113 VII

[16] Finally, we must determine the appropriate scope of the relief to be ordered. As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case, and a court is not necessarily limited by the prayer sought in the mandate petition but may grant the relief it deems appropriate. (See *Johnson v. Fontana County F.P. Dist.* (1940) 15 Cal.2d 380, 391-392, 101 P.2d 1092; *George M. v. Superior Court* (1988) 201 Cal.App.3d 755, 760, 247 Cal.Rptr. 330; *Sacramento City Police Dept. v. Superior Court* (1984) 156 Cal.App.3d 1193, 1197, fn. 5, 203 Cal.Rptr. 169.)

In the present case, we are faced with an unusual, perhaps unprecedented, set of circumstances. Here, local public officials have purported to authorize, perform, and register literally thousands of marriages in direct violation of explicit state statutes. The Attorney General, as well as a number of local taxpayers, have filed these original mandate proceedings in this court to halt the local officials' unauthorized conduct and to compel these

officials to correct or undo the numerous unlawful actions they have taken in the immediate past. As explained above, we have determined that the city officials exceeded their authority in issuing marriage licenses to, solemnizing marriages of, and registering marriage certificates on behalf of, same-sex couples. Under these circumstances, we conclude ***268 that it is appropriate in this mandate proceeding not only to order the city officials to comply with the applicable statutes in the future, but also to direct the officials to take all necessary steps to remedy the continuing effect of their past unlawful actions, including correction of all relevant official records and notification of affected individuals of the invalidity of the officials' actions.

[17] In light of the clear terms of Family Code section 300 *defining* marriage as a "personal relationship arising out of a civil contract between a man and a woman" and the legislative history of this provision demonstrating that the purpose of this limitation was to "prohibit persons of the same sex from entering lawful marriage" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 [discussed, *ante*, 17 Cal.Rptr.3d **495 p. 236, fn. 11, 95 P.3d p. 468, fn. 11]), we believe it plainly follows that all same-sex marriages authorized, solemnized, or registered by the city officials must be considered void and of no legal effect from their inception. Although this precise issue has not previously been presented under California law, every court that has considered the question has determined that when state law limits marriage to a union between a man and a woman, a same-sex marriage performed in violation of state law is void and of no legal effect. (See, e.g., *Jones v. Hallahan, supra*, 501 S.W.2d 588, 589 [same-sex marriage "would not constitute a marriage" under Kentucky law]; *1114 *Anonymous v. Anonymous* (N.Y.Sup.Ct.1971) 67 Misc.2d 982, 325 N.Y.S.2d 499, 501 [under New York law, same-sex "marriage ceremony was a nullity" and "no legal relationship could be created by it"]; *McConnell v. Nooner* (8th Cir.1976) 547 F.2d 54, 55-56 ["purported" same-sex marriage of no legal effect under Minnesota law]; *Adams v. Howerton, supra*, 486 F.Supp. 1119, 1122 [purported same-sex marriage has "no legal effect" under Colorado or federal law].) The city has not cited any case in which a same-sex marriage, performed in contravention of a state statute that bans such marriages and that has not judicially been held unconstitutional, has been given any legal effect.

The city and several amici curiae representing same-sex couples who obtained marriage licenses from city officials--and had certificates of registry of marriage registered by such officials--raise a number of objections to our determining that the same-sex marriages that have been performed in California are void and of no legal effect, but we conclude that none of these objections is meritorious.

First, the city and amici curiae contend that the Attorney General and the petitioners in *Lewis* lack standing to challenge the validity of the same-sex marriages that already have been performed, relying upon the provisions of Family Code section 2211, which sets forth the categories of individuals who may bring an action to nullify a "voidable" marriage--categories that generally are limited to one of the parties to the marriage or, where a party to the marriage is a minor or a person incapable of giving legal consent, the parent, guardian, or conservator of such party. Past California decisions, however, make clear that the procedural requirements generally applicable in an action to nullify or annul a "voidable" marriage are inapplicable when a purported marriage is void from the beginning or is a legal nullity. As this court stated in *Estate of Gregorson* (1911) 160 Cal. 21, 26, 116 P. 60: "A marriage prohibited as incestuous *or illegal* and declared to be 'void' or 'void from the beginning' is a legal nullity *and its validity may be asserted or shown in any proceeding in which the fact of marriage* ***269 *may be material.*" (Italics added.) In our view, the present mandate action, which seeks to compel public officials to correct the effects of their unauthorized official conduct in issuing marriage licenses to or registering marriage certificates of thousands of same-sex couples, is such a proceeding, because the validity or invalidity of the same-sex marriages authorized and registered by such officials is central to the scope of the remedy that may and should be ordered in this case. [FN39]

> FN39. Contrary to the assertion of Justice Werdegar's concurring and dissenting opinion (*post*, 17 Cal.Rptr.3d at p. 286, 95 P.3d at p. 509), the validity or invalidity of the existing same-sex marriages is material to this case not simply because the Attorney General has requested this court to decide that issue, but because resolution of the issue is necessary in determining the scope of the remedy that properly should be ordered in this mandate action to correct, and undo the potentially disruptive consequences of, the unauthorized actions of the city officials.

*1115 The city and amici curiae additionally contend that we cannot properly determine the validity or invalidity of the existing same-sex marriages in this proceeding because the parties to a marriage are indispensable parties to any legal action seeking to invalidate a marriage, and the thousands of same-sex couples whose marriages were authorized and registered by the local authorities are not

formal parties to the present mandate proceeding. The city relies on cases involving actions that have been brought to annul a particular marriage on the basis of facts peculiar to that marriage, in which the courts have held the parties to the marriage to be **496 indispensable parties. (See, e.g., *McClure v. Donovan* (1949) 33 Cal.2d 717, 725, 205 P.2d 17.) In the present instance, by contrast, the question of the validity or invalidity of a same-sex marriage does not depend upon any facts that are peculiar to any individual same-sex marriage, but rather is a purely legal question applicable to all existing same-sex marriages, and rests on the circumstance that the governing state statute limits marriage to a union between a man and a woman. Under ordinary principles of stare decisis, an appellate decision holding that, under current California statutes, a same-sex marriage performed in California is void from its inception effectively would resolve that legal issue with respect to all couples who had participated in same-sex marriages, even though such couples had not been parties to the original action. Because the validity or invalidity of same-sex marriages under current California law involves only a pure question of law, couples who are not formal parties to this action are in no different position than if this question of law had been presented and resolved in an action involving some other same-sex couple rather than in an action in which the legal arguments regarding the validity of such marriages have been vigorously asserted not only by the city officials who authorized and registered such marriages but also by various amici curiae representing similarly situated same-sex couples. Requiring a separate legal proceeding to be brought to invalidate each of the thousands of same-sex marriages, or requiring each of the thousands of same-sex couples to be named and served as parties in the present action, would add nothing of substance to this proceeding.

The city and amici curiae further contend that it would violate the due process rights of the same-sex couples who obtained marriage licenses, and had their marriage certificates registered by the local officials, for this court to determine the validity of same-sex marriages without giving the couples notice and an opportunity to be heard. To begin with, there may be some question whether an individual who, ***270 through the deliberate unauthorized conduct of a public official, obtains a license, permit, or other status that clearly is not authorized by state law, possesses a constitutionally protected *1116 property or liberty interest that gives rise to procedural due process guarantees. (Cf., e.g., *Snyder v. City of Minneapolis* (Minn.1989) 441 N.W.2d 781, 792; *Mellin v. Flood Brook Union School Dist.* (2001) 173 Vt. 202, 790 A.2d 408, 421; *Gunkel v. City of Emporia, Kan.* (10th Cir.1987) 835 F.2d 1302, 1304-1305 & fns. 7, 8.) In any event, these same-sex couples have not been denied the right to meaningfully participate in these proceedings. Although we have not permitted them to intervene formally in these actions as parties, our order denying intervention to a number of such couples explicitly was without prejudice to participation as amicus curiae, and numerous amicus curiae briefs have been filed on behalf of such couples directly addressing the question of the validity of the existing same-sex marriages. Accordingly, the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages have been heard and fully considered. Furthermore, under the procedure we adopt below (see, *post,* 17 Cal.Rptr.3d p. 272, 95 P.3d p. 498), before the city takes corrective action with regard to the record of any particular same-sex marriage license or same-sex marriage certificate, each affected couple will receive individual notice and an opportunity to show that the holding of the present opinion is not applicable to the couple.

The city and amici curiae next maintain that even if this court properly may address the validity of the existing same-sex marriages in this proceeding, under California law such marriages cannot be held void (or voidable, for that matter), because there is no California statute that explicitly provides that a marriage between two persons of the same sex or gender is void (or voidable). As we have seen, however, Family Code section 300 explicitly *defines* marriage as "a personal relation arising out of a civil contract between a man and a woman," and in view of the language and legislative history of this provision (see, *ante,* 17 Cal.Rptr.3d p. 236, fn. 11, 95 P.3d p. 468, fn. 11), we believe that the Legislature has made clear its intent that a same-sex marriage performed in California is not a valid marriage under California law. Accordingly, we view Family Code **497section 300 itself as an explicit statutory provision establishing that the existing same-sex marriages at issue are void and invalid.

The city and amici curiae also rely upon Family Code section 306, which provides in part that "[n]oncompliance with this part by a nonparty to the marriage does not invalidate the marriage," maintaining that this statute demonstrates that even if the county clerk erred in issuing marriage licenses to same-sex couples, such noncompliance by the county clerk (a nonparty to the marriage) does not invalidate the marriage. In our view, section 306--which is unofficially entitled "Procedural requirements; effect of noncompliance"-- has no application here. The defect at issue clearly is not simply a procedural defect in the issuance of the license or in the solemnization or registration process. Indeed, it is not simply the invalidity or unauthorized nature of the *county clerk's* action in issuing a marriage license to a same-sex *1117 couple that renders void any marriage between a same-sex couple. What renders such a purported

marriage void is the circumstance that the current California statutes reflect a clear legislative decision to "prohibit persons of the same sex from entering lawful marriage." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, discussed, *ante,* 17 Cal.Rptr.3d at ***271 p. 236, fn. 11, 95 P.3d at p. 468, fn. 11.) It is that substantive legislative limitation on the institution of marriage, and not simply the circumstance that the actions of the county clerk or county recorder were unauthorized, that renders the existing same-sex marriages invalid and void from the beginning.

Finally, the city urges this court to postpone the determination of the validity of the same-sex marriages that already have been performed and registered until a court rules on the substantive constitutional challenges to the California marriage statutes that are now pending in superior court. From a practical perspective, we believe it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail. [FN40]

> FN40. Whether or not any same-sex couple "has filed a lawsuit seeking the legal benefits of their purported marriage" (conc. & dis. opn. of Werdegar, J., *post,* 17 Cal.Rptr.3d at p. 284, 95 P.3d at p. 508), there can be no question that the legal status of such couples has and will continue to generate numerous questions for such couples and third parties that must be resolved on an ongoing basis.

In any event, we believe such a delay in decision is unwarranted on more fundamental grounds. As we have explained, because Family Code section 300 clearly limits marriage in California to a marriage between a man and a woman and flatly prohibits persons of the same sex from lawfully marrying in California, the governing authorities establish that the same-sex marriages that already have been performed are void and of no legal effect *from their inception.* (See, *ante,* 17 Cal.Rptr.3d p. 267, 95 P.3d p. 493 and cases cited; see also *Estate of Gregorson, supra,* 160 Cal. 21, 26, 116 P. 60 ["A marriage prohibited as ... illegal and declared to be 'void' or 'void from the beginning' is a legal nullity...."].) In view of this well-established rule, we do not believe it would be responsible or appropriate for this court to fail at this time to inform the parties to the same-sex marriages and other persons whose legal rights and responsibilities may depend upon the validity or invalidity of these marriages that these marriages are invalid, notwithstanding the pendency of numerous lawsuits challenging the constitutionality of California's marriage statutes. Withholding or delaying a ruling on the current validity of the existing same-sex marriages might lead numerous persons to make fundamental changes in their lives or otherwise proceed on the basis of erroneous expectations, creating potentially irreparable harm.

*1118 Although the city and the amici curiae representing same-sex couples suggest that these couples would prefer to live with uncertainty rather than be told at this point that the marriages are invalid, in light of the explicit terms of Family Code section 300 and the warning included in the same-sex marriage license applications provided by the **498 city (see, *ante,* 17 Cal.Rptr.3d p. 232, fn. 5, 95 P.3d p. 465, fn. 5) these couples clearly were on notice that the validity of their marriages was dependent upon whether a court would find that the city officials had authority to allow same-sex marriages. Now that we have confirmed that the city officials lack this authority, we do not believe that these couples have a persuasive equitable claim to have the validity of the marriages left in doubt at this point in time, creating uncertainty and potential harm to others who may need to know whether the marriages are valid or not. Had the current constitutional ***272 challenges to the California marriage statutes followed the traditional and proper course (see, *ante,* 17 Cal.Rptr.3d p. 256, 95 P.3d p. 485), no same-sex marriage would have been conducted in California prior to a judicial determination that the current California marriage statutes are unconstitutional. Accordingly, as part of the remedy for the city officials' unauthorized and unlawful actions, we believe it is appropriate to make clear that the same-sex marriages that already have purportedly come into being must be considered void from their inception. Of course, should the current California statutes limiting marriage to a man and a woman ultimately be repealed or be held unconstitutional, the affected couples then would be free to obtain lawfully authorized marriage licenses, have their marriages lawfully solemnized, and lawfully register their marriage certificates. [FN41]

> FN41. Contrary to the contention of Justice Werdegar's concurring and dissenting opinion (*post,* 17 Cal.Rptr.3d at p. 284, 95 P.3d at p. 508), should the existing marriage statutes ultimately be held unconstitutional, we do not believe that the principle of "basic fairness" or a claim for "full relief" justifies placing the same-sex couples who took advantage of the unauthorized actions of San Francisco officials in a different or better position than other same-sex couples who were denied marriage licenses in other counties throughout the state by public

officials who properly fulfilled their duties in compliance with the governing state statutes.

Accordingly, to remedy the effects of the city officials' unauthorized actions, we shall direct the county clerk and the county recorder of the City and County of San Francisco to take the following corrective actions under the supervision of the California Director of Health Services, who, by statute, has general supervisory authority over the marriage license and marriage certificate process. (See, *ante,* 17 Cal.Rptr.3d pp. 237-239, 95 P.3d pp. 469-471.) The county clerk and the county recorder are directed to (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to ***1119** demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex couples, and (5) make appropriate corrections to all relevant records.

VIII

As anyone familiar with the docket of the United States Supreme Court, of this court, or of virtually any appellate court in this nation is aware, many statutes currently in force may give rise to constitutional challenges, and not infrequently the constitutional questions presented involve issues upon which reasonable persons, including reasonable jurists, may disagree. If every public official who is under a statutory duty to perform a ministerial act were free to refuse to perform that act based solely on the official's view that the underlying statute is unconstitutional, any semblance of a uniform rule of law quickly would disappear, and constant and widespread judicial intervention would be required to permit the ordinary mechanisms of government to function. This, of course, is not the system of law with which we are familiar. Under long-established *****273** principles, a statute, once enacted, is presumed to be constitutional until it has been judicially determined to be unconstitutional.

****499** An executive official, of course, is free to criticize existing statutes, to advocate their amendment or repeal, and to voice an opinion as to their constitutionality or unconstitutionality. As we have explained, however, an executive official who is charged with the ministerial duty of enforcing a statute generally has an obligation to execute that duty in the absence of a judicial determination that the statute is unconstitutional, regardless of the official's personal view of the constitutionality of the statute.

In this case, the city has suggested that a contrary rule--one under which a public official charged with a ministerial duty would be free to make up his or her own mind whether a statute is constitutional and whether it must be obeyed--is necessary to protect the rights of minorities. But history demonstrates that members of minority groups, as well as individuals who are unpopular or powerless, have the most to lose when the rule of law is abandoned--even for what appears, to the person departing from the law, to be a just end. [FN42] As observed at the outset of this opinion, granting every ***1120** public official the authority to disregard a ministerial statutory duty on the basis of the official's opinion that the statute is unconstitutional would be fundamentally inconsistent with our political system's commitment to John Adams' vision of a government where official action is determined not by the opinion of an individual officeholder--but by the rule of law.

FN42. The pronouncement of Sir Thomas More in the well-known passage from Robert Bolt's A Man For All Seasons comes to mind:
"Roper: So now you'd give the Devil benefit of law!
"More: Yes. What would you do? Cut a great road through the law to get to the Devil?
"Roper: I'd cut down every law in England to do that!
"More: Oh? And when the last law was down, and the Devil turned round on you--where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake." (Bolt, A Man for All Seasons (1962) p. 66.)

IX

For the reasons discussed above, a writ of mandate shall issue compelling respondents to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes, and directing the county clerk and the county recorder of the City and County of San Francisco to take the following corrective actions under the supervision of the California Director of Health Services: (1) identify all same-sex couples to whom the officials issued marriage

licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage related fees paid by or on behalf of same-sex ***274** couples, and (5) make appropriate corrections to all relevant records.

As the prevailing parties, petitioners shall recover their costs.

WE CONCUR: BAXTER, CHIN, BROWN and MORENO, JJ.

Concurring Opinion by MORENO, J.

I concur. The majority opinion addresses primarily the limitations on the power of local officials to disobey statutes that may be, but have not yet been judicially established to be, unconstitutional. I write separately to focus on the related but distinct question of what courts should do when confronted with such disobedience on the part of local officials. As the majority opinion suggests, a court should not invariably refuse to decide constitutional questions arising from local governments' or local officials' refusal to obey purportedly unconstitutional statutes. Indeed, California courts *1121 under these circumstances **500 have, on a number of occasions, decided the underlying constitutional questions. In the present case, the majority declines to decide the constitutional validity of Family Code section 300, prohibiting same-sex marriage, but instead concludes that a writ of mandate against San Francisco's (the city's) local officials is justified because they exceeded their ministerial authority. As elaborated below, I agree that under these somewhat unusual circumstances, local officials' disobedience of the statute justifies this court's issuance of a writ of mandate against those officials before the underlying constitutional question has been adjudicated.

At the outset, I review the requirements for obtaining a writ of mandate. To obtain writ relief a petitioner must show: " '(1) A clear, present and usually ministerial duty on the part of the respondent ...; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty....' " (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540, 28 Cal.Rptr.2d 617, 869 P.2d 1142.) Also required is "the lack of any plain, speedy and adequate remedy in the usual course of law...." (*Flora Crane Service, Inc. v. Ross* (1964) 61 Cal.2d 199, 203, 37 Cal.Rptr. 425, 390 P.2d 193.) Although the writ of mandate generally must issue if the above requirements are clearly met (see *May v. Board of Directors* (1949) 34 Cal.2d 125, 133-134, 208 P.2d 661), the writ of mandate is an equitable remedy that will not issue if it is contrary to "promoting the ends of justice." (*McDaniel v. City etc. of San Francisco* (1968) 259 Cal.App.2d 356, 361, 66 Cal.Rptr. 384; see also *Bartholomae Oil Corp. v. Superior Court* (1941) 18 Cal.2d 726, 730, 117 P.2d 674.)

The local officials in the present case have a clear ministerial duty to issue marriage licenses in conformance with state statute and have violated that duty. The Attorney General, and for that matter the plaintiffs in *Lewis v. Alfaro*, have a substantial right to ensure that marriage licenses conform to the statute. (See *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100-101, 162 P.2d 627.) But when a court is asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality, the above-stated principles dictate that a court at least has the discretion to refuse to issue the writ until the underlying constitutional question has been decided.

How should courts exercise that discretion? In California, generally speaking, courts faced with local governments' or local officials' refusal to obey assertedly unconstitutional statutes have decided the constitutional question before determining whether a writ or other requested relief should issue. (See, e.g., ***275***County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 132 Cal.Rptr.2d 713, 66 P.3d 718 [county refused to obey as unconstitutional a state statute mandating binding arbitration for local agencies that reach *1122 negotiating impasse with police and firefighters]; *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 227 Cal.Rptr. 391, 719 P.2d 987 [county refused to act in accordance with a state revenue statute it had judged, correctly, to violate the U.S. Const.]; *Zee Toys, Inc. v. County of Los Angeles* (1978) 85 Cal.App.3d 763, 777-781, 149 Cal.Rptr. 750 [same]; *Paso Robles etc. Hospital Dist. v. Negley* (1946) 29 Cal.2d 203, 173 P.2d 813 [local financial officer refused to issue bonds and defended a lawsuit in order to expeditiously settle the constitutional validity of the bond issue]; *Denman v. Broderick* (1896) 111 Cal. 96, 105, 43 P. 516 [local official refused to spend public funds required by a statute believed to be unconstitutional "special legislation"]; *City of Oakland v. Digre* (1988) 205 Cal.App.3d 99, 252 Cal.Rptr. 99 [local official refused to enforce a parcel tax believed to be unconstitutional and required the city to demonstrate its

constitutionality in court]; *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 14-15, 97 Cal.Rptr. 431 [county board of supervisors refused to issue permission for timber operations, although such refusal was not authorized under rules promulgated pursuant to state statute].) Indeed, any time a city determines that a state law is contrary to its own constitutional prerogative of self-governance and therefore refuses to obey the law, it is making a constitutional determination. (See, e.g., *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64, 81 Cal.Rptr. 465, 460 P.2d 137 [determining that state prevailing **501 wage law for public works projects was not binding on cities].)

As the majority states, "the classic understanding of the separation of powers doctrine [is] that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." (Maj. opn., *ante*, 17 Cal.Rptr.3d at p. 230, 95 P.3d at p. 463.) But "the separation of powers doctrine does not create an absolute or rigid division of functions." (*Ibid.*) As the above cases suggest, local officials sometimes exercise their authority to *preliminarily* determine that a statute that directly affects the local government's functioning is unconstitutional and, in some circumstances, refuse to obey that statute as a means of bringing the constitutional challenge. This preliminary determination is the exercise of an *executive* function. Local officials and agencies do not "arrogate[ ] to [the local executive] core functions of the ... judicial branch" in violation of the separation of powers (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297-298, 105 Cal.Rptr.2d 636, 20 P.3d 533), but rather raise constitutional issues for the courts to ultimately decide.

In my view, there are at least three types of situations in which a local government's disobedience of a statute would be reasonable. In these situations, courts asked to grant a writ of mandate to compel the local agency to obey the statute should therefore address the underlying constitutional issue rather than simply conclude the local governmental entity exceeded its *1123 ministerial authority. First, there are some cases in which the statute in question violates a "clearly established ... constitutional right" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396). An executive decision not to spend resources to comply with a clearly unconstitutional statute is a reasonable exercise of the local executive power and ***276 does not usurp a core judicial function. Indeed, refusing to enforce clearly unconstitutional statutes saves the resources of both the executive and the judiciary.

A second category of "disobedience" cases involves a local official or governmental entity disobeying a statute when there is a substantial question as to its constitutionality *and* the statute governs matters integral to a locality's limited power of self-governance. In these cases, a local entity or official is directly affected by the statute and in a unique position to challenge it. As the above cases illustrate, local entities and officials have challenged statutes to determine the validity of a bond, or the payment of a government salary for a position unconstitutionally created, or an exemption to a local tax that assertedly violates the commerce clause, or a statute that intrudes on local matters of city or county employee compensation. It is noteworthy that in virtually all the above cases, the local agency's or official's refusal to obey an assertedly unconstitutional statute had the effect of preserving the status quo, pending judicial resolution of the matter, thereby minimizing interference with the judicial function.

Perhaps in some of these cases localities could have proceeded by obtaining declaratory relief as to a statute's unconstitutionality, rather than by disobeying the statute. In other cases, an actual controversy necessary for declaratory relief may have been lacking. In any case, the fact that the local government agency did not proceed by means of declaratory relief provided no insurmountable obstacle to a court's deciding the underlying constitutional issue raised by the agency's disobedience. (See, e.g., *County of Riverside v. Superior Court, supra*, 30 Cal.4th 278, 283, 132 Cal.Rptr.2d 713, 66 P.3d 718.) [FN1] Of course, if a court determines that interim relief to compel a government agency to obey a statute is appropriate, it may grant such relief before the constitutional question is ultimately adjudicated.

> FN1. The above dictum does not apply when the Legislature has required that a governmental entity challenge an assertedly unconstitutional statute by means of declaratory relief. (See, e.g., Rev. & Tax.Code, § 538 [county assessor to challenge constitutionality of state revenue statute by requesting declaratory relief under Code Civ. Proc., § 1060].)

A third possible category of cases in which city officials might legitimately disobey statutes **502 of doubtful constitutionality are those in which the question of a statute's constitutionality is substantial, and irreparable harm may result to individuals to which the local government agency has some protective *1124 obligation--be they employees, or students of a public college, or patrons of a public library, or patients in a public hospital, or in some cases simply residents of the city. Again, a court asked to grant a writ of mandate

could conclude that a delay in granting the writ pending resolution of the underlying constitutional question is justified. To issue a writ enforcing a statute that may be unconstitutional, and that will work irreparable harm, would not "promote[ ] the ends of justice" (*McDaniel v. City etc. of San Francisco, supra*, 259 Cal.App.2d at pp. 360-361, 66 Cal.Rptr. 384), and a court has the discretion to delay such issuance until the underlying constitutional question is resolved.

The present case is quite different from the above situations. First, as the majority demonstrates, the unconstitutionality of Family Code section 300 is not clearly established by either state or federal constitutional precedent, and certainly not from the language of the constitutional provisions themselves. Nor does this case ***277 pertain to a statute that interferes with a city's or county's limited power of self-governance that these entities are in a unique position to challenge. Rather, local officials in this case perform a ministerial function pursuant to the state marriage law. Unlike the cases cited above, in which the constitutionality of a statute is likely to go unchallenged if a local governmental entity does not do so, Family Code section 300 limits individual rights, and those individuals subject to that limitation are in the best position to challenge it.

Nor does the present case fit the third category of cases, in which a city refuses to enforce a law so as to protect its citizens from irreparable harm. The only harm caused here is a delay in the ability of same-sex couples to get married while the constitutional issue is being adjudicated. But that delay will occur whether or not we grant a writ of mandate against the city in this case. Put another way, local officials have no real power to marry same-sex couples, given the statutory prohibition against doing so. What *was* within their power, prior to our issuance of a stay, was to issue licenses of indeterminate legal status. The exercise of the court's mandate power to preclude local officials from continuing this course of action, and voiding the licenses already issued, brings no irreparable harm to the individuals who have received or might receive such licenses.

In sum, the city advances no plausible reason why it had to disobey the statute in question. Even so, it might have been appropriate to have delayed the issuance of a writ of mandate against it until the underlying constitutional question had been adjudicated if, for example, the city had issued a single "test case" same-sex marriage license. But it went far beyond a test case. It issued thousands of these marriage licenses. As such, the city went well beyond making a preliminary determination of the statute's unconstitutionality or performing an act that would bring the constitutional issue to the *1125 courts. Rather, city officials drastically and repeatedly altered the status quo based on their constitutional determination, issuing a multitude of licenses that purported to have an independent legal effect, contrary to their ministerial duty and statutory obligation and prior to any judicial determination of the statute's unconstitutionality. By such dramatic overreaching, these officials trespassed on a core judicial function of deciding the constitutionality of statutes and endowed the issue of their authority to disobey the statute with a life of its own, independent of the underlying constitutional issue. I therefore agree with the majority that a writ of mandate is rightly issued against the city and its officials in this case.

I reiterate what is clear in the majority opinion. Our holding in this case in no way expresses or implies a view on the underlying issue of the constitutionality of a statute prohibiting same-sex marriage. That issue will be addressed in the context of litigation in which the issue is properly raised. (See *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309, 798 N.E.2d 941.)

**503 Concurring and Dissenting Opinion by KENNARD, J.

I concur in the judgment, except insofar as it declares void some 4,000 marriages performed in reliance on the gender-neutral marriage licenses [FN1] issued in the City ***278 and County of San Francisco. Although I agree with the majority that San Francisco public officials exceeded their authority when they issued those licenses, and that the licenses themselves are therefore invalid, I would refrain from determining here, in a proceeding from which the persons whose marriages are at issue have been excluded, the validity of the marriages solemnized under those licenses. That determination should be made after the constitutionality of California laws restricting marriage to opposite-sex couples has been authoritatively resolved through judicial proceedings now pending in the courts of California.

> FN1. As the majority explains, the license application was altered "by eliminating the terms 'bride,' 'groom,' and 'unmarried man and unmarried woman,' and by replacing them with the terms 'first applicant,' 'second applicant,' and 'unmarried individuals.' " (Maj. opn., *ante*, 17 Cal.Rptr.3d at p. 232, 95 P.3d at p. 465.)

I

Like the majority, I conclude that officials in the City and County of San Francisco exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, and I agree with the majority that those officials may not justify their actions on the ground that state laws

restricting marriage to opposite-sex couples violate the state or the federal Constitution. The cases discussed by the majority demonstrate, in my view, that a public official may refuse to enforce a statute on constitutional grounds only in these situations: ***1126** 1) when the statute's unconstitutionality is obvious beyond dispute in light of unambiguous constitutional language or controlling judicial decisions; (2) when refraining from enforcement is necessary to preserve the status quo and to prevent irreparable harm pending judicial determination of a legitimate and substantial constitutional question about the statute's validity; (3) when enforcing the statute could put the public official at risk for substantial personal liability; or (4) when refraining from enforcement is the only practical means to obtain a judicial determination of the constitutional question. (See Field, The Effect of an Unconstitutional Statute (1935, reprint ed.1971) p. 119 et seq.; Note, *Right of Ministerial Officer to Raise Defense of Unconstitutionality in Mandamus Proceeding* (1931) 15 Minn. L.Rev. 340; Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes* (1927) 11 Minn. L.Rev. 585; Note, *Who Can Set Up Unconstitutionality-- Whether Public Official Has Sufficient Interest* (1920) 34 Harv. L.Rev. 86.) Because none of these situations is present here, as I explain below, the public officials acted wrongly in refusing to enforce the opposite-sex restriction in California's marriage laws.

A. Indisputably Unconstitutional Law

In restricting marriages to couples consisting of one woman and one man, California's marriage laws are not plainly or obviously unconstitutional under either the state or the federal Constitution. Neither Constitution expressly prohibits limiting marriage to opposite-sex couples, and neither Constitution expressly grants any person a right to marry someone of the same sex. Nor does any judicial decision establish beyond reasonable dispute that restricting marriage to heterosexual couples violates any provision of the California Constitution or the United States Constitution.

Indeed, there is a decision of the United States Supreme Court, binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does *not* violate the federal Constitution's guarantees of equal protection and due process of law. After the Minnesota Supreme Court held that Minnesota laws preventing marriages between persons of *****279** the same sex did not violate the equal protection or due process clauses of the United States Constitution (*Baker v. Nelson* (1971) 291 Minn. 310, 191 N.W.2d 185), the decision was appealed to the United States Supreme Court, as federal law then permitted (see 28 U.S.C. former ****504** § 1257(2), 62 Stat. 929 as amended by 84 Stat. 590). The high court later dismissed that appeal "for want of substantial federal question." (*Baker v. Nelson* (1972) 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65.)

As the United States Supreme Court has explained, a dismissal on the ground that an appeal presents no substantial federal question is a decision on ***1127** the merits of the case, establishing that the lower court's decision on the issues of federal law was correct. (*Mandel v. Bradley* (1977) 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199; *Hicks v. Miranda* (1975) 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223.) Summary decisions of this kind "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." (*Mandel v. Bradley, supra,* at p. 176, 97 S.Ct. 2238.) Thus, the high court's summary decision in *Baker v. Nelson, supra,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, prevents lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same sex violates the equal protection or due process guarantees of the United States Constitution.

The binding force of a summary decision on the merits continues until the high court instructs otherwise. (*Hicks v. Miranda, supra,* 422 U.S. at p. 344, 95 S.Ct. 2281.) That court may release lower courts from the binding effect of one of its decisions on the merits either by expressly overruling that decision or through " 'doctrinal developments' " that are necessarily incompatible with that decision. (*Id.* at p. 344, 95 S.Ct. 2281.) The United States Supreme Court has not expressly overruled *Baker v. Nelson, supra,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, nor do any of its later decisions contain doctrinal developments that are necessarily incompatible with that decision.

The San Francisco public officials have argued that the United States Supreme Court's decision in *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508, holding unconstitutional a state law "making it a crime for two persons of the same sex to engage in certain intimate sexual conduct" (*id.* at p. 562, 123 S.Ct. 2472), amounts to a doctrinal development that releases courts and public officials from any obligation to obey the high court's decision in *Baker v. Nelson, supra,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65. Although *Lawrence* represents a significant shift in the high court's view of constitutional protections for same-sex relationships, the majority in *Lawrence* carefully pointed out that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter" (*Lawrence v. Texas, supra,* at p. 568, 123 S.Ct. 2472) and that the case "d[id] not involve whether the government must give

formal recognition to any relationship that homosexual persons seek to enter" (*id.* at p. 578, 123 S.Ct. 2472). Because there is a long history in this country of defining marriage as a relation between one man and one woman, and because marriage laws do involve formal government recognition of relationships, the high court's decision in *Lawrence* did not undermine the authority of *Baker v. Nelson* to such a degree that a lower federal or state court, much less a public official, could disregard it. Until the United States Supreme Court says otherwise, which it has not yet done, *Baker v. Nelson* defines federal constitutional law on the ***280** question whether a state may deny same-sex couples the right to marry.

***1128** Because neither the federal nor the California Constitution contains any provision directly and expressly guaranteeing a right to marry another person of the same sex, and because no court has ever decided that either Constitution confers that right, this is not a situation in which a public official refused to enforce a law that was obviously and indisputably unconstitutional.

B. Preserving the Status Quo to Prevent Serious Harm

Nor was this a situation in which a public official, by temporarily refraining from enforcing a state law, merely preserved the status quo to prevent potentially irreparable harm pending judicial determination of a legitimate and substantial constitutional question about the law's validity. By issuing licenses authorizing same-sex marriages, the San Francisco public officials did not preserve ***505** a status quo, but instead they altered the status quo in that California law has always prohibited same-sex marriage.

In 1977, the Legislature amended Family Code section 300 to specify that marriage is a relation "between a man and a woman." (See maj. opn., *ante,* 17 Cal.Rptr.3d at p. 236, fn. 11, 95 P.3d at p. 468, fn. 11.) At the March 2000 election, the voters approved Proposition 22, which enacted Family Code section 308.5 declaring that "[o]nly marriage between a man and a woman is valid or recognized in California." [FN2] But those statutory measures did not change existing law. Since the earliest days of statehood, California has recognized only opposite-sex marriages. (See, e.g., *Mott v. Mott* (1890) 82 Cal. 413, 416, 22 P. 1142 [quoting legal dictionary's definition of marriage as a contract " 'by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife' "].) In issuing gender-neutral marriage licenses, therefore, San Francisco public officials could not have intended merely a temporary or interim preservation of an existing state of affairs pending a judicial determination of a newly enacted law's constitutionality. Instead, as their public statements indicated, they issued those licenses to effect a fundamental and permanent change in traditional marriage eligibility requirements, based on their own views about constitutional questions. In so doing, they exceeded their authority.

> FN2. Although California law has expressly restricted matrimony to heterosexual couples, it has also extended most of the financial and other benefits of marriage to same-sex couples through domestic partner legislation. (See, e.g., Fam.Code, § 297 et seq., Stats.2003, ch. 421, operative Jan. 1, 2005.)

C. Public Officials' Personal Liability

This was not a situation in which public officials had reason to fear they might be held personally liable in damages for enforcing a constitutionally ***1129** invalid state law. In a federal civil rights action brought under 42 United States Code section 1983, a public official may not be held personally liable for enforcing a state law that violates a federal constitutional right unless the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." (*Anderson v. Creighton* (1987) 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523; accord, *Saucier v. Katz* (2001) 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272; *Wilson v. Layne* (1999) 526 U.S. 603, 614-615, 119 S.Ct. 1692, 143 L.Ed.2d 818.) Because the United ***281** States Supreme Court has determined that a state law prohibiting same-sex marriage does not violate the federal Constitution (*Baker v. Nelson, supra,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65), no reasonable public official could conclude that denying marriage licenses to same-sex couples would violate a right that was clearly established under the federal Constitution. Accordingly, federal civil rights law could not impose personal liability on local officials in California for enforcing California's same-sex marriage prohibition. "[A]bsent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." (*Lemon v. Kurtzman* (1973) 411 U.S. 192, 208-209, 93 S.Ct. 1463, 36 L.Ed.2d 151 (plur. opn. of Burger, C. J.).)

Nor was there any reasonable basis for local officials to anticipate personal liability under the California Constitution or California civil rights laws for denying marriage licenses to same-sex couples. Government Code section 820.6 provides immunity for public employees acting in good faith, without malice, under a statute that proves to be unconstitutional. Because same-sex marriage has never been legally authorized in California,

the California Constitution does not expressly grant a right to same-sex marriage, and no judicial decision by any California court has ever suggested, much less held, that state laws limiting marriage to opposite-sex couples violate the California Constitution, Government Code section 820.6 would immunize any public official from personal liability for enforcing the same-sex marriage prohibition should that prohibition, at some ****506** later time, be held to violate the California Constitution.

D. Necessity of Nonenforcement to Obtain Judicial Resolution

Finally, this is not a situation in which a public official's nonenforcement of a law was the only practical way to obtain a judicial determination of that law's constitutionality. Just as the constitutionality of California's prohibition against interracial marriage was properly challenged by a mixed-race couple who were denied a marriage license (*Perez v. Sharp* (1948) 32 Cal.2d 711, 198 P.2d 17), the constitutionality of California's prohibition against same-sex marriage could have been readily challenged at any time through a lawsuit brought by a same-sex couple who had been denied a marriage ***1130** license. Indeed, challenges of this sort are now pending in the superior court. (See maj. opn., *ante,* 17 Cal.Rptr.3d at p. 270, 95 P.3d at p. 495.)

E. Policy Grounds for General Rule Prohibiting Nonenforcement on Constitutional Grounds

As the majority points out (maj. opn., *ante,* 17 Cal.Rptr.3d at pp. 229-230, 264, 95 P.3d at pp. 462-463, 491), confusion and chaos would ensue if local public officials in each of California's 58 counties could separately and independently decide not to enforce long-established laws with which they disagreed, based on idiosyncratic readings of broadly worded constitutional provisions. To ensure uniformity and consistency in the statewide application and enforcement of duly enacted and presumptively valid statutes, the authority of public officials to decline enforcement of state laws, in the absence of a judicial determination of invalidity, based on the officials' own constitutional determinations, is and must be carefully and narrowly limited. I agree with the majority that San Francisco public officials exceeded those limits when they declined to enforce state marriage laws by issuing gender-neutral marriage licenses to same-sex couples.

*****282 II**

Although I agree with the majority that San Francisco officials exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, I do not agree with all the reasoning that the majority offers in support of that conclusion. In particular, I do not agree that a "line of decisions" had established, before the 1978 enactment of section 3.5 of article III of the California Constitution, that "only administrative agencies constitutionally authorized to exercise judicial power have the authority to determine the constitutional validity of statutes." (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 253, 95 P.3d at p. 482.)

The majority does not identify any pre-1978 decision holding that a nonconstitutional administrative agency, during quasi-judicial administrative proceedings, lacked authority to determine a statute's constitutionality. The majority asserts that this court so held in *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281. (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 250, 95 P.3d at p. 480.) But this court there decided only that the doctrine of exhaustion of administrative remedies did not apply to a constitutional challenge to the statute from which the administrative agency derived its authority. (*State of California v. Superior Court (Veta), supra,* at p. 251, 115 Cal.Rptr. 497, 524 P.2d 1281.) In concluding that a litigant was not *required* during quasi-judicial administrative proceedings to make a constitutional challenge to the statute that created the agency, this court explained that "[i]t would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its ***1131** preponderantly lay membership on the constitutionality of the statute establishing its status and functions." (*Ibid.*) This court did not state, or even imply, that an administrative agency *lacked authority* to resolve constitutional issues that a litigant might present.

I also see no need for, and do not join, the majority's observations on topics far removed from the issue presented here, such as the powers of the President of the United States ****507** (maj. opn., *ante,* 17 Cal.Rptr.3d at p. 255, fn. 26, 95 P.3d at p. 484, fn. 26) and the existence of certain legal defenses to war crimes charges (*id.* at p. 258, fn. 30, 95 P.3d at p. 486, fn. 30). These issues are not before this court.

III

Because I agree with the majority that San Francisco's public officials exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, I concur in the judgment insofar as it requires those officials to comply with state marriage laws, to identify the same-sex couples to whom gender-neutral marriage licenses were issued, to notify those couples that their marriage licenses are invalid, to offer refunds of marriage license fees collected, and to make appropriate corrections to all relevant records. But I would not require

notification that the marriages themselves "are void from their inception and a legal nullity." (Maj. opn., *ante*, 17 Cal.Rptr.3d at p. 273, 95 P.3d at p. 499.)

Although a marriage license is a requirement for a valid marriage (Fam.Code, § § 300, 350), some defects in a marriage license do not invalidate the marriage. (See *id.*, § 306; see also, e.g., *Argonaut Ins. Co. v. Industrial Acc. Com.* (1962) 204 Cal.App.2d 805, 809, 23 Cal.Rptr. 1 [applicant's use of false names on license application did not invalidate marriage].) Whether the issuance of a gender-neutral ***283** license to a same-sex couple, in violation of state laws restricting marriage to opposite-sex couples, is a defect that precludes any possibility of a valid marriage may well depend upon resolution of the constitutional validity of that statutory restriction. If the restriction is constitutional, then a marriage between persons of the same sex would be a legal impossibility, and no marriage would ever have existed. But if the restriction violates a fundamental constitutional right, the situation could be quite different. A court might then be required to determine the validity of same-sex marriages that had been performed *before* the laws prohibiting those marriages had been invalidated on constitutional grounds.

When a court has declared a law unconstitutional, questions about the effect of that determination on prior actions, events, and transactions "are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an *1132 all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." (*Chicot County Dist. v. Baxter State Bank* (1940) 308 U.S. 371, 374, 60 S.Ct. 317, 84 L.Ed. 329; accord, *Lemon v. Kurtzman, supra*, 411 U.S. at p. 198, 93 S.Ct. 1463.) This court has acknowledged that, in appropriate circumstances, an unconstitutional statute may be judicially reformed to retroactively extend its benefits to a class that the statute expressly but improperly excluded. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 624-625, 47 Cal.Rptr.2d 108, 905 P.2d 1248 (lead opn. of Lucas, C.J.), 685, 47 Cal.Rptr.2d 108, 905 P.2d 1248 (conc. & dis. opn. of Baxter, J.) [joining in pt. III of lead opn.].) Thus, it is possible, though by no means certain, that if the state marriage laws prohibiting same-sex marriage were held to violate the state Constitution, same-sex marriages performed before that determination could then be recognized as valid.

Although the United States Supreme Court has determined that there is no right to same-sex marriage under the federal Constitution (*Baker v. Nelson, supra*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65), courts in other states construing their own state Constitutions in recent years have reached differing conclusions on this question. (Compare *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309, 798 N.E.2d 941 [denying marriage licenses to same-sex couples violates Massachusetts Constitution] with *Standhardt v. Sup.Ct.* (Ariz.Ct.App.2003) 206 Ariz. 276, 77 P.3d 451 [no right to same-sex marriage under Arizona Constitution].) Recognizing the difficulty and seriousness of the constitutional question, which is now presented in pending superior court actions, this court has declined to address it in this case. *Until that constitutional issue has been finally resolved under the California Constitution*, it is premature and unwise to assert, as the majority essentially does, that the thousands of same-sex weddings performed in **508 San Francisco were empty and meaningless ceremonies in the eyes of the law.

For many, marriage is the most significant and most highly treasured experience in a lifetime. Individuals in loving same-sex relationships have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give. In recognition of that, this court should proceed most cautiously in resolving the ultimate question of the validity of the same-sex marriages performed in San Francisco, even though those marriages were performed under licenses issued by San Francisco public officials without proper authority and in violation of state law. Because the licenses were issued without proper authorization,***284** and in the absence of a judicial determination that the state laws prohibiting same-sex marriage are unconstitutional, employers and other third parties would be under no legal obligation to recognize the validity of any of the same-sex marriages at issue here. Should the pending lawsuits ultimately be resolved by a determination that the opposite-sex marriage restriction is *1133 constitutionally invalid--an issue on which I express no opinion--it would then be the appropriate time to address the validity of previously solemnized same-sex marriages.

Concurring and Dissenting Opinion by WERDEGAR, J.

I agree with the majority that San Francisco officials violated the Family Code by licensing marriages between persons of the same sex. Accordingly, I concur in the decision to order those officials to comply with the existing marriage statutes unless and until they are determined to be unconstitutional. Because constitutional challenges are pending in the lower courts, to order city officials not to license additional same-sex marriages in the meantime is an appropriate way to preserve the status quo pending the outcome of that litigation. That, however, is the extent of my agreement with the majority.

I.

I do not join in the majority's decision to address the validity of the marriages already performed and to declare them void. My concern here is not for the future of same-sex marriage. That question is not before us and, like the majority, I intimate no view on it. My concern, rather, is for basic fairness in judicial process. The superior court is presently considering whether the state statutes that limit marriage to "a man and a woman" (e.g., Fam.Code, § 300) violate the state and federal Constitutions. The same-sex couples challenging those statutes claim the state has, without sufficient justification, denied the fundamental right to marry (e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374, 383, 98 S.Ct. 673, 54 L.Ed.2d 618; *Loving v. Virginia* (1967) 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010; *Perez v. Sharp* (1948) 32 Cal.2d 711, 714-715, 198 P.2d 17) to a class of persons defined by gender or sexual orientation. Should the relevant statutes be held unconstitutional, the relief to which the purportedly married couples would be entitled would normally include recognition of their marriages. By analogy, interracial marriages that were void under antimiscegeny statutes at the time they were solemnized were nevertheless recognized as valid after the high court rejected those laws in *Loving v. Virginia.* (E.g., *Dick v. Reaves* (Okla.1967) 434 P.2d 295, 298.) By postponing a ruling on this issue, we could preserve the status quo pending the outcome of the constitutional litigation. Instead, by declaring the marriages "void and of no legal effect from their inception" (maj. opn., *ante,* 17 Cal.Rptr.3d at p. 268, 95 P.3d at p. 494), the majority permanently deprives future courts of the ability to award full relief in the event the existing statutes are held unconstitutional. This premature decision can in no sense be thought to represent fair judicial process.

The majority asserts that "it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of ***1134** time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail." (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 271, 95 P.3d at p. 497.) Nowhere in the opinion, ****509** however, does the majority note that any same-sex couple has filed a lawsuit seeking the legal *****285** benefits of their purported marriage. Nor is the absence of such lawsuits surprising, since any reasonable court would stay such actions pending the outcome of the ongoing constitutional litigation. [FN1]

> FN1. The majority does note that "officials of the federal Social Security Administration had raised questions regarding that agency's processing of name-change applications resulting from California marriages" (maj. opn., *ante,* 17 Cal.Rptr.3d at p. 233, 95 P.3d at p. 465), but this is unlikely to be a serious problem because San Francisco used a nonstandard, easily recognizable form for licensing same-sex marriages (*id.,* at pp. 232- 233, 239-240, 95 P.3d at pp. 464-465, 470- 472).

The majority's decision to declare the existing marriages void is unfair for the additional reason that the affected couples have not been joined as parties or given notice and an opportunity to appear. On March 12, 2004, we denied all petitions to intervene filed by affected couples. That ruling made sense at the time it was announced because our prior order of March 11, 2004, which specified the issues to be briefed and argued, did not identify the validity of the existing marriages as an issue. Only on April 14, 2004, *after* having denied the petitions to intervene, did the court identify and solicit briefing on the issue of the marriages' validity. To declare marriages void after denying requests by the purported spouses to appear in court as parties and be heard on the matter is hard to justify, to say the least. [FN2]

> FN2. Compare Code of Civil Procedure section 389, subdivision (a): "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest...."

The majority counters that "the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages have been heard and fully considered." (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 270, 95 P.3d at p. 496.) But this is a claim a court may not in good conscience make unless it has given, to the persons whose rights it is purporting to adjudicate, notice and the opportunity to appear. This is the irreducible minimum of due process, even in cases involving numerous parties. (See *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314-315, 70 S.Ct. 652, 94 L.Ed. 865.) Amicus curiae briefs, which any member of the public may ask to file and which the court has no obligation to read, cannot seriously be thought to satisfy these requirements. The majority writes that "requiring each of the thousands of same-sex couples to be named and served as parties in the present action, would add nothing of substance to this proceeding." (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 269, 95 P.3d at p. 495.) Of ***1135** course, the same argument can be made in many class actions with respect to the absent members of the class, but due process still gives

each class member the right to notice and the opportunity to appear. (*Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. at pp. 314-315, 70 S.Ct. 652.) Here, notice has been given to none of the 4,000 affected couples; and even the 11 same-sex couples who affirmatively sought to intervene were denied the opportunity to appear. (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 270, 95 P.3d at p. 496.) What the majority has done, in effect, is to give petitioners the benefit of an action against a defendant class of same-sex couples free of the burden of procedural due process. If the majority truly desired to hear the views of the same-sex couples ***286** whose rights it is adjudicating, it would not proceed in absentia.

Aware of this problem, the majority offers a specious imitation of due process by ordering the city to notify the same-sex couples that this court has decided their marriages are void, and to "provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages" before canceling their marriage records. (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 273, 274, 95 P.3d at pp. 499, 500; see also *id.,* at p. 270, 95 P.3d at p. 497.) This procedure may prevent the city from mistakenly deleting the records of heterosexual marriages, but it cannot benefit any same-sex couple. Notice after the ****510** fact that one's rights have been adjudicated is not due process.

The majority attempts to justify the procedural shortcuts it is taking by invoking the rule that "[a] marriage prohibited as ... illegal and declared to be 'void' or 'void from the beginning' is a legal nullity and its validity may be asserted or shown in any proceeding in which the fact of marriage may be material." (*Estate of Gregorson* (1911) 160 Cal. 21, 26, 116 P. 60, quoted in maj. opn., *ante,* 17 Cal.Rptr.3d at p. 269, 95 P.3d at p. 495.) But that rule, until today, has permitted persons other than spouses to challenge the validity of a marriage *only as and when necessary to resolve another issue in the case,* for example, the legitimacy of an heir's claim to property or an assertion of marital privilege. In essence, the *Gregorson* rule simply recognizes that a litigant whose claim or defense depends on the validity or invalidity of a marriage may introduce evidence to prove the point. [FN3] We have never held that this type of collateral attack on a marriage has any binding effect on *nonparties* to the ***1136** action. A court's refusal in the course of a criminal trial to recognize a claim of marital privilege, for example, does not compel the State Office of Vital Records to destroy a record of the marriage. The majority asserts that the question of the existing marriages' validity or invalidity is material because it is "*central to the scope of the remedy that may and should be ordered in this case.*" (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 269, 95 P.3d at p. 495, italics added.) But this is just another way of saying the question is material because the Attorney General has asked us to decide it. With this reasoning, the majority assumes the conclusion and converts the *Gregorson* rule into a pretext for denying fundamental fairness.

> FN3. For example, *Estate of Elliott* (1913) 165 Cal. 339, 343, 132 P. 439 (decedent's daughter may challenge purported marriage of decedent to person seeking appointment as administrator); *Estate of Stark* (1941) 48 Cal.App.2d 209, 215-216, 119 P.2d 961 (heirs may challenge marriage of decedent's parents to show that other purported heirs were illegitimate and, thus, lack standing to contest the will); *People v. Little* (1940) 41 Cal.App.2d 797, 800-801, 107 P.2d 634 (the People in a criminal case may challenge defendant's marriage to an alleged coconspirator in order to avoid the rule that spouses cannot commit the crime of conspiracy); *People v. MacDonald* (1938) 24 Cal.App.2d 702, 704-705, 76 P.2d 121 (the People in a criminal case may challenge defendant's marriage to a witness in order to defeat a claim of spousal privilege); *People v. Glab* (1936) 13 Cal.App.2d 528, 535, 57 P.2d 588 (same).

II.

I also do not join in the majority's unnecessary, wide-ranging comments on the respective powers of the judicial and executive branches of government.

The ostensible occasion for the majority's comments--a threat to the rule of law (maj. opn., *ante,* 17 Cal.Rptr.3d at p. 273, ***287** 95 P.3d at p. 499)-- seems an extravagant characterization of recent events. On March 11, 2004, when we assumed jurisdiction and issued an interim order directing San Francisco officials to cease licensing same-sex marriages, those officials immediately stopped. Apparently the only reason they had not stopped earlier is that the lower courts had denied similar applications for interim relief. While city officials evidently understood their oaths of office as commanding obedience to the Constitution rather than to the marriage statutes they believed to be unconstitutional, those officials never so much as hinted that they would not respect the authority of the courts to decide the matter. Indeed, not only did our interim order meet with immediate, unreserved compliance by city officials, but the same order apparently sufficed to recall to duty any other public officials who might privately have been thinking to follow San Francisco's lead. In the meantime, not one of California's 58 counties or over 400 municipalities has licensed a same-sex marriage.

Under these circumstances, I see no justification for asserting a broad claim of power over the executive branch. Make no mistake, the majority does assert such a claim by holding that executive officers must follow statutory rather than constitutional law until a court gives them permission in advance to do otherwise. For the judiciary to assert such power over the executive branch is fundamentally misguided. As the high court ****511** has explained, " [i]n the performance of assigned constitutional duties *each branch of the Government must initially interpret the Constitution,* and the interpretation of its powers by any branch is due great respect from the others." (*United States v. Nixon* (1974) 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039, italics added.) To recognize that an executive officer has the practical freedom to act based on an interpretation of the Constitution that may ultimately prove to be wrong ***1137** does not mean the rule of law has collapsed. So long as the courts remain open to hear legal challenges to executive conduct, so long as the courts have power to enjoin such conduct pending final determination of its legality, and so long as the other branches acknowledge the courts' role as " 'ultimate interpreter of the Constitution' " (*id.*, at p. 704, 94 S.Ct. 3090, quoting *Baker v. Carr* (1962) 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663) in matters properly within their jurisdiction, no genuine threat to the rule of law exists. San Francisco's compliance with our interim order eloquently demonstrates this.

Furthermore, a rule requiring an executive officer to seek a court's permission before declining to comply with an apparently unconstitutional statute is fundamentally at odds with the separation of powers and, in many cases, unenforceable. The executive branch is necessarily active, managing events as they occur. The judicial branch is necessarily reactive, waiting until invited to serve as neutral referee. The executive branch does not await the courts' pleasure. A rule to the contrary, though perhaps enforceable against local officials in some cases, will be impossible to enforce against executive officers who exercise a greater share of the state's power, such as a Governor or an Attorney General. By happy tradition in this country, executive officers have generally acquiesced in the judicial branch's traditional claim of final authority to resolve constitutional disputes. (*Marbury v. Madison* (1803) 1 Cranch 137, 5 U.S. 137, 176, 2 L.Ed. 60; see also *United States v. Nixon, supra,* 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039.) But a court can never afford to forget that the judiciary "may truly be said to have neither Force nor *****288** Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." (Hamilton, The Federalist No. 78 (Willis ed.1982) p. 394.) Accordingly, we are ill advised to announce categorical rules that will not stand the test of harder cases.

The majority acknowledges that "legislators and executive officials may take into account constitutional considerations in making discretionary decisions within their authorized sphere of action--such as whether to enact or veto proposed legislation or exercise prosecutorial discretion." (Maj. opn., *ante,* 17 Cal.Rptr.3d at p. 230, 95 P.3d at p. 463.) But the majority views executive officers exercising "ministerial" functions as statutory automatons, denied even the scope to obey their oaths of office to follow the Constitution. (*Ibid.*) Contrary to the majority, I do not find the purported distinction between discretionary and ministerial functions helpful in this context. Were not state officials performing ministerial functions when, strictly enforcing state segregation laws in the years following *Brown v. Board of Education* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, they refused to admit African-American pupils to all-White schools until the courts had applied *Brown's* decision about a Kansas school system to each state's law? We formerly believed that school officials' oaths of office to obey the Constitution had sufficient gravity in such cases to permit them to obey the higher law, even *before* the courts had ***1138** spoken state by state. (*Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, 311, fn. 2 [3d par.], 134 Cal.Rptr. 189, 556 P.2d 289.) So, too, did the United States Supreme Court. (*Cooper v. Aaron* (1958) 358 U.S. 1, 18-20, 78 S.Ct. 1401, 3 L.Ed.2d 5.) Today, in contrast, the majority equivocates on this point (see maj. opn., *ante,* 17 Cal.Rptr.3d at pp. 258-259, 95 P.3d 486-487) and writes that "a public official 'faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid' " (*id.*, at p. 257, 95 P.3d at p. 485, quoting *Southern Pac. Transportation Co. v. Public Utilities Com., supra,* at p. 319, 134 Cal.Rptr. 189, 556 P.2d 289 (conc. & dis. opn. of Mosk, J.)). But ****512** as history demonstrates, however convenient the majority's view may be in dealing with subordinate officers within a governmental hierarchy, that view is not entirely correct.

The majority's strong view of judicial power over the executive branch leads it to suggest, albeit without actually so holding, that a state may properly condition on advance judicial approval its executive officers' duty to obey even the *federal* Constitution. The majority writes, for example, that "[t]he city has not cited any case holding that the federal Constitution prohibits a state from defining the authority of a state's executive officials in a manner that requires such officials to comply with a clearly applicable statute unless and until such a statute is judicially determined to be unconstitutional" (maj. opn.,

ante, 17 Cal.Rptr.3d at p. 265, 95 P.3d at p. 492), and that " 'the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it ... *is a purely local question*' [citation]--that is, purely a question of state (not federal) law" (*id.*, at p. 266, 95 P.3d at pp. 493-494, quoting *Smith v. Indiana* (1903) 191 U.S. 138, 148, 24 S.Ct. 51, 48 L.Ed. 125, italics in maj. opn.). [FN4]

> FN4. In *Smith v. Indiana, supra*, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125, the high court held only that it would not necessarily recognize a state official's *standing* to challenge a state law on federal grounds. (See *id.*, at pp. 148-150, 24 S.Ct. 51.) Even on this narrow point, *Smith* has not been consistently followed. (See *Board of Education v. Allen* (1968) 392 U.S. 236, 241, fn. 5, 88 S.Ct. 1923, 20 L.Ed.2d 1060 [local school officials permitted to challenge under the federal Constitution a state statute requiring them to purchase and loan textbooks to parochial school pupils]; *Coleman v. Miller* (1939) 307 U.S. 433, 438 & fn. 3, 59 S.Ct. 972, 83 L.Ed. 1385 [state legislators permitted to challenge under the federal Constitution state's procedures for recording votes on constitutional amendments]; cf. *id.*, at p. 466, 59 S.Ct. 972 (separate opn. of Frankfurter, J., citing *Smith*); *Akron Board of Ed. v. State Board of Ed. of Ohio* (6th Cir.1974) 490 F.2d 1285, 1290-1291, cert. den. *sub nom. State Board of Education of Ohio v. Akron Board of Education* (1974) 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 [local school officials permitted to challenge under the federal Constitution state officials' decision to transfer White students from desegregated schools to all-White schools]; cf. *Akron Board of Ed. v. State Board of Ed. of Ohio, supra*, 490 F.2d at p. 1296 (conc. & dis. opn. of Pratt, J., citing *Smith*).)

***289** Given that respondent city officials have complied with our interim order to cease issuing same-sex marriage licenses, and that the constitutionality of the existing marriage statutes is presently under review, I consider the majority's determination to speculate about the limits of a state official's duty to obey ***1139** the federal Constitution unnecessary and regrettable. A court should not trifle with the doctrine invoked by recalcitrant state officials, in the years following *Brown v. Board of Education, supra*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, to rationalize their delay in complying with the Fourteenth Amendment. The high court definitively repudiated this erroneous doctrine in *Cooper v. Aaron, supra*, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." The United States Constitution, itself, immediately commands the unqualified obedience of state officials in article VI, section 3, which declares that "all executive and judicial officers, both of the United States *and of the several states*, shall be bound by oath or affirmation, to support this Constitution...." (Italics added; see also *Cooper v. Aaron, supra*, 358 U.S. at pp. 19-20, 78 S.Ct. 1401.)

We, as a court, should not claim more power than we need to do our job effectively. In particular, strong claims of judicial power over the executive branch are best left unmade and, if they must be made, are best reserved for cases presenting a real threat to the separation of powers--a threat that provides manifest necessity for the claim, a genuine test of the claim's validity, and a suitable incentive for caution in its articulation. None of these conditions, all of which are necessary to ensure sound decisions in hard cases, is present here.

III.

In conclusion, I agree with the majority's decision to order city officials not to license additional same-sex marriages pending resolution of the constitutional challenges to the existing marriage statutes. To say more at this time is neither necessary nor wise.

33 Cal.4th 1055, 95 P.3d 459, 17 Cal.Rptr.3d 225, 04 Cal. Daily Op. Serv. 7342, 2004 Daily Journal D.A.R. 9916

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- 2004 WL 1242744 (Appellate Petition, Motion and Filing) Petition (Apr. 21, 2004)
- 2004 WL 1197080 (Appellate Brief) Reply to Amicus Curiae Brief of Roger Jon Diamond (Mar. 29, 2004)
- 2004 WL 1197081 (Appellate Brief) Application of Roger Jon Diamond for Leave to File Brief Amicus Curiae Challenging Constitutionality of Article III, Section 3.5 of the California Constitution; Proposed Brief (Mar. 24, 2004)
- S122923 (Docket) (Feb. 27, 2004)
- 2004 WL 2016420 (Appellate Petition, Motion and Filing) Verified Petition for Immediate Stay and

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