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Public Sector Interest Arbitration: Threat to Local Representative Government?

The incidence of strikes by public employees in recent years has increased concomitantly with the political power of public employee groups. Although criticized as an impermissible infringement on governmental authority,¹ public employee strikes are presently tolerated in many communities. Certain strikes, however, particularly those by essential safety employees, are intolerable, and their occurrence subjects the community to serious health and economic dangers. Unable to effectively avert these strikes, many states require that bargaining impasses between the public employer and its essential employees be submitted for a binding resolution by private citizen arbitrators. Interest arbitration, although seldom used in the private sector,² has mustered an impressive record for avoiding public employee strikes.

The arbitration process, however, presents a serious conflict with our representative form of local government because it places in the hands of private citizen arbitrators important policymaking powers that traditionally are reserved for elected officials. In order to resolve a dispute a private citizen arbitrator is often called upon to direct increases in municipal expenditures, and not infrequently, to formulate important portions of community social policy. Unlike the elected legislators who normally make these types of decisions, however, the private citizen arbitrator is not

1. The now antiquated philosophy that strikes by public employees are tantamount to mutiny against the sovereignty of governmental authority was most notably espoused by President Wilson in his reaction to the Boston police strike: "[I]t is not within the province of the trade union movement to especially organize policemen, no more than to organize militiamen, as both policemen and militiamen are often controlled by forces inimical to the labor movement." PROCEEDINGS, AFL CONVENTION 35 (1897). See *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 276, 83 A.2d 482, 485 (1951); Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 612 (1950). See generally Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974).

2. See Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, 1 INDUS. REL. L.J. 427, 427-32 (1976) [hereinafter cited as Morris].

politically accountable to a constituency. One arbitrator, who dissented in an early arbitration award, described the essence of the problem when he asked, "Who elected the arbitration panel of which I am a part? To whom is this panel responsive? What pressures can the citizens . . . bring to bear on the panel? How do they express their satisfaction or dissatisfaction with the decision?"³ The concern expressed by this arbitrator, that policymaking should be left in the hands of politically accountable officials, provides the impetus for this comment. Prior to detailing the scope of this problem, it is necessary to review some basic concepts.

When the representatives of a public employee organization⁴ and of a public employer⁵ meet to negotiate⁶ the terms of a memorandum of agreement,⁷ the parties will frequently be unable to reach agreement on certain terms. When further negotiations appear futile, the parties typically attempt other techniques to resolve the dispute.⁸ In the private sector, the employees

3. Dissenting opinion of Arbitrator Jenner in *City of Marquette v. Marquette Police Local* (unpublished, Mar. 26, 1970) quoted in Rehms, *Legislated Interest Arbitration* in INDUSTRIAL RELATIONS RESEARCH ASS'N SERIES, PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL WINTER MEETING 307, 308 (1974) [hereinafter cited as Rehms].

4. Public employees in California are granted the right to organize and to exclusive representation during negotiations with the public employer. These rights are provided to state employees, CAL. GOV'T CODE §3515.5; to local employees, CAL. GOV'T CODE §3503; and to public school employees, CAL. GOV'T CODE §3540. This comment will focus on the Meyers-Milias-Brown Act [hereinafter referred to as the MMB Act], CAL. GOV'T CODE §§ 3500-3511, which governs municipal labor relations. Government Code Section 3501(a) defines an "employee organization" as "any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in their relations with that public agency." A "public employee" is defined as:

[A]ny person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed by the governor of this state.

CAL. GOV'T CODE §3501(d).

5. Government Code Section 3501(c) defines "public agency," which is used by this comment interchangeably with "public employer" as:

[E]very governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not.

This definition does not include "a school district or a county board of education . . ." CAL. GOV'T CODE §3501(c).

6. The terms "negotiation" and "bargaining" are used interchangeably by this comment to identify the procedure whereby the representatives of the public agency and the employee organization representing an employee unit "meet and confer in good faith" over wages, hours and other terms and conditions of employment. These parties 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 . . ." CAL. GOV'T CODE §3505.

7. A "memorandum of agreement" is used interchangeably by this comment with "memorandum of understanding." The legal significance of a memorandum of agreement is similar to a private sector collective bargaining agreement. See *Glendale City Emp. Ass'n v. City of Glendale*, 15 Cal. 3d 328, 339-40, 540 P.2d 609, 616-17, 124 Cal. Rptr. 513, 520-21 (1975). Once the parties reach agreement and it is approved by the public agency, the agreement becomes binding on both parties, *id.* at 336, 540 P.2d at 614, 124 Cal. Rptr. at 518, and it may be enforced by writ of mandamus, see *id.* at 344, 540 P.2d at 620, 124 Cal. Rptr. at 524.

8. The term "dispute" is used interchangeably herein with the term "impasse." A dispute, or impasse, is a condition in which the parties, after negotiating in good faith about matters within the scope of negotiation, are unable to reach agreement, and further negotiations

are permitted to apply economic pressure on the employer through work stoppages in order to break the bargaining deadlock.⁹ In the public sector, however, strikes are generally unlawful.¹⁰ Nevertheless, public employee strikes are occurring with increasing frequency.¹¹ The demand for local governmental services is generally inelastic¹² and does not produce income.

appear futile. See CAL. GOV'T CODE §3540.1(f). An "interest" impasse or dispute concerns matters to be included in a new agreement. On the other hand, a "grievance" or "rights" impasse or dispute relates to a disagreement about an interpretation of provisions in an already existing agreement. Similarly, there are two forms of arbitration: interest and grievance arbitration. This comment is only concerned with interest arbitration. See generally R. GORMAN, BASIC TEXT ON LABOR LAW (1976).

9. Under the National Labor Relations Act, concerted employee activities, such as strikes for higher wages, are protected. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938); 29 U.S.C. §157 (1970). The employer may also employ economic pressure, for example by a lockout. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

10. The majority of states prohibit public employee strikes by either statute, e.g., DEL. CODE tit. 19, §1312; KAN. STAT. §75-4333(c)(5), or by case law, e.g., *Anderson Fed. of Teachers Local 519 v. School City of Anderson*, 252 Ind. 558, 560, 254 N.E.2d 329, 330 (1970); *Jefferson County Teachers Ass'n v. Board of Educ.*, 463 S.W. 2d 627 (Ky. 1970), cert. denied, 404 U.S. 865 (1971). Seven states have right to strike legislation. ALASKA STAT. §23.40.200 (1972) (permitted for semi-essential and nonessential employees but prohibited for essential employees); HAW. REV. STAT. §89-12 (Supp. 1975) (not permitted when health or safety is endangered); MINN. STAT. ANN. §179.64 (Supp. 1976) (strike prohibited except where employer refuses to comply with arbitration award); MONT. REV. CODES ANN. §41-2209 (Supp. 1975) (permitted for nurses); OR. REV. STAT. §243.726 (1975) (permitted after impasse procedures, such as mediation, are exhausted); PA. STAT. ANN. tit. 43, §1101.1003 (Purdon Supp. 1975) (permitted after exhaustion of impasse procedures unless strike creates a clear and present danger to public's health, safety or welfare). The common law rule, adopted by California courts, is that strikes by public employees are unlawful in the absence of express legislative authorization. E.g., *City of San Diego v. American Fed'n of State, County & Mun. Emps.*, 8 Cal. App. 3d 308, 310-11, 87 Cal. Rptr. 258, 259-60 (1970); *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 36-37, 80 Cal. Rptr. 518, 521 (1969). The issue is not yet settled, however. *Los Angeles County Civil Serv. Comm'n v. Superior Court*, 141 Cal. Rptr. 126, 130 (1977) (hearing granted by supreme court, L.A. 30878). Only strikes by firefighters are outlawed by statute. CAL. LAB. CODE §1962. An agreement induced by a strike, however, is fully enforceable against the public employer. *City & County of San Francisco v. Cooper*, 13 Cal. 3d 898, 918, 534 P.2d 403, 416, 120 Cal. Rptr. 707, 720 (1975). See also *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976).

11. The Bureau of Labor Statistics reports that the number of strikes by government employees rose from 384 in 1974 to a record high of 478 in 1975, of which 446 were by local employees. Strikes over wage increase demands accounted for 52.1 percent of all work stoppages in 1975. [1977] 694 GOV'T EMPL. REL. REP. (BNA) 18-23.

12. "Elasticity" is an economic concept devised to measure the responsiveness of consumer demand for a product or service to a change in price for the product or service. If demand is "elastic," an increase in price will result in a decrease in demand. Conversely, an "inelastic" demand is one in which a price increase will not result in a corresponding decrease in demand. See P. SAMUELSON, *ECONOMICS* 364 (7th ed. 1967). The elasticity of the demand for goods or services and the corresponding demand for labor creates market forces that constrain the power of unions to force the level of wages up in the private sector. This "wage-employment trade-off," which tends to influence union wage demands in the private sector, is not generally present in the public sector. Thus, public sector unions are not as sensitive to a potential decrease in demand for labor, which results from increased wages, as are their private sector counterparts. Three reasons are advanced for this difference between the private and public sectors: (1) government normally holds a monopoly on the provision of public services, for example, fire and police protection; (2) the demand for government services is more inelastic than is the demand for private goods or services since there are few, if any, acceptable alternative sources for government services available to the taxpayer; and (3) arguably, public services are more essential than are most private goods and services. L.G. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS*, 676-77 (6th ed. 1974). Further, most public services are financed entirely by tax revenues, while private goods and services are dependent on income produced from sales. When labor costs increase causing the price for private goods or services to increase, the consumer demand for private goods and services will normally drop. In the public sector, however, when the tax rate (price) goes up, the demand for the government

Therefore, unlike strikes in the private sector, a public employee work stoppage does not create economic pressure.¹³ Many governmental services are, however, essential to the health and safety of the citizens, and when these services are withheld, the public employer is subjected to political pressure from the community to capitulate to employee demands.¹⁴ In an effort to avoid the interruption of essential services, most states either authorize or require submission of interest disputes to binding arbitration.¹⁵ Under a system of interest arbitration the arbitrator determines the terms of the parties' agreement, unlike grievance arbitration in which the arbitrator interprets the terms of an already existing agreement.

The California Legislature has not yet enacted legislation that either authorizes or mandates interest arbitration.¹⁶ The increased occurrence of

services remains the same. Although the demand for most public services is inelastic, in that the taxpayer will continue to finance the service as the cost escalates, there are a variety of constraints on tax increases: the natural resistance of taxpayers; the political sensitivity of elected officials, interested in reelection, to the potential voter response to increased taxes; the community leaders' fear of losing business and employment to other cities or states; and occasional constitutional restrictions on tax increases by cities and states. *Id.* Some of the local spending restrictions are statutorily imposed by the state government. *E.g.*, CAL. GOV'T CODE §§53732, 53733; MICH. COMP. LAWS ANN. §141.45 (Supp. 1975). See Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1120 (1969).

13. It could be maintained that certain employee strikes are welcomed by the local legislative body. Certain services are nonessential and the absence of these services can be tolerated by the community. A strike, thus, can result in a significant payroll savings and cause minimal political pressure from the community to resolve the negotiation impasse.

14. Professors Wellington and Winter argue that public employee strikes distort the political process by placing too much power, relative to other interest groups, in the hands of public employee unions. "This distortion therefore may result in a redistribution of income by government, whereby union members are subsidized at the expense of other interest groups." H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 167 (1971). These authors suggest that even without the strike weapon, public employee unions wield political power that is disproportionate to the size of their membership. The use of the strike significantly increases their political power; thus, in the public sector, the strike can be regarded as a "political weapon," unlike the private sector, where it is an "economic weapon." See *id.* at 168-69.

15. Most states that provide for interest arbitration require the parties to submit to arbitration within a specified amount of time after reaching a bargaining impasse. ALASKA STAT. §23.40.200 (1972); CONN. GEN. STAT. ANN. §§7-472, -473 (Supp. 1976); IOWA CODE ANN. §§90.1-.4 (West Supp. 1976); ME. REV. STAT. tit. 26, §§965(3)-(4), 979-D(3)-(4); MASS. GEN. LAWS ANN. ch. 150E, §8 (West Supp. 1975); MICH. COMP. LAWS §423.233 (Supp. 1976); MINN. STAT. §179.69 subd. 3 (Supp. 1976); NEB. REV. STAT. §48-810 (1974); NEV. REV. STAT. §288.200 (1975); N.Y. CIV. SERV. LAW §§205-205.9, 207-207.17 (McKinney Supp. 1975); OR. REV. STAT. §§243.742-.762 (1975); PA. STAT. ANN. tit. 43, §§217.4, 2101.804 (Purdon Supp. 1975); R.I. GEN. LAWS §36-11-9 (Supp. 1975) §§28-9.1-7, -2-7, -3-9, -4-10 (1969); S.D. COMP. LAWS ANN. §9-14A-2 (Supp. 1975) (declared unconstitutional in *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, — S.D. —, 234 N.W.2d 35 (1975)); UTAH CODE ANN. §34-20a-7 (Supp. 1975); WASH. REV. CODE ANN. §41.56.450 (Supp. 1975); WIS. STAT. ANN. §111.77(3) (1974); WYO. STAT. §27-269 (1967).

In other states that provide for arbitration, however, submission to the arbitration process is not mandatory. DEL. CODE tit. 19, §1310 (1975); HAW. REV. STAT. §89-11(b)(3) (Supp. 1974); IND. CODE ANN. §§22-6-4-9, 22-6-4-11 (Burns Supp. 1976); MONT. REV. CODES ANN. §59-1614(9) (Supp. 1975); N.H. REV. STAT. ANN. §273-A:12 (1975); N.J. REV. STAT. §34:13A-7 (1975); OKLA. STAT. ANN. tit. 11, §548.7 (West Supp. 1976-77); TEX. REV. CIV. STAT. ANN. art. 5154c-1, §10 (Vernon Supp. 1975); VT. STAT. ANN. tit. 21, §1733 (Supp. 1977).

16. Numerous bills providing for interest arbitration have come before the California legislature in recent years. See note 20 *infra*. Attempts to provide for mandatory interest arbitration as well as attempts to prohibit it by constitutional amendment were afoot at publication time. A Senate Constitutional Amendment was introduced on June 24, 1977, to provide for arbitration, SCA 50, 1977-78 Regular Session, and a statewide drive to place an initiative on the ballot prohibiting arbitration was underway, Harrison, *Election Sought on*

strikes by essential public employees¹⁷ with its attendant political impact,¹⁸ as well as the apparent effectiveness of arbitration in other states,¹⁹ suggests that such legislation will be forthcoming. The legislature has considered twenty-three proposals for binding arbitration during the past fourteen years.²⁰ The most recent proposal²¹ was defeated on the senate floor²² after

Strike Ban, San Diego Union, July 6, 1977, §A, at 1, col. 2. Presently, three California charter cities provide for binding arbitration. HAYWARD, CAL. CHARTER §809, CAL. STATS. 1975, charter c. 28 at 116-18; VALLEJO, CAL. CHARTER §810, CAL. STATS. 1970, res. c. 183, at 3773; OAKLAND, CAL. CHARTER §810, CAL. STATS. 1973 res. c. 52, at 3080. The arbitration provision in San Francisco, Cal., S.F. Adm. Code §16.21(c), (d) (1974) ([1974] RF-40 Gov't EMPL. REL. REP. (BNA) 51:4165, was ruled an unlawful delegation of legislative power by the California Court of Appeal. *San Francisco Fire Fighters Local 798 v. City & County of San Francisco*, 68 Cal. App. 3d 896, 901, 137 Cal. Rptr. 607, 609 (1977). For an example of the California Legislature's study of arbitration see CALIFORNIA STATE ASSEMBLY, FINAL REPORT OF THE ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS 194-240 (Mar. 15, 1973). See also Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes*, 11 SAN DIEGO L. REV. 473 (1974).

17. The Bureau of Labor Statistics reports that the number of days idle due to strikes by protective services nationwide increased from 14,200 days in 1974 to 29,100 days in 1975 with an increase in the total number of workers involved in the strike activities from 3,400 workers in 1974 to 6,100 in 1975. Protective services include police and firefighter personnel. [1977] 694 Gov't EMPL. REL. REP. (BNA) 22. But see Cebulski, *A 1975-76 Tabulation of Strikes in California's Public Sector*, 33 CAL. PUB. EMP. REL. 2, 6-7 (1977). This study indicates that there were no strikes by safety services during 1976 in California, compared with eight such strikes in 1975. There were, however, numerous sick-ins and slowdowns by safety employees. See H. Polland, *The Need for Interest Arbitration for California's Public Safety Employees* 29 (1977) (unpublished paper on file at *Pacific Law Journal*) [hereinafter cited as Polland]. For a discussion of the distinction between essential (such as the safety services) and nonessential employees, see text accompanying notes 176-189 *infra*.

18. See note 14 *supra*. The political repercussions from the August 1975 strike by police and firefighter personnel in San Francisco are illustrative. For a summary of the events surrounding this strike see Bowen, *Two Case Studies—Facts and Issues*, 27 CAL. PUB. EMP. REL. 19 (1975). The San Francisco strike was settled by the mayor under his emergency powers. The settlement was upheld by the courts after numerous suits were brought. *E.g.*, *Crowley v. City & County of San Francisco*, 64 Cal. App. 3d 450, 461-62, 134 Cal. Rptr. 533, 539 (1976); *Verreos v. City & County of San Francisco*, 63 Cal. App. 3d 86, 109, 133 Cal. Rptr. 649, 663 (1976). The San Francisco electorate demonstrated its disdain for the striking police and firefighters at the polls in November 1976 when it adopted several initiative measures designed to deter public employee strikes. For a description of these measures, see [1976] 683 Gov't EMPL. REL. REP. (BNA) B-14; Taylor, *Solving Employee Relations Problems by Charter Amendment: A New Legal Quandry?*, 30 CAL. PUB. EMP. REL. 10, 10-12 (1976). One of the measures enacted in November 1975, which required police and firefighter personnel to take an oath that he or she will not engage in strike action against the city, was declared unconstitutional. *San Francisco Police Officers Ass'n v. City & County of San Francisco*, 69 Cal. App. 3d 1019, 1025, 138 Cal. Rptr. 755, 758 (1977).

19. It appears that the most reliable indicator of the effectiveness of arbitration to avoid strikes is to examine the frequency of strikes in a state both before and after its arbitration statute was enacted. On this basis, there can be no argument that arbitration is successful. For example, during the 39 months of conventional arbitration in Michigan there were no strikes by firefighters and "only a few by police. All but one of these were of short duration and only one against an arbitration award." J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER & B. DENNIS, FINAL-OFFER ARBITRATION 71 (1975) [hereinafter cited as J. STERN]. Since final-offer arbitration was adopted, there have been no strikes, work stoppages or significant job actions by public safety employees. *Id.* There have not been any strikes by either police or firefighters in Pennsylvania since 1968 when the arbitration statute was enacted. *Id.* at 32. There have been no strikes by safety personnel since the enactment of arbitration statutes in Alaska (1972), Connecticut (1975), Iowa (1974), Maine (1974), Massachusetts (1973), Minnesota (1972), Nebraska (1969), Nevada (binding fact-finding 1975), New York (1974), Oregon (1973), Rhode Island (1967), Utah (1975), Washington (1973), and Wyoming (1965). Polland, *supra* note 17, at 48.

20. The California Legislature has previously considered, but rejected, 23 bills that proposed arbitration of public employee disputes. SB 164, 1977-78 Regular Session; SB 4, 275, 1294, 1310, 1975-76 Regular Session; AB 86, 119, 1724, 1781, 1975-76 Regular Session; SB 32, 1973-74 Regular Session; AB 33, 1243, 3666, 1973-74 Regular Session; SB 1424, 1440, 1972 Regular Session; SB 333, 1971 Regular Session; AB 98, 1970 Regular Session; SB 1293, 1294, 1970 Regular Session; AB 1400, 1969 Regular Session; AB 1935, 1967 Regular Session; AB

a heated debate that focused on the political impact of a state mandate for arbitration on local governments.²³

Numerous arguments have been made about the vices and virtues of interest arbitration in the public sector.²⁴ Proponents of arbitration regard it as merely an extension of the negotiation process, and defend it by pointing to its ability to resolve bargaining deadlocks while avoiding strikes.²⁵ The opponents claim that the arbitration process effectively removes decision-making from the hands of elected officials, thereby insulating the government from the governed.²⁶ To date, all but three of the twelve state high courts that have considered the constitutionality of an interest arbitration law have held it valid.²⁷ Two of the decisions upholding arbitration were,

2500, 3084, 1963 Regular Session. See *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 26, 553 P.2d 1140, 1142, 132 Cal. Rptr. 668, 670 (1976). Justice Mosk, dissenting, argued that 22 defeated bills does not represent legislative opposition toward binding arbitration. He states "[In] these circumstances, even the Oracle of Delphi would have difficulty in finding legislative hostility to local use of arbitration." 18 Cal. 3d at 30, 553 P.2d at 1145, 132 Cal. Rptr. at 673.

21. SB 164, 1977-78 Regular Session, as amended, June 22, 1977, provided for mandatory binding issue-by-issue final-offer arbitration of interest disputes between local governments and its safety employees and for the imposition of stringent penalties on striking employees.

22. JOURNAL OF THE CALIFORNIA SENATE at 3913 (1977-78 Reg. Sess.). The vote was 16 in favor; 21 opposed.

23. The June 23, 1977, debate on the senate floor, which was witnessed by the author, saw numerous senators vehemently argue their respective positions. The principal criticism of the bill was that it would remove decisionmaking from the hands of locally elected officials. For an example of the type of arguments echoed by the legislators, both for and against arbitration, see *Interim Hearing Before the California Senate Subcommittee on Local Public Employment Practices*, Sept. 30, 1976, at 72 (pro arbitration statement of Brian L. Hatch, Federated Fire Fighters of California, AFL-CIO); *id.* at 145 (statement of Michael J. Arnold, Legislative Representative, League of California Cities, against arbitration); see Arnold, *The Case Against Compulsory Interest Arbitration*, 33 CAL. PUB. EMP. REL. 32 (1977) [hereinafter cited as Arnold]; Davis & Reno, *The Case for Compulsory Interest Arbitration*, 33 CAL. PUB. EMP. REL. 21 (1977) [hereinafter cited as Davis & Reno].

24. See, e.g., Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47 (1973); McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972).

25. Grodin, *Political Aspects of Public Sector Interest Arbitration*, 1 INDUS. REL. L.J. 1, 17 (1976) [hereinafter cited as Grodin]; Davis & Reno, *supra* note 23.

26. Arnold, *supra* note 23 at 33.

27. *Valid*: *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387 (Me. 1973); *Town of Arlington v. Board of Concil. and Arb.*, — Mass. —, 352 N.E.2d 914 (1976); *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975); *School Dist. of Seward Educ. Ass'n v. School Dist.*, 188 Neb. 772, 199 N.W.2d 752 (1972); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *City of Warwick v. Regular Fireman's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969); *City of Spokane v. Spokane Police Guild*, — Wash. 2d —, 553 P.2d 1316 (1976); *State ex rel. Fire Fighters Local 946 v. City of Laramie*, 437 P.2d 295 (Wyo. 1968). *Invalid*: *City of Aurora v. Aurora Firefighters Prot. Ass'n*, — Colo. —, 566 P.2d 1356 (1977); *Greeley Police Union v. City Council*, — Colo. —, 553 P.2d 790 (1976); *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, — S.D. —, 234 N.W.2d 35 (1975); *Salt Lake City v. International Ass'n of Firefighters*, — Utah —, 563 P.2d 786 (1977). Other state courts have also examined these or related issues. *Maryland Classified Emp. Ass'n v. Anderson*, (Md. Cir. Ct. Case No. 1178 Oct. 18, 1976) (discussed in [1976] 687 GOV'T EMPL. REL. REP. (BNA) B-15) (arbitration law invalid); *Midwest City v. Cravens*, 532 P.2d 829 (Okla. 1975) (arbitration law is matter of statewide concern); *City of Hermiston v. Employment Rel. Bd.*, — Or. App. —, 557 P.2d 681 (1976) (public employee relations, including arbitration is a municipal affair). See also *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161 (5th Cir. 1976); *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Board of Trustees v. Cook County College Teachers Local 1600*, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); *Mugford v. Mayor & City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945); *Fairview Hosp. Ass'n v. Public Bldg. Ser. & Hosp. Emp. Local 113*, 241 Minn. 523, 64 N.W.2d 16 (1954);

however, reached by equally divided courts.²⁸ Three principal attacks have been leveled at compulsory arbitration in the courts. First is the claim that a state lacks the power to mandate arbitration of charter city²⁹ employee disputes because, unlike a general law city,³⁰ a charter city is constitutionally immune from state legislation that concerns its "municipal affairs."³¹ The difficult, and still unresolved, task of the courts is to determine whether

City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); New Jersey Bell Tel. Co. v. Communication Workers, 5 N.J. 354, 75 A.2d 721 (1950); Local 1226, American Fed'n of State, County & Muni. Emps. v. City of Rhinelander, 35 Wis. 2d 209, 151 N.W.2d 30 (1967).

28. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975). The justices in each case were equally divided, thereby affirming the lower court's finding that the arbitration law was valid.

29. A California city may become a "charter city" by majority vote of its electors. Once the city charter is adopted, it becomes effective when filed with the Secretary of State. CAL. CONST. art. XI, §3(a). As a consequence of the enactment of this charter, a city acquires its "home rule" powers to "make and enforce all ordinances and regulations in respect to municipal affairs." CAL. CONST. art. XI, §5(a). For a general discussion of home rule, see S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 216-36 (1970).

30. While a charter city derives its power to govern its municipal affairs from the constitution, CAL. CONST. art. XI, §5, a general law city derives this power from the legislature, see CAL. GOV'T CODE §§34300-45345. The constitution grants all cities and counties, however, the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. art. XI, §7. This power must be distinguished from the power over municipal affairs which is only constitutionally granted to charter cities. See Sato, "Municipal Affairs" in California, 60 CALIF. L. REV. 1055, 1094-98 (1972) [hereinafter cited as Sato]. The main advantage enjoyed by chartered cities is that the exercise of local authority is not restricted as it is for general law cities. The California Legislature, however, has been generous with general law cities and there are few powers enjoyed by chartered cities that have not been granted to general law cities. Further, the municipal affairs doctrine appears to be narrowing as the courts are defining fewer matters as municipal affairs. See LEAGUE OF CALIFORNIA CITIES, CHARTER OR GENERAL LAW CITY? 6 (1971) [hereinafter cited as LEAGUE OF CALIFORNIA CITIES].

31. CAL. CONST. art. XI, §5. Professor Sato describes the immunity as the protective function of the municipal affairs doctrine. Sato, *supra* note 30, at 1060. For a discussion of the evolution of the municipal affairs doctrine in California, see Peppin, *Municipal Home Rule in California I*, 30 CALIF. L. REV. 1 (1941). See note 124 *infra*. Reference to municipal affairs is made in CAL. CONST. art. XI, §5 which provides:

(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensations, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

For examples of cases attacking arbitration as a violation of "home rule" powers, see Town of Arlington v. Board of Concil. and Arb., — Mass. —, 352 N.E.2d 914, 918 (1976); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 26-27, 332 N.E.2d 290, 292-93, 371 N.Y.S.2d 404, 407 (1975); State ex. rel. Firefighters Local 946 v. City of Laramie, 437 P.2d 295, 300 (Wyo. 1968). Cf. Midwest City v. Cravens, 532 P.2d 829, 834 (Okla. 1975) (grievance arbitration for firefighters and police is statewide affair); City of Hermiston v. Employment Rel. Bd., — Or. App. —, 557 P.2d 681, 685-86 (1976) (public employee relations act is not binding on charter cities); Salt Lake City v. International Ass'n of Firefighters, — Utah —, 563 P.2d 786, 789 (1977) (state legislature's withdrawal of local control over wages of firefighters and police does not interfere with municipal function).

a state mandate³² for public sector interest arbitration constitutes a matter of statewide concern³³ or a municipal affair.³⁴ The second attack rests on the doctrine prohibiting the delegation of legislative power.³⁵ The argument is

32. Unlike voluntary interest arbitration, a system of mandatory or compulsory interest arbitration, upon which this comment will focus, *requires* that the parties submit their dispute to the arbitral tribunal if it is unresolved after a statutorily prescribed period. *E.g.*, IOWA CODE ANN. §20.22 (West Supp. 1976); N.Y. CIV. SERV. LAW §209.4 (McKinney Supp. 1975); WIS. STAT. ANN. §111.77(3) (West 1974). Under a system of voluntary interest arbitration, the state does not direct that disputes be submitted to arbitration, rather the parties are free to request binding arbitration during negotiations under a state arbitration plan. *E.g.*, ALASKA STAT. §23.40.200 (1972); N.J. REV. STAT. §34:13A-7 (1965). Alternatively, the state does not provide for arbitration, thereby permitting each municipality independently to adopt and administer an arbitration plan. *See Morris, supra* note 2 at 459. *But see Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 26, 553 P.2d 1140, 1143, 132 Cal. Rptr. 668, 671 (1976) (a California general law city is not permitted to enact an interest arbitration plan). SB 164, 1977-78 Regular Session, *as amended*, June 22, 1977, contained a "local option" provision permitting the voters of a community to render the proposed compulsory arbitration law inapplicable to the municipality. *See notes 20-23 supra*.

33. In *Bishop v. City of San Jose*, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969), the California Supreme Court attempted to shed some light on the meaning of "statewide concern." The court stated:

As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine). . . . [L]ocal governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Instead, in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other 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.

Id. at 61-63, 460 P.2d at 140-41, 81 Cal. Rptr. at 468-69.

34. The determination of what constitutes a municipal affair will not be resolved by the legislature, but by the courts, *id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469, on a case-by-case basis, *Butterworth v. Boyd*, 12 Cal. 2d 140, 147, 82 P.2d 434, 438 (1938). *See note 31 supra* and text accompanying notes 122-126 *infra*.

35. The California Supreme Court stated in *Kugler v. Yocum*, 69 Cal. 2d 371, 445 P.2d 303, 71 Cal. Rptr. 687 (1968), that "the purpose of the doctrine that legislative power cannot be delegated is to assure that 'truly fundamental issues will be resolved by the Legislature' and that a 'grant of authority [is] . . . accompanied by safeguards to prevent its abuse.'" *Id.* at 376, 445 P.2d at 306, 71 Cal. Rptr. at 690. Professor Freund, the first American master of this subject, wrote in 1928:

While it is extremely difficult to formulate a generally valid principle of legitimacy of delegation, the observation may be hazarded, that with regard to major matters the appropriate sphere of delegated authority is where there are no controverted issues of policy or of opinion.

E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 218 (1928). In 1976, Professor Grodin wrote:

Nondelegation doctrine is an unusually murky area of constitutional law. At its core is the notion that the power of legislatures to insulate policymaking from ultimate political control must have some limits. Courts have never developed meaningful criteria for the imposition of those limits, however, and their inability to do so reflects both the complexity of modern government and the reluctance, at least in recent decades, of the judiciary to intrude too deeply into legislative discretion in the structuring of the decisionmaking process.

Grodin, *supra* note 25, at 6. Professor Davis flatly states, "The non-delegation doctrine has failed." K. DAVIS, ADMINISTRATIVE LAW TEXT §2.01 (1972). Nevertheless, courts have seriously considered attacks leveled at arbitration laws founded on the nondelegation doctrine. *E.g.*, *Greeley Police Union v. City Council*, — Colo. —, —, 553 P.2d 790, 792 (1976); *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 398 (Me. 1973); *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 246, 231 N.W.2d 226, 230 (1975).

that certain decisionmaking powers which are vested with the local legislative body may not be delegated to an arbitrator.³⁶ This argument has led some courts to consider the third attack on arbitration: that arbitration severely impinges on the democratic character of local representative government.³⁷ The thrust of this charge is that legislative decisions³⁸ must be made by individuals or bodies that are politically accountable³⁹ to the citizenry represented. When the arbitrator is a private citizen, he or she is immune from the essential political sensitivity that is at the heart of our notion of representative government.⁴⁰

This comment will not consider whether arbitration chills the bargaining process,⁴¹ or whether strikes by public employees should be legalized;⁴² it will be assumed that a workable arbitration scheme is available to California lawmakers and that they will indeed enact such a plan. This comment, instead, will focus on the extent to which California courts will permit a

36. The Michigan Supreme Court, in *Dearborn* stated:

Under the act, the arbitrator/chairman exercises delegated legislative power, political power, the kind of power the Legislature and the Governor possess. But, in contrast with the Legislature, the Governor, established agencies of government and other appointees who exercise a continuing responsibility for the administration of delegated legislative power, the arbitrator/chairman is not accountable through normal political processes for the critical decisions affecting the distribution and level of public services and the allocation of public revenues which he independently makes.

394 Mich. at 256, 231 N.W.2d at 235.

37. See, e.g., *Greeley Police Union v. City Council*, — Colo. —, —, 553 P.2d 790, 792 (1976); *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 256-57, 231 N.W.2d 226, 235 (1975). But see *Town of Arlington v. Board of Concil. and Arb.*, — Mass. —, —, 352 N.E.2d 914, 922 (1976).

38. Decisions that are "legislative" in character generally produce the declaration of general principles to be applied prospectively to all those within the jurisdiction of the legislature. The decision is

usually accompanied by and supplemented with specific regulations designed to transpose the principle into action The legislative function, accordingly, consists of the formulation and validation by government of general rules, principles, and standards for the regulation of human conduct.

1 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION 3 (4th ed. 1972).

39. The Colorado Supreme Court recently stated that fundamental among the basic tenets of representative government "is the precept that officials engaged in governmental decision-making . . . must be accountable to the citizens they represent." *Greeley Police Union v. City Council*, — Colo. —, —, 553 P.2d 790, 792 (1976). Accord, *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 256, 231 N.W.2d 226, 235 (1975). The phrase "political accountability," as used throughout this comment, is intended to represent political sensitivity on the part of decisionmakers to a community as well as the ability of that community to achieve the removal of the decisionmaker. The source of all political power is the people and when they delegate this power, the persons who exercise it must remain sensitive to their constituents. See *Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672 (1976); *Brikenfeld v. City of Berkeley*, 17 Cal. 3d 129, 146, 550 P.2d 1001, 1014, 130 Cal. Rptr. 465, 478 (1976); *Spencer v. City of Alhambra*, 44 Cal. App. 2d 75, 77, 111 P.2d 910, 912 (1941).

40. The principle of representation is fundamental to our republican form of government. See U.S. CONST. art. IV, §4; THE FEDERALIST No. 10 (J. Madison).

41. Numerous commentators claim that compulsory arbitration inhibits the normal bargaining process. See, e.g., Sullivan, *Binding Arbitration in Public Employment Labor Disputes*, 67 U. CIN. L. REV. 666, 676 (1967); Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 287 (1969). But see, e.g., Davis & Reno, *supra* note 23, at 24-25; Rehmus, *supra* note 3, at 311.

42. There has been considerable debate about the desirability of prohibiting public employee strikes. See, e.g., Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970) [hereinafter cited as Burton & Krider]. The debate is presently academic. Strikes by public employees are occurring at an increasing rate, see note 11 *supra*, despite their prohibition, see note 10 *supra*.

legislative mandate for arbitration to intrude on the representative character of local government, and the methods by which the legislature can build political accountability into its arbitration scheme.

This comment will examine whether a legislative mandate for interest arbitration should be binding on California's cities, counties and districts. To facilitate discussion, all future references to charter cities are intended also to apply to charter counties,⁴³ and references to general law cities are intended also to apply to general law counties and districts.⁴⁴ First, three aspects of the arbitration process will be discussed generally.⁴⁵ These aspects are: (1) the state policy decision to mandate arbitration of local public employee interest disputes in order to avert strikes; (2) the scope of arbitrable subjects over which the arbitrator has jurisdiction; and (3) the procedure for selecting the arbitrator. Second, this comment will consider whether California's charter cities will be subject to a legislative mandate for binding interest arbitration. In order to determine whether arbitration constitutes a "municipal affair" thereby holding charter cities autonomous from a statewide legislative mandate, the three aspects of the arbitration process will be examined. Third, the doctrine prohibiting the delegation of legislative power will be considered as a basis for preventing the legislature from vesting the local decisionmaking power of both general law and charter cities in arbitrators who are not politically accountable. Last, methods for selecting the arbitrator will be inspected to gauge the extent to which the arbitration process may be made consonant with our representative form of local government.

ASPECTS OF PUBLIC SECTOR INTEREST ARBITRATION

Three aspects of the interest arbitration process are important to an analysis of whether a legislative mandate for arbitration will be binding on California's charter and general law cities. First is the state policy decision

43. Although there is no constitutional doctrine comparable to the "municipal affairs" doctrine which applies to charter counties, when a charter county has provided for a matter in its charter, which matter was authorized or required by the constitution, such provision supersedes general law. See CAL. CONST. art. XI, §4(g). Thus, as to personnel matters generally, charter provisions of charter counties, as with charter cities, will supersede general laws on the subject, except as to matters of statewide concern. See *Pearson v. County of Los Angeles*, 49 Cal. 523, 535, 319 P.2d 624, 631 (1957). But see *Los Angeles County Civil Serv. Comm'n v. Superior Court*, 141 Cal. Rptr. 126 (1977) (hearing granted by supreme court, L.A. 30878).

44. As with general law cities, general law counties and districts are political subdivisions of the state and derive their power solely from the state legislature. Thus, the issues presented herein with respect to general law cities should apply to general law counties and districts. Districts are organized and operated under the provisions of CAL. GOV'T CODE §§58001-58243. General law counties are governed by CAL. GOV'T CODE §§23000-33017.

45. No attempt is made by this comment to examine the entire process of arbitration. Only three aspects of the process will be considered. For a general discussion of how arbitration works, see F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (3d ed. 1973); Morris, *supra* note 2. Arbitration should be distinguished from other impasse resolution procedures, such as mediation and fact finding. For a definition and discussion of mediation, see INSTITUTE OF INDUSTRIAL RELATIONS, UCLA, *IMPASSE RESOLUTION IN PUBLIC SECTOR INTEREST DISPUTES* tab B (1976), and of factfinding see *id.* at tab C. A hybrid form of interest arbitration that has been drawing increased attention is mediation—arbitration or "med-arb." See Morris, *supra* note 2,

to employ a neutral⁴⁶ third party to resolve interest disputes in order to avoid the interruption of essential local governmental services.⁴⁷ The second aspect concerns the scope of arbitration. The scope includes those issues that the arbitrator should properly be allowed to decide. This is the most critical element of the arbitration process because by prescribing the range of arbitrable issues, the arbitrator's impact on the community may be controlled. Related to the scope of arbitration is the standard imposed by the state legislature to guide the arbitrator's discretion in resolving the dispute. The last aspect of the arbitration process concerns the method for selection of arbitrators. The design of the selection procedure offers an opportunity to the legislature to build political accountability in an otherwise closed arbitration process.⁴⁸ To facilitate analysis of the problems presented by a state mandate for interest arbitration, each aspect will be discussed.

A. Basis for a State Policy to Mandate Arbitration

State legislation that mandates arbitration of local employee disputes is premised on a need to protect all citizens from the effects of essential service interruptions.⁴⁹ The argument is that cities are interdependent for essential services and that a strike in one city will have a direct impact on neighboring communities.⁵⁰ Although the immediate effect of a work stoppage or slowdown by public employees is typically regional⁵¹ in character, it may have

at 461. The procedure permits the neutral third party to interact with the parties and thus assist them in reaching their own agreement. See Kagel & Kagel, *Using Two New Arbitration Techniques*, 95 MONTHLY LAB. REV. 11 (1972).

46. The neutrality of the arbitrator is assured in the private sector by both parties joining in the selection of the arbitrator. See M. TROTTA, *ARBITRATION OF LABOR-MANAGEMENT DISPUTES* 36 (1974). This is the prevailing practice in the public sector as well. See Grodin, *supra* note 25, at 17. A politically accountable person is necessarily responsive to the pressures of the community to which he or she is politically sensitive. If solely accountable to the municipality whose dispute is to be settled, his or her neutrality will be questioned by the employee group. See Grodin, *supra* note 25, at 16. The qualification of the arbitrator to resolve the important questions of public finance and social policy which will face him or her is another important consideration. One way to address this consideration is to require certification of public sector arbitrators, after they have undergone certain prescribed training. Cf. SB 164, 1977-78 Regular Session (requiring registration with the State Mediation and Conciliation Service).

47. Reference to essential employees in this comment generally applies to firefighters and police officers. Arbitration statutes are typically limited to these employee groups. E.g., MICH. COMP. LAWS ANN. §423.233 (Supp. 1975); WIS. STAT. ANN. §111.77(3) (West Supp. 1975). For a discussion of the distinction between essential and nonessential employees, see Burton & Krider, *supra* note 42, at 427. Another important purpose of interest arbitration is the protection of the employees' basic bargaining rights. See Sato, *supra* note 30, at 1060.

48. Under most public sector arbitrator selection procedures, the arbitrators are selected by the parties to the dispute. Morris, *supra* note 2, at 464. This selection procedure focuses the arbitrator's attention on the needs of the disputing parties, and in his or her effort to present at least an appearance of nonpartisanship (arguably to encourage his or her selection by future disputants), a "closed" process is created, which reduces the arbitrator's political sensitivity. A related criticism of this selection procedure is that the parties will be discouraged from engaging in "hard bargaining" if they anticipate that the arbitrator will "split the difference." See Morris, *supra* note 2, at 464. This criticism has given impetus to the increasing use of "final-offer" arbitration, wherein the arbitrator is limited to selecting the final proposal of either party. See J. STERN, *supra* note 19, at 79.

49. Grodin, *supra* note 25, at 2.

50. See notes 186-197 and accompanying text *infra*.

51. An example may illustrate the regional impact of essential employee work stoppages. Suppose City A reaches impasse over a 13% pay raise demand by Union representing police

statewide repercussions.⁵² The contemplated statewide impact of strikes, which compulsory arbitration is intended to avoid, is thus advanced as the basis for state legislation.⁵³ If, however, it is not established that public employee strikes cause an impact that transcends the geographical boundaries of the affected city, the state will lack the constitutional power to mandate a procedure for establishing the terms of employment for charter city employees. This is because a charter city, unlike a general law city, is constitutionally protected from state interference in matters that are exclusively of municipal concern,⁵⁴ such as the setting of its employee wage rates.⁵⁵

The statewide impact, if any, of a strike by municipal employees will depend on the nature of the services withheld. For example, a strike by firefighters in City X has a higher probability of affecting adjoining City Y than a strike by X's city painters. Thus, state legislation that mandates arbitration of municipal employee interest disputes will be binding on general law cities since they are subject to all state general laws, and will be binding on charter cities depending on the services rendered by the employee groups affected.

Another problem presented by state legislation that mandates the resolution of municipal employee interest disputes by arbitration is whether the

officers. Union calls a work stoppage that is joined by the city's firefighters. The strike ends four days later when City A's mayor, exercising his emergency powers, succumbs to Union's demands to end the strike. While no empirical evidence is collected, it appears that the strike produced an increase in burglaries, vandalism and robberies; as well as severe losses for the downtown retail business district. The impact from the strike extended beyond the city limits and had a direct effect on neighboring communities. While the regional effect of the strike is clear, the impact on the state generally, although present, is definitely not as great. This example is not entirely imaginary; a similar strike occurred in August 1975 in San Francisco. See Bowen, *Two Case Studies—Facts and Issues*, 27 CAL. PUB. EMP. REL. 19 (1975). See generally *Verreos v. City & County of San Francisco*, 63 Cal. App. 3d 86, 133 Cal. Rptr. 649 (1976).

52. One important concern for the state during a strike by the essential employees of a municipality, is the protection of state property located in the municipality. For example, during the 25-day firefighter strike in Berkeley, the Governor sent 47 State Division of Forestry firefighters and seven firefighting rigs to protect University property in Berkeley. See *Berkeley Firefighter's 25-Day Strike*, 27 CAL. PUB. EMP. REL. 43 (1975). A related reason for requiring arbitration is the state's concern for the protection of citizens residing in a community that chooses to endure the essential employee strike, rather than capitulate to employee demands. This was the position of the city during the Berkeley firefighter strike. *Id.* This is also apparently the position of the California League of Cities. See *Hearings before the California Senate Subcommittee on Local Public Employment Practices*, Sept. 30, 1976, at 168 (statement of Don Fausset, Employee Relations, City of Sacramento (representing the California League of Cities)). But see Horton, *Arbitration, Arbitrators, and the Public Interest*, 28 INDUS. & LAB. REL. REV. 497, 506 (1975). See also CAL. GOV'T CODE §§8550-8668, 50926.

53. For example, section 1 of SB 164, 1977-78 Regular Session, which was defeated on the Senate floor on June 23, 1977, provided in part:

The Legislature hereby finds and declares that strikes by firefighters and peace officers are a matter of statewide concern and are not in the public interest and are illegal. The Legislature further finds and declares that compulsory and binding arbitration is the appropriate method for resolving disputes that lead to such strikes. It is the intent of this act to prohibit strikes by peace officers and firefighters . . . and to establish impasse remedies, including mandatory binding arbitration . . . in lieu of strikes by such peace officers and firefighters.

54. *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 291, 384 P.2d 158, 167, 32 Cal. Rptr. 830, 839 (1963).

55. CAL. CONST. art. XI, §5(b)(4).

state may delegate the power of the cities to determine the terms and conditions of employment for their personnel to a nonpolitically accountable arbitrator. Interest arbitration is in effect a synonym for delegation. When two parties voluntarily agree⁵⁶ to submit their dispute to arbitration, they decide to substitute their joint judgment with that of an arbitrator. Further, these parties may precisely define the arbitrable issues.⁵⁷ When, however, the *decision* to submit interest disputes to arbitration, and the scope of the arbitrator's authority is not determined by the affected parties, but is imposed by the state, the question arises whether the state possesses the constitutional authority so to delegate the authority of a city to a nonlocally accountable arbitrator. The resolution of this question will depend on the relationship of the nondelegation doctrine to the concern for preserving local representative government⁵⁸ and whether the doctrine that prohibits the delegation of legislative power is violated by the state decision to mandate arbitration, or by the types of the issues left to arbitration.⁵⁹ To explore these problems fully, the scope of arbitration must first be discussed.

B. The Scope of Arbitration

Under a compulsory arbitration system, once the parties reach a bargaining deadlock, the dispute is submitted to arbitration. Initially, the arbitrator must determine whether he or she will have the authority to decide each disputed issue.⁶⁰ Therefore, the arbitrator decides whether each issue falls within the scope of arbitration. Most state laws do not prescribe the scope of

56. The California Arbitration Act, CAL. CIV. PROC. CODE §§1280-1288.8, provides for the enforcement of voluntary agreements to submit existing or future controversies to arbitration. See CAL. CIV. PROC. CODE §1281. There is a substantial difference between the state permitting arbitration of interest disputes by local governments and mandating it. When the local governing body chooses to agree to arbitration, the community may more directly hold these officials politically accountable for their decision than if they are required to submit to arbitration by the state. Compelling local governments to submit to arbitration not only reduces local political accountability, but permits local officials who are faced with difficult issues to leave the decision to the arbitrator. Cf. Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 CIN. L. REV. 47, 53 (1973) (compulsory arbitration reduces the reasoning process of the public employer and union representatives).

57. See *Townsend v. Pacific Inv. Co.*, 58 Cal. App.3d 1, 10, 129 Cal. Rptr. 489, 493 (1976).

58. See S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 11-12 (1975).

59. See text accompanying notes 260-261 *infra*.

60. The California Supreme Court in *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 611, 526 P.2d 971, 973, 116 Cal. Rptr. 507, 509 (1974), declared that whether a matter is arbitrable depends on the facts of each case. The arbitrator should decide whether a matter is within the scope of arbitration in the first instance, with the understanding that "neither party may be bound by a decision in excess of the arbitrator's jurisdiction." Quoting Professor Grodin approvingly, the court noted the dynamic nature of arbitration:

Proposals get modified and non-negotiable positions become negotiable as the parties sort out their priorities, develop understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered.

To determine what is arbitrable and what is not against this changing context is a bit like trying a balancing act in the middle of a rushing torrent.

Id. at 614-15, 526 P.2d at 975, 116 Cal. Rptr. at 511.

arbitration,⁶¹ and the arbitrator typically applies the guidelines established for the scope of negotiation.⁶²

The scope of negotiation⁶³ encompasses the range of issues⁶⁴ that the parties are required, by statute, to discuss in an attempt to reach agreement.⁶⁵ Local government employee relations in California are governed by the Meyers-Milias-Brown Act⁶⁶ [hereinafter referred to as the MMB Act]. The MMB Act establishes the scope for negotiation by directing the parties to meet and confer in good faith,⁶⁷ and to endeavor to reach agreement⁶⁸ on "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment"⁶⁹

61. Most statutes do not describe the scope of arbitration, but assume that the scope of arbitration includes all disputed issues within the scope of negotiation. Hence, the statutes employ language such as "unresolved issues" or "matters in dispute" to define the scope of arbitration. *E.g.*, MASS. GEN. LAWS ANN. ch. 150E, §9 (West Supp. 1975); N. Y. CIV. SERV. LAW §209(4)(c)(v) (McKinney Supp. 1971-72); OKLA. STAT. ANN. tit. 11, §548.7 (West Supp. 1974). Some states exclude wages from the scope of arbitration. *E.g.*, ME. REV. STAT. tit. 26, §979-D (1974); R.I. GEN. LAWS §36-11-9 (Supp. 1974). See also Grodin, *supra* note 25, at 18-20.

62. See Grodin, *supra* note 25, at 18-19.

63. The MMB Act refers to the scope of negotiation as the "scope of representation." See CAL. GOV'T CODE §3504.

64. In *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the California Supreme Court relied on private sector cases under the National Labor Relations Act in interpreting the scope of negotiations. See *id.* at 617, 526 P.2d at 977, 116 Cal. Rptr. at 513. For a comprehensive analysis of the issues held by California courts to be within and without the scope of negotiations under the MMB Act, see INSTITUTE OF INDUSTRIAL RELATIONS, UCLA, THE SCOPE OF BARGAINING IN CALIFORNIA PUBLIC SECTOR LABOR RELATIONS, tab B (1977).

65. The MMB Act does not require the parties to reach an agreement; they must only "meet and confer in good faith" in an effort to reach an agreement. CAL. GOV'T CODE §3505. The definition of "good faith" requires consultation on all issues that fall within the scope of negotiation and prohibits unilateral action without negotiation. See *International Ass'n of Fire Fighters v. City of Pleasanton*, 56 Cal. App. 3d 959, 966-67, 129 Cal. Rptr. 68, 73-74 (1976).

66. CAL. GOV'T CODE §§3500-3590, enacted by CAL. STATS. 1971, c. 254, at 401. For an analysis of the MMB Act, see Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts*, 21 CAL. PUB. EMP. REL. 2 (1974); Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719 (1972). California's state employee relations are governed by the Dills Act, CAL. GOV'T CODE §§3512-3526, (effective July 1, 1978), enacted by CAL. STATS. 1977, c. 1159, at —. For an analysis of the Dills Act, see REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION, 9 PAC. L.J. 644 (1978). Educational employee relations are governed by the Rodda Act, CAL. GOV'T CODE §§3540-3549, enacted by CAL. STATS. 1975, c. 961, at 2247. For an analysis of the provisions of the Rodda Act, see REVIEW OF SELECTED 1975 CALIFORNIA LEGISLATION, 7 PAC. L.J. 451 (1976). Since this comment addresses only local employee relations, references to California public employee relations are directed to the provisions of the MMB Act.

67. CAL. GOV'T CODE §3505 provides, in part:

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.

68. See *Placentia Fire Fighters Local 2147 v. City of Placentia*, 57 Cal. App. 3d 9, 21, 129 Cal. Rptr. 126, 135 (1976). See note 65 *supra*.

69. CAL. GOV'T CODE §3504. The right to representation under the MMB Act reaches all matters of employer-employee relations. CAL. GOV'T CODE §3502. See *Social Workers' Local*

Some issues that fall within the scope of negotiation under the MMB Act involve matters of social planning.⁷⁰ These matters are such that political accountability of the decisionmaker to the community is very important. Since the MMB Act only requires that the parties meet in good faith and endeavor to reach agreement,⁷¹ the only compulsion to reach agreement is the result of political pressure on the representatives of the city's governing body exerted by the community and the employee group.⁷²

Arbitration is, however, a totally different matter. To be effective, the resolution of the dispute is no longer voluntary, but is imposed on both parties to the dispute by the arbitrator. Further, if the scope of the arbitrator's authority is congruent with the scope of the parties' negotiations, the nonpolitically accountable arbitrator may be called upon to decide issues of social policy that should be left to the political process. Arbitration is generally regarded as the *quid pro quo* for the prohibition of local employee strikes.⁷³ Thus, it is generally suggested that for arbitration to be effective, the arbitrator must have the authority to decide all issues upon which the

535 v. Alameda County Welfare Dept., 11 Cal. 3d 382, 387, 521 P.2d 453, 456, 113 Cal. Rptr. 461, 464 (1974).

70. See generally Grodin, *supra* note 25; see also Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974). There are generally three types of issues, which may be within the scope of negotiation and thus arbitration, that an arbitrator may decide or influence. The first category consists of decisions having direct and precise economic impact upon the municipal fisc, such as wages and related matters. The second consists of those matters that result in costs to the employer, but are not within the generic definition of wages. For example, the number of police officers assigned per patrol car is a matter directly affecting the working conditions and workload of the employees that involves important social policy considerations as well as increased costs. The third type of arbitrable dispute consists of issues that present no perceptible financial impact upon the community but relate to working conditions. An example of an issue in this category is the procedure to be followed by a citizen's police review board. Such a board was established by initiative in Berkeley, California (Berkeley, Cal., Ordinance 4644-NS (Apr. 1974)), where a superior court held the review board was required to "meet and confer" with the local police officers association prior to adopting its hearing procedures. (Police Ass'n v. Police Review Comm'n, Civil No. 459-645-9 (Alameda County Sup. Ct., Feb. 7, 1975)). See also Abood v. Detroit Bd. of Educ., 97 S. Ct. 1782, 1797 (1977). The U.S. Supreme Court has acknowledged the exercise of political influence on government decisionmaking by public employee unions through the collective bargaining process. 97 S. Ct. at 1796.

71. See notes 67 & 68 *supra*. Once an agreement is reached, however, it is enforceable against both parties by writ of mandamus. See notes 7 *supra* and 257 *infra*.

72. See 97 S. Ct. at 1796.

Professors Wellington and Winter argue that the process of collective bargaining gives employees too much power over officials who are responsive to political pressure from the community. Therefore, public employees should be left, as any other special interest group, to the normal political process. See Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L. J. 1107, 1123 (1969). Professor Summers suggests that as to some issues, such as wages, public employees are apt to be at a political disadvantage without collective bargaining. See Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L. J. 1156, 1160 (1974).

73. The *City of Vallejo* court ruled that the no-strike clause in the Vallejo charter was interdependent with the provision for arbitration. The court relied on a private sector ruling in *Boys Market, Inc. v. Clerks Union*, 398 U.S. 235 (1970), to conclude that:

[T]he employee's *quid pro quo* for this no-strike provision consisted of the arbitrability of all disputes Any interpretation of the Vallejo charter which improperly failed to require arbitration on the *full range of negotiable issues* would not only erroneously curtail arbitration but would invite the very labor strife which the charter provisions seek to prevent.

12 Cal. 3d at 622-23, 526 P.2d at 981, 116 Cal. Rptr. at 517. (Emphasis in original and added).

parties have been unable to reach agreement.⁷⁴ To achieve the legislative purpose of arbitration, which is to avoid public employee strikes,⁷⁵ it is thus asserted that the scope for arbitration should be congruent to the scope for negotiation. Congruent scopes for negotiation and arbitration remove important issues of social planning from the hands of politically accountable officials and impose a binding and final settlement of the dispute upon the community. If negotiated issues, which reach impasse, are kept outside the scope of arbitration, however, the *quid pro quo* is eliminated and the purpose of the arbitration law is frustrated.

The tension between the desire for an effective strike deterrent and the concern for keeping policymaking in the hands of accountable officials presents a dilemma for lawmakers. This dilemma is generally resolved by prescribing standards to guide the arbitrator's discretion.⁷⁶ The standards imposed on the arbitrator are typically oriented to the economic impact of the award on either the employees or the city; such as the city's ability to finance the award,⁷⁷ the consumer-price index,⁷⁸ and the wages paid to similar private sector employees.⁷⁹ This approach is premised on the notion that by guiding the arbitrator's discretion, fair and uniform decisions will be rendered and the arbitration process will thus be successful.⁸⁰ Besides ignoring the impact on the representative form of local government, however, use of this approach tends to increase the magnitude of the dilemma. For example, a standard that is frequently prescribed is consideration of the municipality's ability to pay for the award.⁸¹ Implicit in this requirement is an evaluation of the city's allocation of resources and its setting of priorities as well as an examination of the community's comparative tax effort.⁸² Although the arbitrator does not *technically* usurp the city's taxing power since the act of raising taxes is left to the local governing body,⁸³ the

74. See Grodin, *supra* note 25, at 19. See also Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?*, 51 ORE. L. REV. 177 (1971).

75. See notes 47 & 53 and text accompanying notes 50-53 *supra*.

76. See Grodin, *supra* note 25, at 9.

77. E.g., MINN. STAT. ANN. §179.72 subdiv. 7 (West Supp. 1975); NEV. REV. STAT. §288.200(8)(a) (1975); OR. REV. STAT. §243.746 (1974). See Grodin, *supra* note 25, at 9-10; Zack, *Ability to Pay In Public Sector Bargaining*, in PROCEEDINGS OF THE NEW YORK UNIVERSITY TWENTY-THIRD ANNUAL CONFERENCE ON LABOR 403 (T. Christensen & A. Christensen eds. 1971).

78. E.g., MICH. COMP. LAWS §423.239 (Supp. 1975); WIS. STAT. ANN. §111.77(6)(e) (West 1974). Some states do not require consideration of any cost of living analyses but require consideration of such employment related factors as hazards and physical and mental qualifications and skills. E.g., N.Y. CIV. SERV. LAW §209(14)(c)(v)(c) (McKinney Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 5154c-1, §13(a) (Vernon Supp. 1975). In other states, the arbitrator is also required to consider "the interests and welfare of the public," e.g., IOWA CODE ANN. §20.22(9)(c) (West Supp. 1975); OKLA. STAT. ANN. tit. 11, §548.10(4) (West Supp. 1974). Three states—Alaska, Pennsylvania and South Dakota—do not prescribe any standards to guide the arbitrator's discretion.

79. TEX. REV. CIV. STAT. ANN. art. 5154c-1, §§4,13 (Vernon Supp. 1975); WASH. REV. CODE ANN. §41.56.460(c) (Supp. 1975).

80. See Davis & Reno, *supra* note 23, at 25.

81. See note 75 *supra*.

82. Grodin, *supra* note 25, at 9-10.

83. California cities are largely subject to fiscal policies established by the state. See CAL. GOV'T CODE §§53732, 53734. Further, an increase in local government costs that result from

practical effect of the award is an exercise of the taxing power.⁸⁴ The courts that have considered this point have dismissed it by relying on the technical distinction between how to finance the award and whether to finance it.⁸⁵

If the arbitrator determines that the city's taxpayers can afford the contemplated award, strikes will be avoided, but the arbitrator will have directed either a tax increase or a reallocation of the city's resources. Alternatively, if the arbitrator finds the citizenry cannot afford to meet the employees' demand, the risk of a strike is heightened. Thus, in neither case are both the concerns for strike avoidance and for keeping policymaking in the hands of the elected official satisfied. Rather, the dilemma created by the tension between these two competing concerns is increased by requiring the arbitrator to play the policymaking role of judging the city's ability to pay.

Another approach to resolving the dilemma created by congruent scopes is to narrow the scope of negotiation. Typically "narrowing" excludes from the bargaining table matters that extend to the managerial prerogatives of the city, such as the setting of standards for services or the size of the work force. This is done in the MMB Act by requiring negotiation over issues that relate to "wages, hours, and other terms and conditions of employment"⁸⁶ and by excluding from negotiation matters that relate to "the merits, necessity, or organization of any service or activity"⁸⁷ The motivation for the latter "management rights proviso"⁸⁸ is "the trepidation that the

both the arbitration process, as well as the arbitrator's award, may constitute a "state-mandated local cost," thereby making the state liable for these costs. CAL. REV. & TAX. CODE §2231 (SB 90). See OP. CAL. LEGIS. COUNSEL No. 1311 (Jan. 23, 1976) State-mandated Local Costs: Labor Relations (SB 1294).

84. Professor Grodin states that the options facing a community that cannot "afford" the arbitrator's award are: (1) cut back the labor force; (2) reduce or do away with other municipal services; (3) increase taxes; or (4) borrow money. Grodin, *supra* note 25, at 7. When the arbitrator considers the ability of the city to finance the contemplated award, he or she explicitly or implicitly examines these options. Not only do these considerations involve issues of social policy that should be left to the political arena, but an arbitrator's award that eliminates an option, by, for example, directing an increase in the work force, as well as the cost of labor, results in effectively directing a tax increase. In the 1975 Oakland arbitration award, arbitrator Arthur B. Jacobs, directed, *inter alia*, the total minimum firefighter work force; the minimum manning level per company, as well as a wage and benefit increase. Local 55, Int'l Ass'n of Fire Fighters v. City of Oakland, Feb. 15, 1975 (Jacobs, Arb.) (copy on file at Pacific Law Journal). See also Ross, *The Arbitration of Public Employee Wage Disputes*, 23 IND. & LAB. REL. REV. 3 (1969).

85. See, e.g., *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 27-28, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); *City of Spokane v. Spokane Police Guild*, — Wash. 2d —, —, 553 P.2d 1316, 1319 (1976).

86. CAL. GOV'T CODE §3504.

87. CAL. GOV'T CODE §3504.

88. The "management rights proviso" in private sector labor relations has no statutory origin. The courts, however, have segregated from the scope of mandatory bargaining, those issues that are solely management functions. See, e.g., *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 267, n.5 (1965); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 213 (1964). The MMB Act explicitly excludes management functions from the scope of negotiations. See text accompanying notes 86-90 *supra*. Nearly all of the California cities and counties that have enacted local employer-employee relations provisions, provide for management rights provisos as part of the scope of negotiation language. See P. TAMOUSH, LOCAL OPTION IN THE ADMINISTRATION OF PUBLIC SECTOR EMPLOYMENT RELATIONS: CALIFORNIA EXPERIENCE AND PROSPECTS 22 (1977) [hereinafter cited as P. TAMOUSH]. See note 90 and accompanying text *infra*.

union would extend its province into matters that should properly remain in the hands of employers⁸⁹ This proviso, however, has been narrowly construed by California courts.⁹⁰

In *Fire Fighters Local 1186 v. City of Vallejo*,⁹¹ one of the union demands was for the addition of one fire engine company and for an increase in the number of personnel assigned to the present companies.⁹² This demand entailed the possible construction of a new fire station and the purchase of new equipment.⁹³ The city contended the demand was outside the scope of negotiation and thus outside the scope of arbitration since it related to the city's fire prevention policy.⁹⁴ The union countered that it was not seeking to influence the city's policy, but instead its demand was directed at the workload and safety of its members.⁹⁵ Although the demand was withdrawn prior to appeal, the California Supreme Court commented that the determination of this question would depend on the purpose of the union's demand. If the union proved its demand was *primarily* related to the working conditions of its members, then the parties would be required to discuss it.⁹⁶ Furthermore, since the Vallejo Charter provided for arbitration of disputes, the court stated that the determination of whether this demand was arbitrable should be made initially by the arbitrator⁹⁷ and should be directed at achieving congruency with the scope of negotiation.⁹⁸ Thus, under an arbitration provision that does not specify the scope of the arbitrator's authority, in order to achieve the *quid pro quo* for the prohibition of strikes, the arbitrator, upon finding an issue within the scope for negotiation, would be compelled to decide it.

The union demand considered by the *City of Vallejo* court suggests the variety of issues that potentially face an arbitrator. Most of these are not susceptible to the formulation of standards to guide the arbitrator's discretion.⁹⁹ Thus, an arbitrator confronted with a union demand that primarily relates to employee working conditions and yet arguably impinges on the city's policymaking authority, must either decide the issue, or disregard the union's evidence and classify it as outside the scope of arbitration. The

89. *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 616, 526 P.2d 971, 976, 116 Cal. Rptr. 507, 512 (1974).

90. See, e.g., *id.*; *Los Angeles County Emps. Ass'n. Local 660 v. County of Los Angeles*, 33 Cal. App. 3d 1, 7-8, 108 Cal. Rptr. 625, 629-30 (1973). Cf. *International Ass'n of Fire Fighters v. City of Pleasanton*, 56 Cal. App. 3d 959, 968, 129 Cal. Rptr. 68, 74 (1976) (scope of negotiation to be liberally construed). But see *San Francisco Fire Fighters, Local 798 v. Board of Supervisors*, 1 Civ. No. 38823 (filed and certified for publication Dec. 14, 1977) at 15.

91. 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974).

92. *Id.* at 618, 526 P.2d at 978, 116 Cal. Rptr. at 514.

93. *Id.* at 619, 526 P.2d at 978, 116 Cal. Rptr. at 514.

94. *Id.*

95. *Id.*

96. *Id.* at 620-21, 526 P.2d at 979, 116 Cal. Rptr. at 515.

97. *Id.*

98. *Id.* at 621, 526 P.2d at 980-81, 116 Cal. Rptr. at 516-17.

99. See text accompanying notes 257-258 *infra*.

implications of either decision should be considered. If the *City of Vallejo* arbitrator decides the issue in favor of the union, although the focus is on working conditions, he or she will inevitably modify the fire prevention policy for the city. If the Vallejo community is dissatisfied with this result it has no recourse since the arbitrator's¹⁰⁰ award will be enforceable against it.¹⁰¹ Alternatively, the arbitrator may decide that this issue should be left to the political process.¹⁰² Such a refusal to decide the issue may undermine the credibility of the arbitrator, thereby reducing his or her effectiveness, and may ultimately frustrate the legislative purpose for arbitration.¹⁰³

This comment suggests that the most promising approach for resolving the dilemma created by congruent scopes is to focus on the procedure for selecting the arbitrator, which will be examined next. This approach appears most attractive when it is recognized that attempts to guide an arbitrator's discretion by imposing standards may complicate the problem rather than resolve it, and that many issues within a congruent scope of arbitration are not susceptible to prior guidance by the legislature.

C. Selecting the Arbitrator

Most state arbitration laws provide for tripartite arbitration panels.¹⁰⁴ Each party to the dispute selects one person to serve on the panel. The two "partisan arbitrators" then choose a third person who acts as a neutral chairperson. The principal benefit to this approach is mediative.¹⁰⁵ The primary alternative to the tripartite panel is selection of a single arbitrator.¹⁰⁶ Under either procedure, it is generally believed that by participating in the selection of the arbitrator, the parties' confidence in and thus the effective-

100. References made to arbitration in this comment are intended to include both single ad hoc arbitrators as well as panels of arbitrators. The City of Vallejo Charter provides for a panel of three arbitrators. VALLEJO CHARTER §810 (quoted at 12 Cal. 3d at 613 n.3, 526 P.2d at 974 n.3, 116 Cal. Rptr. at 510 n.3). Most states provide for tripartite arbitration panels. See note 104 *infra*.

101. Most states provide that an arbitrator's award is final and binding on both parties. *E.g.*, CONN. GEN. STAT. ANN. §7-473(c)(3) (West Supp. 1977); R.I. GEN. LAWS §§28-9.1-9, 2-9 (1969). The normal statutory procedure is to permit judicial enforcement of an award. Morris, *supra* note 2, at 492. Most of the states with interest arbitration statutes permit an award to be contested on only narrow grounds. *E.g.*, N.J. REV. STAT. §§2A: 24-8, 24-9 (1952); VT. STAT. ANN. tit. 21, §1733(c) (Supp. 1975); WIS. STAT. §298.11 (1958).

The Vallejo City government has twice attempted to repeal the charter arbitration provision. These attempts failed by increasingly greater margins at each election. Davis & Reno, *supra* note 23, at 26.

102. By refusing to decide an issue believed to belong in the political arena, the arbitrator forces the employees to rely upon political weapons to induce agreement to their desired position. See Grodin, *supra* note 25, at 19-20. See note 14 *supra*.

103. *Cf.* Grodin, *supra* note 25, at 13-14 (most arbitrators regard arbitration as an extension of the collective bargaining process and are likely to seek to resolve disputes by locating areas of flexibility).

104. *E.g.*, ME. REV. STAT. tit. 26, §965 (1974); MICH. COMP. LAWS §423.235 (Supp. 1976); PA. STAT. ANN. tit. 43, §217.4 (Purdon Supp. 1975).

105. See J. STERN, *supra* note 19, at 124. *But see* Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 36 (criticizing the use of tripartite panels).

106. *E.g.*, IOWA CODE ANN. §20.22 (West Supp. 1976); MINN. STAT. §179.72 (Supp. 1976); WIS. STAT. ANN. §111.77(3) (West Supp. 1974). Nebraska provides a Court of Industrial Relations. NEB. REV. STAT. §48-810 (1974).

ness of the arbitration process is increased.¹⁰⁷ Either selection procedure provides an alternative method for choosing the neutral arbitrator-chairperson when the parties are unable to agree. Typically this is done by each party alternatively striking names from a list of names maintained by a state agency.¹⁰⁸ When a party refuses to select a partisan arbitrator or strike a name from the list, the agency that administers the state's arbitration law may make the appointment.¹⁰⁹

The Michigan Supreme Court recently decided that the appointment of the neutral chairperson of an arbitration panel by a politically accountable government official was necessary to satisfy a constitutional requirement of continuing political accountability for local policymaking.¹¹⁰ Requiring arbitrators to be politically accountable appears as an appealing middle ground between the view that regards arbitration as an extension of the negotiation process¹¹¹ and the view that expresses concern for the impact of arbitration on the representative character of local government.¹¹² If the arbitrator is answerable to the local governing body his or her effectiveness will suffer.¹¹³ Alternatively, if the arbitrator is answerable to the state legislative body, sensitivity to local conditions and thus accountability to the community may be lost. The middle ground occupied by the politically accountable arbitrator permits the arbitration process to avoid strikes without sacrificing the essential ingredients of representative government. This comment, therefore, suggests that arbitrators be appointed by politically accountable officials on a regional level.¹¹⁴ Arbitrator selection at this intermediate level

107. See, e.g., Grodin, *supra* note 25, at 17; McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1197 (1972).

108. E.g., IOWA CODE ANN. §20.22(5) (West Supp. 1975); ME. REV. STAT. tit. 26, §965(4) (1974); UTAH CODE ANN. §34-20a-8 (Supp. 1975).

109. In Michigan, the neutral chairman must be selected from a list of names compiled by the Michigan Employee Relations Commission. The names are taken from a panel of arbitrators appointed indefinitely after being administered a constitutional oath. MICH. COMP. LAWS §423.235 (Supp. 1976). California has recently created a public employee relations board. CAL. GOV'T CODE §3541, *as amended*, CAL. STATS. 1977, c. 1159, at —.

110. Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975). Justice Williams noted that:

Collective bargaining in the public sector is part of the public process, and thus persons bearing the ultimate political responsibility must not isolate themselves from the process. While it is not necessary that elected officials themselves do the arbitrating, citizens should be able to identify every elected official responsible for the result of the arbitration—either because he was an arbitrator or appointed the arbitrator.

Id. at 315-16, 231 N.W.2d at 264.

111. See note 25 and accompanying text *supra*.

112. See note 26 and accompanying text *supra*.

113. See Grodin, *supra* note 25, at 16.

114. An important consideration in defining the boundaries of each region is the population density. For example, the San Francisco bay area may warrant several regions, e.g., Peninsula, East Bay, and North Bay regions. Less densely populated areas, such as some Northern California areas, may warrant larger geographical boundaries. A prerequisite to being selected to serve on a regional board of arbitrators should be either residence in the region or intimate knowledge of the needs and concerns of the area. These boards could serve the additional valuable function of monitoring employer-employee relations in the area. A system of "mini-perbs" serves this function in New York. See P. TAMOUSH, *supra* note 88, at 2-3. This suggestion may be regarded as a step toward "metropolitan governments," an idea which has

should produce individuals attuned to the unique local condition; yet not directly answerable to the local governments.

The foregoing has examined three aspects of the interest arbitration process in the public sector. A state policy that mandates arbitration of interest disputes is premised on a desire to avoid strikes by essential public employees. While there appears a need to build political accountability in an otherwise politically insulated arbitration process, caution should be exercised so that the process remains effective in avoiding strikes. Therefore, it was suggested that the scope of negotiation and the scope of arbitration should be congruent and that preservation of the representative character of local government may best be achieved by focusing on building political accountability in the arbitrator selection procedure. Thus, it was recommended that arbitrators be appointed by politically accountable officials and should serve on regional panels.

This comment next examines the aspects of the arbitration process to determine whether a legislative mandate for interest arbitration will be binding on charter cities. Following this examination, the comment will consider whether the mandate will constitute an unlawful delegation of legislative power. Finally, the comment will return for a closer examination of the recommendation for a regional panel of politically appointed arbitrators.

INTEREST ARBITRATION—BINDING ON CHARTER CITIES?

Concern for representative local government was first manifested by the California courts in the late 1800's.¹¹⁵ The courts relied on the "right to local self-government" to insulate cities from state interference in matters of purely local concern.¹¹⁶ In 1896,¹¹⁷ and again in 1914,¹¹⁸ constitutional amendments were enacted granting chartered cities immunity from state interference in matters concerning municipal affairs.¹¹⁹

When the state legislature enacts a law intended to deal with a matter that concerns the state generally, such as a statewide compulsory arbitration law, a statewide concern is expressed. When, however, the substance of the state law directly interferes with matters of exclusively municipal concern, the

previously been proposed. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SUB-COMM., HOUSE COMM. ON GOV'T OPNS., 89TH CONG. 2D SESS., METROPOLITAN AMERICA: CHALLENGE TO FEDERALISM 1-9 (Comm. Print 1966).

115. *People v. Lynch*, 51 Cal. 15 (1875).

116. *Id.*; see Peppin, *Municipal Home Rule in California I*, 30 CALIF. L. REV. 1, 6-22 (1941). In *Hoagland v. City of Sacramento*, 52 Cal. 142 (1877), the California Supreme Court also relied on the concept of "no taxation without representation" to preserve local autonomy from state interference. The "inherent right" doctrine has been vigorously attacked as inconsistent with the premises of the American constitutional system. McBain, *The Doctrine of an Inherent Right to Local Self-Government*, 16 COLUM. L. REV. 190, 299 (1916).

117. CAL. CONST. art. XI, §6 (1896).

118. CAL. CONST. art. XI, §6 (1914). A corresponding amendment was made to Section 8.

119. See Sato, *supra* note 30, at 1056.

law will not be binding on charter cities.¹²⁰ In the case of a statewide compulsory arbitration law, the interest of the state is uniformly to avoid local labor strife by the arbitration of disputes and thereby to avert public employee strikes that detrimentally affect the state's citizenry.¹²¹ The interest of the municipality is to retain control over decisionmaking on the issues that cause the disputes, and thereby maintain local accountability for policies that directly affect the community. The determination of whether a law is to be binding on a charter city depends on whether the law primarily deals with a matter of statewide rather than municipal concern.¹²² If the law only *incidentally* affects a municipal affair in the accomplishment of the matter of statewide concern, then it may be applied to the charter city.¹²³ Thus, a law that deals with a matter of *exclusively* municipal concern will not be binding on a charter city.¹²⁴

Interpreting the concept of "municipal affairs" has been a difficult duty for California courts.¹²⁵ Recognizing that it must remain sensitive to the changing demands of society, the supreme court has cautioned that "[w]hat 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."¹²⁶ Thus, rather than announcing guidelines for determining the nature of municipal affairs, the court has stated that it would define "municipal affairs" on a case-by-case basis.¹²⁷ Furthermore, the supreme court has declared itself as the final arbiter of whether a matter is of statewide concern.¹²⁸ While the purpose of the legislature in enacting a general law is important, this fact alone is not determinative.¹²⁹

In order to predict whether a legislative mandate for arbitration will be binding on California's seventy-seven chartered cities,¹³⁰ it is necessary to

120. See *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 291, 384 P.2d 158, 167, 32 Cal. Rptr. 830, 839 (1963).

121. See text accompanying notes 46-49 *supra*.

122. See *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969); CAL. CONST. art. XI, §5.

123. *Wilson v. Walters*, 19 Cal. 2d 111, 119, 119 P.2d 340, 344 (1941).

124. Personnel matters have long been held to be an area in which charter provisions prevail over state law. See *Pearson v. County of Los Angeles*, 49 Cal. 2d 523, 536, 319 P.2d 624, 632 (1957). Certain other matters have been classified as municipal affairs. For example: public employee salaries, *Popper v. Broderick*, 123 Cal. 456, 56 P. 53 (1899); the discipline of public employees, *Shewbridge v. Police Comm'n*, 64 Cal. App. 2d 787, 149 P.2d 429 (1944); and the imposition of residency requirements for public employees, *Ector v. City of Torrance*, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973) (overruled by constitutional amendment, Nov. 5, 1974, see CAL. CONST. art. XI, §10(b)).

125. *Ex parte Braun*, 141 Cal. 204, 214, 74 P. 780, 784 (1903), in which concurring Justice McFarland lamented, "The section of the constitution in question uses the loose, indefinable, wild words 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean." *Id.*

126. *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 771, 336 P.2d 514, 517 (1959).

127. *Butterworth v. Boyd*, 12 Cal. 2d 140, 147, 82 P.2d 434, 438 (1938).

128. 1 Cal. 3d at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

129. *Id.* The court emphasized that "the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." *Id.*

130. See LEAGUE OF CALIFORNIA CITIES, *supra* note 30, at v.

determine whether arbitration constitutes a matter of municipal or statewide concern. Therefore, the aspects of the arbitration process will be examined in light of the judicial opinions interpreting the constitutional provision¹³¹ granting chartered cities autonomy from state interference in municipal affairs. At the outset, it is important to emphasize the distinction between the interest of the state in averting public employee strikes by mandating arbitration of disputes and the interest of the municipalities in retaining control over the substance of the disputes. Therefore, the following analysis will attempt to ascertain whether, in light of these competing interests, a statewide compulsory arbitration law will constitute a statewide concern and therefore be binding on charter cities in California.

A. Public Sector Labor Relations

The present status of municipal employee labor relations laws in California and their application to charter cities provides a useful starting point for an analysis of whether a legislative mandate for interest arbitration will be binding on charter cities. Labor relations for all municipal employees, except for educational employees,¹³² are governed by the MMB Act. Prior to the enactment of the MMB Act¹³³ special sections of the Labor Code, relating to firefighters, were adopted.¹³⁴ These sections gave firefighters certain basic rights to join a labor organization¹³⁵ and to present grievances and recommendations regarding wages, salaries, hours and working conditions.¹³⁶ This law, which also expressly prohibits strikes by firefighters,¹³⁷ supplements the provisions of the MMB Act that are currently applied to labor relations with firefighters.¹³⁸ Neither the provisions of the Labor Code nor the MMB Act provide for any impasse resolution procedure.¹³⁹ Thus, the selection of an impasse resolution procedure has been a matter left to each community by the state legislature.¹⁴⁰ Both the firefighter provisions of the Labor Code and certain provisions of the MMB Act have been held by

131. CAL. CONST. art. XI, §6.

132. See note 66 *supra*.

133. With the enactment of the George Brown Act, CAL. STATS. 1961, c. 1964, at 4141, which preceded the MMB Act, California became one of the first states in the nation statutorily to recognize the concept of public employee bargaining. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719, 719 (1972).

134. CAL. LAB. CODE §§1960-1963, enacted by CAL. STATS. 1959, c. 723, at 2711.

135. CAL. LAB. CODE §1960.

136. CAL. LAB. CODE §1962.

137. CAL. LAB. CODE §1962.

138. See *Los Angeles County Firefighters Local 1014 v. City of Monrovia*, 24 Cal. App. 3d 289, 101 Cal. Rptr. 78 (1972).

139. The MMB Act provides for mediation, CAL. GOV'T CODE §3505.2, but the parties are not required to place disputed matters in the hands of a mediator. *Placentia Fire Fighters Local 2147 v. City of Placentia*, 57 Cal. App. 3d 9, 21, 129 Cal. Rptr. 126, 135 (1976).

140. The use of impasse resolution procedures other than mediation is permitted by charter cities only. See *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 25, 553 P.2d 1140, 1142, 132 Cal. Rptr. 668, 670 (1976). Cities and counties are allowed to employ factfinding under the Redda Act, CAL. GOV'T CODE §3548.1-3. For a survey of impasse resolution procedures employed by selected California cities and counties, see P. TAMOUSH, *supra* note 88, at 20-21.

California courts to apply to charter cities.¹⁴¹

Ruling on the applicability of the firefighter provision of the Labor Code¹⁴² to a charter city, the California Supreme Court in *Professional Firefighters, Inc. v. City of Los Angeles*¹⁴³ stated that since the "Legislature was attempting to deal with labor relations on a statewide basis"¹⁴⁴ with the intention of providing certain special rights and benefits to firefighters¹⁴⁵ in order to "create uniform fair labor practices throughout the state,"¹⁴⁶ the law was binding on charter cities, despite some impingement on local control.¹⁴⁷ The unanimous court reasoned that the law was not depriving local government of management or control of its fire department, but was simply imposing standards for uniform statewide fair labor relations.¹⁴⁸ The court's holding appears to rest on its finding that the legislature was attempting to deal with a problem in a uniform statewide manner and that the local effect of the law would only incidentally impact on the municipal affairs of the chartered city.¹⁴⁹

The *Professional Firefighters* court found support for its contention that labor relations with firefighters was a matter of statewide concern in the holdings of twenty-two cases in which matters typically of municipal concern were found to be governed by state law due to the desire of the legislature to deal with these matters on a statewide basis.¹⁵⁰ This aspect of the court's rationale is presently of questionable validity due to the reasoning in *Bishop v. City of San Jose*,¹⁵¹ in which the California Supreme Court stated that while the desire of the legislature to deal with a matter on a statewide basis will be given great weight, that fact alone will not be determinative to the court's conclusion that a matter is either a municipal affair or a matter of statewide concern.¹⁵² The court's departure from its previous *Professional Firefighters* rationale prompted Justice Peters, in his sharp dissent, to argue that *Bishop* impliedly overruled *Professional Firefighters*.¹⁵³ Nevertheless, *Professional Firefighters* appears to be viable

141. See *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 294-95, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963); *San Francisco Fire Fighters Local 798 v. Board of Supervisors*, 1 Civ. No. 38823 (filed and certified for publication Dec. 14, 1977) at 6; *Los Angeles County Civil Serv. Comm'n v. Superior Court*, 141 Cal. Rptr. 126, 130 (1977) (hearing granted by supreme court, L.A. 30878); *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*, 58 Cal. App. 3d 492, 500, 129 Cal. Rptr. 893, 898 (1976); *San Leandro Police Officers Ass'n v. City of San Leandro*, 55 Cal. App. 3d 553, 557, 127 Cal. Rptr. 856, 858 (1976).

142. CAL. LAB. CODE §§1960-1963.

143. 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

144. *Id.* at 294, 384 P.2d at 169, 32 Cal. Rptr. at 841.

145. *Id.* at 291, 384 P.2d at 167, 32 Cal. Rptr. at 839.

146. *Id.* at 295, 384 P.2d at 169, 32 Cal. Rptr. at 841.

147. *Id.*

148. *Id.* at 294-95, 384 P.2d at 169, 32 Cal. Rptr. at 841.

149. *Id.*

150. *Id.* at 294, 384 P.2d at 169, 32 Cal. Rptr. at 841.

151. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

152. *Id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

153. *Id.* at 67, 460 P.2d at 144, 81 Cal. Rptr. at 472 (Peters, J., dissenting). Justice Peters was joined by two other Justices in his dissent.

authority for the proposition that "[l]abor relations in the public sector are matters of statewide concern"¹⁵⁴ This statement was the basis for the Fourth District Court of Appeal holding in *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*¹⁵⁵ that a charter city is bound by the definition of scope of negotiation in the MMB Act.¹⁵⁶ Because of the unique nature of the MMB Act, which permits broad local flexibility in the implementation of the objectives of the Act,¹⁵⁷ the courts seldom have been faced with cases calling for a distinction between the applicability of the MMB Act to charter cities versus general law cities.

Two recent cases are, however, worthy of note. First, in *Bagley v. City of Manhattan Beach*,¹⁵⁸ the supreme court held that a general law city properly withheld from the ballot a proposed initiative measure providing for binding arbitration of interest disputes with the firefighting personnel of the city because the city was not permitted to delegate its wage-setting authority without an express authorization from the state legislature.¹⁵⁹ The court buttressed its ruling, which was based on a general law¹⁶⁰ *outside of the MMB Act*, on a construction of the MMB Act in which it determined that the Act did not permit the use of arbitration to resolve interest disputes.¹⁶¹ Significantly, the court compared its previous ruling in *Fire Fighters Local 1186 v. City of Vallejo*,¹⁶² in which it had enforced a similar arbitration provision¹⁶³ for a charter city. The difference between the two cases lies in the nature of the city; Vallejo is a charter city, while Manhattan Beach is a general law city.¹⁶⁴ Although *Bagley* does indicate that the court is sensitive to the difference between charter cities and general law cities in the field of

154. *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*, 58 Cal. App. 3d 492, 500, 129 Cal. Rptr. 893, 898 (1976).

155. 58 Cal. App. 3d 492, 129 Cal. Rptr. 893 (1976).

156. *Id.* at 503, 129 Cal. Rptr. at 900.

157. CAL. GOV'T CODE §3507; see P. TAMOUSH, *supra* note 88, at 1; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719, 724-25 (1972).

158. 18 Cal. 3d 22, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976).

159. *Id.* at 26-27, 553 P.2d at 1143, 132 Cal. Rptr. at 671.

160. CAL. GOV'T CODE §36506.

161. The *Bagley* court stated that "the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to . . . binding arbitration. 18 Cal. 3d at 25, 553 P.2d at 1142, 132 Cal. Rptr. at 670 (emphasis in original). This language is susceptible to different interpretations. If the court means that the MMB Act does not authorize arbitration, then the legislature has not attempted to foreclose its use by chartered cities. Rather, the legislature has neither encouraged nor discouraged the use of arbitration by local agencies. If, however, the court reads the MMB Act provision as pronouncing a legislative intent to prohibit arbitration, then by virtue of the previous unanimous endorsement of the Vallejo charter arbitration provision, see *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 622 n.13, 526 P.2d 971, 981 n.13, 116 Cal. Rptr. 507, 517 n.13 (1974), the court suggests that impasse resolution under the MMB Act may be a municipal affair left to charter cities.

162. 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974).

163. Compare *id.* at 612-13 nn.2 & 3, 526 P.2d 974-75 nn. 2 & 3, 116 Cal. Rptr. 510-11 nn. 2 & 3 with *Bagley v. City of Manhattan Beach*, 123 Cal. Rptr. 908, 909-10 (1975) (court of appeal decision).

164. The *Bagley* court noted, "Although *Fire Fighters Union v. City of Vallejo* . . . approved arbitration provisions adopted by initiative, Vallejo is a chartered city—not a general law city subject to Government Code section 36506." 18 Cal. 3d at 27 n.1, 553 P.2d at 1143 n.1, 132 Cal. Rptr. at 671 n.1.

labor relations, it is of limited value to this analysis since the primary basis for the court's holding was the general wage-setting law,¹⁶⁵ and not the MMB Act.

Second, in *San Francisco Fire Fighters Local 798 v. Board of Supervisors*¹⁶⁶ the First District Court of Appeal ruled that the charter city board of supervisors was not required by the MMB Act to meet and confer in good faith with the employee representatives prior to placing a measure that affected the employment conditions on the ballot.¹⁶⁷ The court founded its ruling on the different concept of government employed by charter cities, whose citizens, unlike those of general law cities, have "elected to be governed by a charter which they themselves legislated into existence by majority vote."¹⁶⁸ Thus, since the power to place proposed charter amendments on the ballot was constitutionally granted to the board of supervisors,¹⁶⁹ the court ruled that the MMB Act had no application. This ruling suggests that a charter city could circumvent the provisions of the MMB Act by enacting conflicting charter provisions. This holding is not reconcilable with the *Huntington Beach* case, in which the court noted that

[a]lthough the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the MMB Act. Were we to uphold the city's regulation in question, local entities would . . . "undercut the very purpose which the act purports to serve."¹⁷⁰

The court went on, quoting Professor Grodin approvingly, "[T]he power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are 'consistent with, and effectuate the declared purposes of, the statute as a whole.'"¹⁷¹

Arguably, since the *Huntington Beach* provision was not part of the city charter, but was a city council resolution,¹⁷² it is distinguishable from *San Francisco Fire Fighters* which involved proposed charter provisions.¹⁷³ Such a distinction appears, however, to be illusory. The question facing both courts was the extent to which a charter city should be permitted to circumvent the requirements imposed by the MMB Act. The method employed by either city to achieve the circumvention should not be relevant. Central to the ruling of the *San Francisco Fire Fighters* court was concern

165. CAL. GOV'T CODE §36506.

166. 1 Civ. No. 38823 (filed and certified for publication Dec. 14, 1977).

167. *Id.* at 15-16.

168. *Id.* at 16.

169. CAL. CONST. art. XI, §3. See CAL. GOV'T CODE §34459.

170. 58 Cal. App. 3d at 501-02, 129 Cal. Rptr. at 899-900.

171. *Id.* at 502, 129 Cal. Rptr. at 900.

172. *Id.* at 495, 129 Cal. Rptr. at 895.

173. 1 Civ. No. 38823 (filed and certified for publication Dec. 14, 1977) at 4-5.

for preserving the power of the electorate to affect local decisionmaking.¹⁷⁴ The *Bagley* court did not share this concern, however, when it was faced with a similar claim in a case involving a general law city.¹⁷⁵ The manner in which the supreme court resolves the conflict between *Huntington Beach* and *San Francisco Fire Fighters* will be indicative of its posture *vis-à-vis* arbitration. An endorsement of the *Huntington Beach* analysis would suggest support for a statewide arbitration law to which charter cities would be subject. Alternatively, endorsement of the *San Francisco Fire Fighters* analysis would suggest an expression of support for both local autonomy from a statewide arbitration law, as well as concern for preserving local decisionmaking in the hands of the local electorate.

The courts have not yet been faced with the question whether a statewide arbitration law should be binding on charter cities. When faced with such a question, their conclusion should depend on whether the legislative mandate for interest arbitration presents a sufficient statewide concern to warrant the intrusion into the municipal affairs of charter cities. In order to reach a conclusion, the courts should examine the three aspects of the arbitration process, to which this comment next turns.

B. The Decision to Arbitrate

The impact caused by public employee strikes varies depending upon the nature of the services withheld. Burton and Krider suggest that public services can be divided into three categories:¹⁷⁶

- (1) essential services—police and fire—where strikes immediately endanger public health and safety; (2) intermediate services—sanitation, hospitals, transit, water, and sewage—where strikes of a few days might be tolerated; (3) nonessential services—streets, parks, education, housing, welfare and general administration—where strikes of indefinite duration could be tolerated.¹⁷⁷

Noting that essentiality of the service depends on the size of the community affected,¹⁷⁸ they argue that strike prohibitions should not be extended beyond the first category.¹⁷⁹ Other scholars, notably Professors Wellington and Winter, favor the continued prohibition of all public employee strikes, primarily because strikes distort the political process by vesting excessive power in unions in relation to other special interest groups.¹⁸⁰ It has,

174. *See id.* at 16. Admittedly, there is a significant difference between the enactment of a charter provision as in *San Francisco Fire Fighters* and the enactment of an ordinance by the local government as in *Huntington Beach*. The impact on public employee relations may be the same in both cases, however. The only difference is that the electorate enact the charter provisions, while the elected representatives enact the ordinances. *See id.* at 13.

175. Compare 18 Cal. 3d at 26-27, 553 P.2d at 1143, 132 Cal. Rptr. at 671 with 18 Cal. 3d at 28-29, 553 P.2d at 1144, 132 Cal. Rptr. at 672 (Mosk, J., dissenting).

176. Burton & Krider, *supra* note 42, at 427.

177. Burton & Krider, *supra* note 42, at 427.

178. *See* Burton & Krider, *supra* note 42, at 427.

179. *See* Burton & Krider, *supra* note 42, at 427-32.

180. H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 167 (1971).

however, become academic to speak of the right of public employees to strike. Strikes by both essential and nonessential employees are occurring at an increased rate despite their illegality.¹⁸¹ Recognizing this, a majority of states provide arbitration as an alternative to strikes.¹⁸² Most of these arbitration laws are designed to prevent strikes by municipal employees whose services are so essential that a strike could not be tolerated.¹⁸³ Although disputed by its opponents,¹⁸⁴ most evidence suggests that compulsory arbitration has been successful in avoiding public employee strikes.¹⁸⁵

A statewide policy that mandates arbitration is premised on the notion that strikes by essential local employees should be avoided because of their impact on neighboring communities. This postulates a need for state regulation to avert the impact¹⁸⁶ that results when a city decides to endure a public employee strike.¹⁸⁷ Furthermore, the state has an interest in protecting its property located in the struck area.¹⁸⁸ Thus, a compelling position is presented for state legislation aimed at reducing the incidence of essential employee strikes. This position weakens, however, when it is used to support a state arbitration law aimed at avoiding strikes by nonessential local employees.¹⁸⁹ The impact on neighboring communities, or the state general-

181. See notes 10 & 11 and accompanying text *supra*.

182. See note 15 *supra*.

183. See note 47 *supra*.

184. The opponents of interest arbitration typically claim support in the Australian experience with arbitration and to the Montreal firefighters strike in 1969 and 1974. Speaking of the Australian experience, Professors Bok and Dunlop noted:

In Australia, where arbitration is widely used, strikes are more serious than in most other industrial democracies where free collective bargaining prevails. While no exact parallels can be drawn between two countries, the Australian experience clearly demonstrates that compulsory arbitration does not automatically do away with strikes, or even reduce them to minimal proportions.

D. BOK, LABOR AND THE AMERICAN COMMUNITY 240 (1970). For a discussion of the Australian experience with arbitration, see Morris, *supra* note 2, at 439-56. The Montreal firefighter strike of 1974 allegedly was in reaction to an arbitration award believed by the public employees to be too low. See Burton & Krider, *supra* note 42, at 433-34. Compare Arnold, *supra* note 23, at 37 with Polland, *supra* note 17, at 46.

185. See Polland, *supra* note 17, at 46-49. The author of a study of New York's three year experience with arbitration refused to draw the conclusion that the absence of strikes indicated that the procedure was an effective strike deterrent. But see T. KOCHAN, R. EHRENBERG, J. BADERSCHNEIDER, T. JICK & M. MIRONI, AN EVALUATION OF IMPASSE PROCEDURES FOR POLICE AND FIREFIGHTERS IN NEW YORK STATE: A SUMMARY OF THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS 4 (1976), reprinted in 687 GOV'T EMPL. REL. REP. E-1 (BNA).

186. For a discussion of the impact upon the public and the city from strikes by essential employees, see Polland, *supra* note 17, at 5-10.

187. See note 52 *supra*. See Polland, *supra* note 17, at 6-8. The possibility that a municipality may prefer to endure rather than to succumb to the pressures from a strike by essential employees is not contrived. In September 1975 when the Berkeley, California firefighters walked off the job over a demand for a 16.5% wage and benefit increase, the city council decided to endure the strike, which lasted 25 days. The strike resulted in an agreement to terms that were closer to the city's bargaining position than that of the employees. Shortly after the strike started, the mayor declared a state of emergency and requested support from the State Division of Forestry. The Governor also sent firefighters from University of California campuses to protect the state university property in Berkeley. Finally, the city of Berkeley was required to obtain aid from neighboring communities. This situation illustrates both the interest of the state in preventing essential service interruptions and the impact that a strike by essential service employees can have on neighboring communities. For a day-by-day account of the strike, see *Berkeley Firefighters' 25-Day Strike*, 27 CAL. PUB. EMP. REL. 43 (1975).

188. See note 187 *supra*.

189. In *City of Hermiston v. Employment Relations Board*, — Or. App. —, 557 P.2d 681, 685 (1976), the Oregon Court of Appeals stated: "The interdependency point is well taken;

ly, of a strike by street sweepers or secretaries appears remote when compared to the impact resulting from a strike by firefighters or police in the same city. Thus, this comment suggests that while an arbitration law aimed at averting essential employee strikes addresses a statewide concern; one aimed at nonessential employee strikes does not.

The Oregon Court of Appeals recently employed this analysis.¹⁹⁰ The Oregon public employee relations law,¹⁹¹ which includes a provision for arbitration,¹⁹² is intended peacefully to resolve disputes with all local employees. After rejecting the interest of the state in avoiding disruptions¹⁹³ by nonessential employees and finding the law inseverable,¹⁹⁴ the court held that with the "possible exception of statutes directly controlling strikes," the entire law was inapplicable to charter cities.¹⁹⁵ The court noted that "the interdependency point may prove too much, because it could rapidly be carried to an extreme that would leave nothing within the exclusive control of the home rule cities and counties."¹⁹⁶ The Oregon court reached its conclusion by weighing the interest of the state against the city in regulating labor relations.¹⁹⁷

When the California Supreme Court decided that "[l]abor relations are [a matter] of . . . statewide concern"¹⁹⁸ in *Professional Firefighters*, it examined a law that applied only to firefighters and that did not provide for arbitration.¹⁹⁹ Therefore, it does not follow from the *Professional Firefighters* court ruling that an arbitration law should be binding on charter cities. Thus, if a statewide compulsory arbitration law is aimed at nonessential employees, it appears that it should not stand because the state's interest will not outweigh that of the municipalities'. The applicability of a state arbitration law aimed at the essential employees of a charter city, however, will depend on the extent of the interest of the state in the other two aspects of the arbitration process: the scope of arbitration and the selection of the arbitrator.

C. The Scope of Arbitration

The crux of the problems presented by arbitration is that while the decision to avoid strikes by essential employees is arguably a matter of state concern, the substance of the disputes within the scope of arbitration is

but at least for nonvital services it is insignificant as a state interest. The possibility of water-meter readers, secretaries or groundskeepers being hastily summoned from one community to another to replace strikers is simply too remote." *Id.*

190. — Or. App. at —, 557 P.2d at 681 (1976).

191. OR. REV. STAT. §§243.650-.782 (1974).

192. OR. REV. STAT. §243.742 (1974).

193. — Or. App. at —, 557 P.2d at 685.

194. *See id.* at —, 557 P.2d at 683-84.

195. *Id.* at —, 557 P.2d at 685-86.

196. *Id.* at —, 557 P.2d at 685.

197. *Id.* at —, 557 P.2d at 684.

198. 60 Cal. 2d 276, 295, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963).

199. CAL. LAB. CODE §§1960-1963.

typically of municipal concern.²⁰⁰ It would not be feasible to allow charter cities the discretion to determine which of the disputed issues could be submitted to the arbitrator since this would frustrate the purpose of a compulsory arbitration law.²⁰¹ Not only would strikes probably result to induce agreement on the issues not submitted to arbitration,²⁰² this lack of uniformity would bring chaos to the administration of a statewide law.²⁰³ Therefore, the courts should compare the competing interests concerning each element of the arbitration process in order to decide whether the *entire* process primarily reflects a state or municipal interest.²⁰⁴

In *City of Pasadena v. Charleville*,²⁰⁵ a contractor was not permitted to employ aliens to erect a fence around the chartered city's reservoir. The California Supreme Court ruled that the paying and hiring of the employees was a municipal affair and was not subject to a general law specifying the prevailing wage rates for public works.²⁰⁶ When the court considered the applicability of a general law that prohibited the employment of aliens by contractors of public works,²⁰⁷ however, it reached a different result. The court reasoned that the Alien Labor Law represented a "wise and beneficial state policy"²⁰⁸ favoring the employment of citizens over aliens on public works. The court concluded that the contractor, while free to set wage rates, was prohibited by the general law from employing aliens.²⁰⁹ This case suggests that the same subject may be a municipal affair for one purpose but not for another.²¹⁰ Thus, while the state interest in avoiding

200. A frequent subject of bargaining and of arbitration is wages. In *Bishop v. City of San Jose*, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969), the California Supreme Court held that a chartered city was not subject to a state prevailing wage law in compensating its employees. Hence, the court ruled, in effect, that the setting of local employee wage rates is a municipal affair. See *Popper v. Broderick*, 123 Cal. 456, 461, 56 P. 53, 55 (1899) (held the determination of police and firemen's salaries to be a municipal affair); CAL. CONST. art. XI, §5(b)(4).

201. If the governing body of the city retains control over the matters within the scope of arbitration and unilaterally establishes policy concerning each issue, the result is counter-productive to a system of collective bargaining and provides no role for an arbitrator. Hence, under such a system, arbitration is pointless.

202. Proponents of arbitration argue that there must be some form of compulsion in the bargaining system to induce agreement and thereby make the negotiations meaningful. Arbitration, they claim, provides this compulsion. With neither arbitration nor the right to strike, public employees are left to "collective begging." See *Davis & Reno*, *supra* note 23, at 24.

203. The *Professional Fire Fighters* court weighed heavily the concern of the legislature for a statewide uniform labor relations policy to avoid labor strife. 60 Cal. 2d at 295, 384 P.2d at 169, 32 Cal. Rptr. at 841.

204. So long as the matter is not *exclusively* a municipal affair, then the state may regulate it through its general laws if the matter can be shown to be primarily a state affair. See *id.* at 294-95, 384 P.2d at 169, 32 Cal. Rptr. at 841.

205. 215 Cal. 384, 10 P.2d 745 (1932).

206. *Id.* at 389, 10 P.2d at 746-47.

207. CAL. STATS. 1931, c. 398, at 913.

208. 215 Cal. at 399, 10 P.2d at 751.

209. *Id.* at 398, 10 P.2d at 750.

210. Professors Sato and Van Alstyne suggest a court's determination of whether a matter is of statewide or municipal concern depends upon the scope of judicial focus in light of the subject matter considered. See S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 232 (1970). The *Professional Fire Fighters* court noted that no case relied upon by defendant held that:

all matters connected with public employment in a chartered city are exclusively municipal affairs in which the state had no concern. Each deals with a specific phase

strikes by *essential* employees may be sufficient to overcome the municipality's interest in controlling its local personnel affairs, the state interest aimed at *nonessential* employees may not. The California courts have also been alert to the extent local policies will have an impact beyond the boundaries of the city.²¹¹ For example, in sustaining the application of a general law imposing liability on chartered cities for the negligent operation of its vehicles, a California Court of Appeal reasoned that the operation of the vehicles of the city on its streets endangered not only its residents, but visiting motorists and pedestrians as well.²¹²

In *Ector v. City of Torrance*,²¹³ the California Supreme Court held that a state statute prohibiting city residency requirements²¹⁴ was not binding on a charter city.²¹⁵ The holding was based on a strict reading of the California constitutional provision that grants charter cities plenary authority to prescribe in their charters the qualifications of their employees.²¹⁶ The *Ector* decision appears to indicate that the legislature may not interfere with municipal affairs that are specifically enumerated in the constitution.²¹⁷ The *Ector* holding is, however, limited to cases in which the matter sought to be controlled by the state is specifically provided for in the constitution. By requiring charter cities to submit their employee disputes to compulsory and binding arbitration, the state would not be dictating the "qualifications" for charter city employees, as it attempted in *Ector*. Rather, the state would only direct the *procedure* to be followed for the determination of the terms and conditions of employment for the employees of the cities. Thus, the constitutional provision, which classifies certain matters as "municipal

of city employment, and each holds that the phase there under consideration is a municipal affair.

60 Cal. 2d 276, 291, 384 P.2d 158, 167, 32 Cal. Rptr. 830, 839 (1963). Referring to *City of Pasadena and Adams v. Wolff*, 84 Cal. App. 2d 435, 190 P.2d 665 (1948), the court stated that each case held that:

The "hiring of employees generally" and "the hiring and paying of municipal employees" is generally a municipal affair. Neither denies the proposition that there may be other phases of public employment that are of state concern.

60 Cal. 2d at 291, 384 P.2d at 167, 32 Cal. Rptr. at 839.

211. In *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959), the California Supreme Court ruled that the charter city could not require the telephone company to obtain a franchise prior to using the streets of the city for telephone lines because of the potential impact this local policy could have on interstate and foreign communications. Hence, because local policy would have an extra-territorial impact, the matter was of state concern.

212. *Lossman v. City of Stockton*, 6 Cal. App. 2d 324, 332, 44 P.2d 397, 401 (1935).

213. 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973).

214. CAL. GOV'T CODE §50083.

215. See 10 Cal. 3d at 133, 514 P.2d at 435, 109 Cal. Rptr. at 851.

216. CAL. CONST. art. XI, §5. The *San Francisco Fire Fighters* court emphasized the "plenary" nature of the constitutional authority granted to charter cities. 1 Civ. No. 38823 (filed and certified for publication Dec. 14, 1977) at 7-8.

217. The *Ector* court stated:

[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" and hence within the general home rule power vested in charter cities by subdivision (a) of section 5, article XI, of the Constitution . . . Here we have the benefit of a specific directive in subdivision (b) of that section, which grants "plenary authority" to charter cities to prescribe in their charters the "qualifications" of their employees.

10 Cal. 3d at 132, 514 P.2d at 434-35, 109 Cal. Rptr. at 850-51 (footnotes omitted).

218. CAL. CONST. art. XI, §5.

affairs,”²¹⁸ will serve the court as a guide²¹⁹ as it seeks to weigh the competing interests of the state and the charter city.

Although the previous rulings of the California courts suggest that matters typically within the scope of arbitration, such as the setting of wage rates, are municipal affairs,²²⁰ in making this determination, the courts will also consider the purpose of the state for the general law as well as the potential impact on the state from leaving the matter in the city’s control. Therefore, the courts may conclude, as they have with respect to other aspects of public employee labor relations,²²¹ that a statewide compulsory arbitration law is not an infringement on home rule but is designed only to provide a uniform procedure for the settlement of essential employee disputes. Thus, the courts are apt to follow the *Professional Firefighters* court’s reasoning, where the court stated:

The total effect of all this legislation was not to deprive local government . . . of the right to manage and control its fire departments but to create uniform fair labor practices throughout the state. As such, the legislation may impinge upon local control to a limited extent, but it is nonetheless a matter of state concern.²²²

The final, and potentially decisive, consideration for the court in determining whether a legislative mandate for arbitration will be binding on charter cities concerns the procedure for selecting the arbitrator who will advance the purpose of the state by deciding matters of local concern.

D. *Selecting the Arbitrator*

The California Constitution prohibits the legislature from delegating to any private person or body the power to perform municipal functions.²²³ The purpose for this provision is to prevent the legislature from controlling “purely local matters” by delegating municipal functions to its own special commissions.²²⁴ The California Supreme Court has upheld delegations to special commissions “if they either fulfill a more than local purpose, under

219. See CAL. CONST. art. XI, §13, which was added in 1970 at the same time as the new Section 5 language, provides in part:

The provisions of Sections . . . 4, and 5 of this Article relating to matters affecting the distribution of powers between the Legislature and cities and counties, including matters affecting supersession, 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.

220. See *Popper v. Broderick*, 123 Cal. 456, 461, 56 P. 53, 55 (1899).

221. See cases cited at note 141 *supra*.

222. 60 Cal. 2d at 294-95, 384 P.2d at 169, 32 Cal. Rptr. at 841.

223. CAL. CONST. art. XI, §11(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.

224. *In re Pfahler*, 150 Cal. 71, 87, 88 P. 270, 277 (1906).

the "larger municipality" doctrine, or promote as a "statewide purpose." , , ,²²⁵

The prohibition against delegations of legislative power to *private* persons or bodies has presented a difficult problem for other state courts whose constitutions contain provisions similar to California's. In 1962, the Pennsylvania Supreme Court held in *Erie Firefighters Local 293 v. Gardner*,²²⁶ that the power to fix municipal salaries was a purely municipal function and was not delegable to a board of conciliators.²²⁷ *Erie Firefighters* was short-lived, however, since a subsequent constitutional amendment explicitly permitted the delegation to third parties who resolve public employee disputes or grievances.²²⁸ The South Dakota Supreme Court also ruled that the state constitutional provision²²⁹ prohibited delegation of control over municipal functions to a private person or commission, and thus invalidated the state arbitration law.²³⁰ The Wyoming Supreme Court ruled that since arbitrators merely execute and do not make law, their actions are administrative in character and thus do not result in an unlawful delegation.²³¹ The Supreme Court of Rhode Island took a novel approach to the problem. The court reasoned that Rhode Island's constitutional provision²³² was aimed at precluding delegations of legislative power to private individuals, but since the arbitrator "is vested by law with a portion of the sovereignty of the state,"²³³ the delegation was valid.²³⁴ This approach has been criticized by

225. *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 500, 487 P.2d 1193, 1206, 96 Cal. Rptr. 553, 566 (1971) (quoting from Comment, *San Francisco Bay: Regulation for its Protection and Development*, 55 CALIF. L. REV. 728, 762 (1967)).

226. 26 Pa. D. & C.2d 327 (1961), *aff'd*, 406 Pa. 395, 178 A.2d 691 (1962).

227. *Id.* at 334-35, *aff'd*, 406 Pa. 395, 178 A.2d 691 (1962).

228. PA. CONST. art. III., §20 (§31 when amended, renumbered on May 16, 1967) provides in part:

Notwithstanding the foregoing limitation or any other provision of the Constitution, the General Assembly may enact laws which provide that the findings of panels or commissions, selected and acting in accordance with law for the adjustment or settlement of grievances or disputes or for collective bargaining between policemen and firemen and their public employers shall be binding upon all parties and shall constitute a mandate to the head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivision or of the Commonwealth, with respect to matters which require legislative action, to take the action necessary to carry out such findings.

In *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969), the Supreme Court of Pennsylvania unanimously endorsed the state's compulsory arbitration law.

229. S.D. CONST. art. III, §26 provides in part:

The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with . . . or to perform any municipal functions whatever.

230. *City of Sioux Falls v. Sioux Falls Firefighters, Local 814*, — S.D. —, —, 234 N.W.2d 35, 38 (1975).

231. *State ex rel. Fire Fighters Local 946 v. City of Laramie*, 437 P.2d 295, 299-300 (Wyo. 1968).

232. R. I. CONST. art. IV, §2 provides in part: "The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives"

233. *City of Warwick v. Regular Firemen's Ass'n*, 106 R.I. 109, 116, 256 A.2d 206, 210 (1969).

234. *Id.* at 117, 256 A.2d 211.

commentators²³⁵ and courts²³⁶ alike. Nevertheless, this "sovereign arbitrator" approach was recently followed by the Supreme Judicial Court of Massachusetts.²³⁷

Therefore, this comment suggests that the constitutional prohibition against the delegation of power to private persons, over municipal functions can be avoided by either making the arbitrator politically accountable or by determining that arbitration involves an overriding state interest.²³⁸ If, however, the arbitrator is not made politically accountable, and reliance is placed exclusively on the interest of the state in averting essential employee strikes for binding charter cities to the state arbitration law, a more fundamental problem emerges. This approach, which would vest policymaking authority in nonpolitically accountable arbitrators, is repugnant to our notion of representative government.

The significance of requiring that legislative decisions, which relate to matters of municipal concern, be made by politically accountable persons should not be limited to charter cities. It appears that the desire for representative local government is shared by citizens of chartered cities and general law cities alike. Thus, while the technicalities of whether a chartered city is bound by a statewide arbitration law may be overcome by demonstrating an overriding state interest, any arbitration law should not be binding on *any* city if it intrudes on the representative character of local government. Thus, the unlawful delegation doctrine, and its relationship to the concern for preserving representative government will next be examined as a basis for requiring political accountability for decisions that affect the citizens of all municipalities.

THE UNLAWFUL DELEGATION DOCTRINE AND REPRESENTATIVE GOVERNMENT

The representative character of government has been preserved by a doctrine that prohibits the delegation of legislative power to persons who are not politically accountable.²³⁹ The justification for the nondelegation doctrine stems from the representative nature of the state legislature. As the

235. See McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1206-07 (1972).

236. *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 397 (Me. 1973). The court found this reasoning "to be tautological." *Id.* One Michigan Supreme Court Justice commented: "Such nominalistic reasoning both begs the question and reduces the analysis of the issue to a reason-free debate over labels." *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 249, 231 N.W.2d 226, 232 (1975).

237. *Town of Arlington v. Board of Concil. and Arb.*, — Mass. —, —, 352 N.E.2d 914, 920 (1976). The court reasoned that "a person may be deemed a public official where he is fulfilling duties which are public in nature" *Id.*

238. See generally A. VAN ALSTYNE, BACKGROUND STUDY RELATING TO ARTICLE XI: LOCAL GOVERNMENT 327-29 (prepared for the California Constitutional Revision Commission; undated).

239. See S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 34-35 (1975).

people's representative, the legislative body may not insulate itself from the electorate by explicitly delegating its legislative function.²⁴⁰ In *Kugler v. Yocum*²⁴¹ the California Supreme Court affirmed that the nondelegation doctrine applies to local legislative bodies and announced that it is "well established in California."²⁴² The court explained that this doctrine

rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. *It cannot escape responsibility by explicitly delegating that function to others* or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.²⁴³

Once the legislature resolves the "truly fundamental issues," it may delegate the implementation of its policy to a third party, so long as the delegation is accompanied by safeguards sufficient to prevent an abuse of the delegatee's discretion.²⁴⁴ It is, therefore, necessary to examine the aspects of the arbitration process to determine if the "truly fundamental issue" is resolved by the legislature prior to the delegation of legislative power²⁴⁵ to the arbitrator and to determine if the delegation is accompanied by sufficient safeguards. This examination must be prefaced, however, by a determination that the legislative body is permitted to delegate to arbitrators, the authority to make final and binding decisions on issues that the municipality and its employees have been unable to resolve.

A. Authority to Delegate Legislative Power

A condition that must precede every valid delegation of legislative power

240. Professor Ehmke suggests that the rule prohibiting the delegation of legislative power is grounded in Locke's doctrine of consent and the consent-trust relationship between the people and their elected representatives. See Ehmke, "*Delegata Potestas Non Potest Delegari*," *A Maxim of American Constitutional Law*, 47 CORNELL L.Q. 50, 57-60 (1961). Professor Jaffe has stated that the rule is simply a "convenient legal formula to express the underlying thought of Locke that 'the legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.'" L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 54 (1965) (quoting from J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §142).

241. 69 Cal. 2d 371, 445 P.2d 303, 71 Cal. Rptr. 687 (1968).

242. *Id.* at 375, 445 P.2d at 305, 71 Cal. Rptr. at 689.

243. *Id.* at 376-77, 445 P.2d at 306, 71 Cal. Rptr. at 690 (emphasis added).

244. *Id.* at 376, 445 P.2d at 306, 71 Cal. Rptr. at 690. See also *Warren v. Marion County*, 222 Or. 307, 313-15, 353 P.2d 257, 261-62 (1960); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

245. The distinction between the exercise of legislative power and administrative power appears esoteric at best. The *Younger* court termed the distinction "irrelevant." 5 Cal. 3d 480, 505, 487 P.2d 1193, 1209, 96 Cal. Rptr. 553, 569 (1971). Several relevant doctrines, however, depend on the distinction, such as the scope of initiative and referendum power. See text accompanying notes 302-304 *infra*. For example, it is well settled in California that the setting of public employee wage rates is an exercise of legislative power. See *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 25, 553 P.2d 1140, 1142, 132 Cal. Rptr. 668, 670 (1976). One factor that may be useful in making the distinction is the nature of the evidence examined by the arbitrator. In resolving the particular issue, consideration should be given to whether the arbitrator examines adjudicative or legislative facts in coming to his or her conclusion. If the matter involves facts that are general and do not concern the immediate parties, the arbitrator is examining legislative facts. Alternatively, if the examination focuses on matters concerning the parties exclusively, he or she will rely on adjudicative facts. See K. DAVIS, ADMINISTRATIVE LAW TEXT §15.03 (1972); C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §1.02 (1972).

is that the delegator must have the authority to make the delegation.²⁴⁶ This prefatory authority is present when the origin of the legislative power is with the delegator.²⁴⁷ A charter city derives most of its legislative power from the state constitution²⁴⁸ and as the original recipient, the city possesses the authority to delegate this power.²⁴⁹ The delegatee of legislative power, however, may not subdelegate without express authorization from the original delegator.²⁵⁰ Thus, since a general law city derives most²⁵¹ of its legislative power from the state legislature in the form of a delegation,²⁵² the city, which holds this power in the nature of a public trust,²⁵³ may not delegate this power without express authorization from the legislature.²⁵⁴ Since California does not presently have legislation mandating interest arbitration,²⁵⁵ a general law city must have express authorization from the

246. See *California School Emps. Ass'n v. Personnel Comm'n*, 3 Cal. 3d 139, 144, 474 P.2d 436, 439, 89 Cal. Rptr. 620, 623 (1970). The rule is broadly stated in 2 E. McQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS*, §10.39 at 843.45 (3d ed. 1966), which states:

[T]he principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others, *unless so authorized by the legislature or charter*. In every case where the law imposes a duty upon an officer in relation to a matter of public interest, *he cannot delegate it to others, as by submitting it to arbitration*. (Emphasis added; footnotes omitted).

247. Legislative power originates with the people. See *Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672 (1976); *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 146, 550 P.2d 1001, 1014, 130 Cal. Rptr. 465, 478 (1976). When the people confer that power on their representatives, those representatives may delegate that legislative power when it is channeled through sufficient standards, *Kugler v. Yocum*, 69 Cal. 2d 371, 375-76, 445 P.2d 303, 306, 71 Cal. Rptr. 687, 690 (1968), and so long as the legislature resolves the "truly fundamental issues," prior to making the delegation, *Wilke & Holzheiser, Inc. v. Department of Alcoholic Bev. Control*, 65 Cal. 2d 349, 369, 420 P.2d 735, 748, 55 Cal. Rptr. 23, 36 (1966). Thus the legislature is empowered to delegate legislative power because the conferral of the power by the people was primary. In comparison, those legislative powers that are directly conferred upon a charter city by the constitution, see CAL. CONST. art. XI, §5, may also be delegated by the city through a charter amendment, see *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 622 n.13, 526 P.2d 971, 981 n.13, 116 Cal. Rptr. 507, 517 n.13 (1974), but may not be delegated without specific authorization from the charter, see *San Francisco Fire Fighters Local 798 v. City & County of San Francisco*, 68 Cal. App. 3d 896, 901, 137 Cal. Rptr. 607, 609 (1977). Similarly, since a general law city has only those powers expressly conferred upon it by the legislature, or the constitution, *Irwin v. City of Manhattan Beach*, 65 Cal. 2d 13, 20, 415 P.2d 769, 773, 51 Cal. Rptr. 881, 885 (1966), it may not delegate this power without express authorization from the delegator of the power, *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 24, 553 P.2d 1140, 1141, 132 Cal. Rptr. 668, 669 (1976). Thus, where the power is conferred upon a legislative body, it is empowered to delegate it, but when that power is delegated to it, it may not make a delegation unless authorization is granted by the delegator.

248. CAL. CONST. art. XI, §5.

249. Cf. 18 Cal. 3d at 27 n.1, 553 P.2d at 1143 n.1, 132 Cal. Rptr. at 671 n.1. The *Bagley* court distinguished the valid delegation to an arbitrator in the Vallejo charter from the invalid attempted delegation by the Manhattan Beach proposed initiative measure on the basis that Vallejo is a charter city while Manhattan Beach is a general law city.

250. See *id.* at 24-25, 553 P.2d at 1141-42, 132 Cal. Rptr. at 669-70. When the state delegates legislative power to a general law city, an attempted redelegation by the city requires statutory authorization from the state because the power is held by the city in the nature of a public trust. *Id.*

251. A general law city derives its "police power" from the constitution, CAL. CONST. art. XI, §7, which provides that, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

252. CAL. GOV'T CODE §§34300-45345.

253. *California School Emps. Ass'n v. Personnel Comm'n*, 3 Cal. 3d 139, 144, 474 P.2d 436, 439, 89 Cal. Rptr. 620, 623 (1970).

254. See note 250 *supra*.

255. See note 16 and accompanying text *supra*.

state in order to delegate its legislative power to an arbitrator. Not finding this authorization present, the California Supreme Court in *Bagley v. City of Manhattan Beach*²⁵⁶ ruled that a general law city lacks the authority to provide for binding interest arbitration.²⁵⁷ Since the state legislature is the source of the wage-setting authority exercised by general law cities,²⁵⁸ the legislature thus possesses the power to delegate the exercise of this authority to an arbitrator to break the bargaining deadlock between the city and its employee representatives. As was previously suggested,²⁵⁹ the legislature

256. 18 Cal. 3d 22, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976).

257. In *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976), the California Supreme Court was squarely faced with whether a general law city possessed the authority to delegate legislative power, which was delegated to it by the state, to an arbitrator. The issue arose when the defendant, City of Manhattan Beach, refused to place on the ballot an initiative measure providing for compulsory and binding arbitration of firefighter employee disputes. *Id.* at 24, 553 P.2d at 1141, 132 Cal. Rptr. at 669. The proposed initiative petition is reproduced in the court of appeal opinion. *Bagley v. City of Manhattan Beach*, 123 Cal. Rptr. 908, 909-10 (1975). The court ruled that in the absence of statutory authorization, the city lacked the power to make the delegation because the city held the power to set wages, which power originated from the state legislature, in the nature of a public trust. 18 Cal. 3d at 24, 553 P.2d at 1141, 132 Cal. Rptr. at 669. Because it was unable to discover any authorization from the state legislature for the proposed delegation to an arbitrator, the *Bagley* court did not reach the issue of whether the delegation was otherwise proper. *Id.* Thus, the majority of the court neither examined whether the proposed delegation to an arbitrator constituted a resolution of the "fundamental policy issue" by the legislative body, nor the sufficiency of safeguards in the proposed delegation.

The propriety of the proposed delegation was, however, examined by Justices Mosk and Tobriner who joined dissenting, in *Bagley*. *Id.* at 27, 553 P.2d at 1143, 132 Cal. Rptr. at 671. The *Bagley* dissenters contended that the power to fix wage rates held by the Manhattan Beach City Council was not unlawfully delegated to an arbitrator. *Id.* The minority reasoned that since the arbitrator's award must be implemented by ordinance, the proposed initiative would not divest the city government of its power under Section 36506 since the "arbitrator's award could be implemented only by a council ordinance." *Id.* at 28, 553 P.2d at 1144, 132 Cal. Rptr. at 672 (Mosk, J., dissenting). Thus, the city council would not be delegating its power to an arbitrator because it retained the power to enact the ordinance. The minority's reasoning is, however, inconsistent with the provision of the proposed initiative, 132 Cal. Rptr. at 909-10, as well as the California Supreme Court's decision in *Glendale City Employees' Ass'n v. City of Glendale*, 15 Cal. 3d 328, 540 P.2d 609, 124 Cal. Rptr. 513 (1975).

The proposed Manhattan Beach initiative provided that the arbitrator's award "shall be final and binding on all parties," 132 Cal. Rptr. at 909-10, and that the city "shall take whatever action is necessary to carry out and effectuate the award." *Id.* In *Glendale*, the court ruled that defendant city was obligated to enact a new salary ordinance to implement the agreement contained in the memorandum of understanding negotiated with the employee representatives. 15 Cal. 3d at 343, 540 P.2d at 619, 124 Cal. Rptr. at 523. The court explained that the legislative act of fixing salaries occurred when the memorandum of understanding was negotiated and approved. *Id.* at 345, 540 P.2d at 620, 124 Cal. Rptr. at 524. Thus, enacting the implementing ordinance became a ministerial act and since the plaintiff employees had no other adequate remedy, the court ruled that the memorandum of understanding would be enforced by issuance of a writ of mandamus. *Id.*

The rationale of the *Glendale* court is applicable to the arbitration process. When arbitration is used to resolve an impasse over employee compensation, the legislative act of fixing employee wage rates is performed by the arbitrator. See note 245 *supra*. Walker v. County of Los Angeles, 55 Cal. 2d 626, 634, 361 P.2d 247, 251, 12 Cal. Rptr. 671, 675 (1961). For the arbitration process to achieve its strike avoidance effect on essential employees, however, the arbitrator's decision *must* be binding. Thus, the employees affected by an arbitrator's award have no other adequate remedy but to seek a writ of mandamus enforcing the award. It appears, therefore, that the legislative power is in reality transferred from the municipal government to the arbitrator, thereby leaving the city council with the ministerial duty to implement the award.

258. CAL. GOV'T CODE §36506. Since a charter city does not require a specific grant of authority from the state, see *City of Glendale v. Trondsen*, 48 Cal. 2d 93, 98, 308 P.2d 1, 3-4 (1957); *Bruce v. Civil Service Bd.*, 6 Cal. App. 2d 633, 636, 45 P.2d 419, 421 (1935), it has the authority to make a delegation of the power which it receives from the constitution if the matter is a municipal affair, and hence not subject to conflicting general laws.

259. See text accompanying notes 118-120 *supra*.

may delegate the exercise of a chartered city's wage-setting power only if the delegation involves an overriding statewide concern. Thus, the state legislature is empowered to delegate legislative power to an arbitrator to resolve issues that have reached an impasse with general law city employers. With respect to charter cities, however, whether the state is authorized to direct the delegation of the charter city's legislative power to an arbitrator will depend on whether arbitration is a matter of statewide concern. Once it is determined that the legislature has the power to delegate the authority of a city to an arbitrator, the propriety of the delegation depends on whether the legislature resolves the "truly fundamental issues" and accompanies the implementation of its policy with sufficient safeguards.

B. Legislature Must Resolve the "Truly Fundamental Issues"

Interest arbitration is in effect a delegation of power since it is a procedure that substitutes an arbitrator's judgment for the judgment of the disputing parties. Thus, the decision to arbitrate is equivalent to a decision to delegate the power to decide those issues, which the parties are unable or unwilling to resolve, lying within the scope of arbitration to an arbitrator. Therefore, it must be determined whether the legislature is resolving the "truly fundamental issue" when it decides to avert strikes by essential employees by delegating to an arbitrator the power to decide the issues in dispute.

The *Bagley* dissenters pragmatically stated that the fundamental issue would be resolved by a legislative determination "that impasses in labor disputes involving firefighters should be resolved not by the present adversary method, with its potential for disruption of essential services, but by a mutual reasoned appeal to an impartial arbitrator."²⁶⁰ Implicit in this statement is the acknowledgement that an arbitrator would serve no useful function if the legislative body were required initially to resolve every issue within the scope of arbitration. Stated otherwise, if each disputed issue must be resolved by the legislative body prior to arbitration, the arbitrator would be simply effectuating the position of a party to the dispute and would, therefore, not be impartial. Thus, the dissenters broadly interpreted the meaning of "truly fundamental issue" so as not to frustrate the legislative purpose of the arbitration process. This broad interpretation, however, results in placing legislative power in the hands of a nonpolitically accountable arbitrator.²⁶¹

The California Supreme Court's previous opinions suggest the direction it will take when faced with whether broadly to interpret this prerequisite to a

260. 18 Cal. 3d at 31, 553 P.2d at 1146, 132 Cal. Rptr. at 674.

261. The *Bagley* minority recognized that the arbitrator would not be politically responsible to the electorate. This problem was solved for the dissenters, however, because the city was to "share an equal role with the employees in selecting [the arbitrator]." 18 Cal. 3d at 33, 553 P.2d at 1147, 132 Cal. Rptr. at 675.

proper delegation. In *City of Vallejo*, a unanimous court declared that the "state policy in California 'favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.'"²⁶² The court then went out of its way to place its imprimatur of constitutionality on the Vallejo arbitration provision.²⁶³ In *Kugler*, the court commented:

Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative character of the process of reaching legislative decision.²⁶⁴

Finally, the court has evidenced a willingness to encourage rather than frustrate legislative innovations in public employee relations.²⁶⁵ Thus, by

262. 12 Cal. 3d 608, 622, 526 P.2d 971, 980, 116 Cal. Rptr. 507, 516 (1974).

263. In *City of Vallejo* an amicus curiae argued that the MMB Act violates the constitutional prohibition against the delegation of power to perform municipal functions. CAL. CONST. art. XI, §11(a). See Brief of Amicus Curiae in Support of Defendant City of Vallejo at 5-7, filed in 1 Civ. No. 32,325, *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974). This would occur, the amicus urged, by including within the scope of negotiation, and hence arbitration, matters that determine the nature of services the city renders; determinations within the exclusive authority of the local elected officials. The court responded by footnote, 12 Cal. 3d at 622 n.13, 526 P.2d 981 n.13, 116 Cal. Rptr. at 517 n.13, noting that two other states (Rhode Island and Wyoming; see text accompanying notes 231-236 *supra*) had held arbitration constitutional and that no unlawful delegation of legislative power would occur so long as the arbitrator proceeds within the provision of the city charter. The footnote response was to an allegation that *collective bargaining* is an unlawful delegation of legislative power to employee representatives. This argument has long ago succumbed to a recognition of a need for communication and negotiation between public employers and their employees. Thus, the dismissal by the court of the amicus' argument does not necessarily reflect the court decision if it were faced with the same argument concerning arbitration—where *all* control over the final decision is surrendered by the employer. Furthermore, the *City of Vallejo* court footnote dictum suggests that legislative power was not even delegated to the arbitrator. Rather, the Vallejo voters, by charter amendment, *empowered* the arbitrator to settle disputes; they did not delegate to him this power. See note 247 *supra*. The United States Supreme Court recently stated in *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672 (1976):

Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. . . . In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.

This does not present any new discovery for California courts. In *Spencer v. City of Alhambra*, 44 Cal. App. 2d 75, 77, 111 P.2d 910, 912 (1941), the Second District Court of Appeal remarked:

It is a basic principle inherent in the American system of representative government, as declared in article I, section 2 of our state Constitution, that "all political power is inherent in the people" [I]t follows that the legislative power of the municipality resides in the people thereof. (emphasis added).

264. 69 Cal. 2d 371, 384, 445 P.2d 303, 311, 71 Cal. Rptr. 687, 695 (1968) (emphasis added).

265. *Bagley* demonstrates a clear concern by the court not to preempt legislative action by prematurely ruling on the propriety of arbitration. Other indications of judicial eagerness to avoid impeding legislative action aimed at resolving difficult public employee relations problems are visible in the court's frequent application of private sector labor relations precedents to public sector cases. For example, in *City of Vallejo*, the court concluded that "the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter." 12 Cal. 3d at 617, 526 P.2d at 977, 116 Cal. Rptr. at 513. In *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975), the California Supreme Court ruled that, as in the private sector, an employee

narrowly interpreting the meaning of a "truly fundamental issue," it appears likely that the California courts will validate legislation that attempts to solve the difficult problem of essential employee strike deterrence by use of compulsory arbitration. Once the "truly fundamental issue" is resolved by the decision of the legislature to avert strikes by essential employees by delegating the authority to decide the disputed issues to an arbitrator, the implementation of this policy must be accompanied by sufficient safeguards to prevent an abuse of discretion by the arbitrator.

C. Safeguards

The *Bagley* minority identified several safeguards in the proposed Manhattan Beach arbitration plan.²⁶⁶ Typical of most compulsory interest arbitration laws, these safeguards fall into three categories. The first category includes provisions for judicial review of the arbitrator's decision.²⁶⁷ Second, the proposed arbitration plan directs the arbitrator to consider the city's ability to pay, as well as various economic indicators.²⁶⁸ Last, the procedure for selecting the arbitrator was considered to be a safeguard.²⁶⁹

The proposed Manhattan Beach arbitration plan adopted the procedure for judicial review of the arbitrator's decision contained in the California Arbitration Act.²⁷⁰ The scope of review under the Arbitration Act is very narrow. The California courts have held that an arbitrator's decision could not be assailed even though his or her determination was erroneous.²⁷¹ Furthermore, the arbitrator is the final judge of both fact and law and an award will not be set aside for a mistake as to either.²⁷² Nevertheless, the Arbitration Act permits judicial review to determine if the arbitrator has exceeded his or her authority.²⁷³ This provision could permit the court to control the scope of arbitration in order to isolate matters that should be left to the political process. If a matter is properly within the scope of negotiation, a determination by the court to exclude it from the scope of arbitration would, however,

relations agreement induced by the coercion resulting from an employee strike, did not invalidate the agreement. These cases appear to suggest that the courts, when possible, will make every effort to support public employee relations legislation, rather than frustrate it.

The courts should also not ignore that the California Legislature has engaged in a thorough study of the problems presented by public employee relations. *See generally* SENATE SELECT COMMITTEE ON LOCAL PUBLIC SAFETY EMPLOYMENT PRACTICES, TO MEET AND CONFER: A STUDY OF PUBLIC EMPLOYEE LABOR RELATIONS (1972).

266. See note 257 *supra*.

267. 18 Cal. 3d at 32, 553 P.2d at 1146, 132 Cal. Rptr. at 674.

268. *Id.*

269. *Id.*

270. CAL. CIV. PROC. CODE §§1280-1288.8. *See Grodin, supra* note 25, at 20-21. Professor Grodin suggests that, because of the political nature of public sector interest arbitration, the scope of judicial review of arbitral awards should be widened at least to assure that the arbitrator has applied the legislatively mandated standards.

271. *Interinsurance Exch. v. Bailes*, 219 Cal. App. 2d 830, 836, 33 Cal. Rptr. 533, 537 (1963).

272. *Frick v. Preston*, 130 Cal. App. 290, 19 P.2d 836 (1933).

273. CAL. CIV. PROC. CODE §1286.2(d) provides that the court may vacate the award if it determines that "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted"

create incongruent scopes, thereby impairing the strike avoidance value of the arbitration process.²⁷⁴

As was previously suggested,²⁷⁵ the use of standards to guide an arbitrator's discretion, such as the city's ability to finance the award, tends to complicate rather than resolve the political problems presented by the arbitration process. This becomes particularly apparent when it is recognized that the disputes typically presented to an arbitrator are not always susceptible to the application of standards. The most frequent issues before an arbitrator are those that increase the personnel costs of the municipality.²⁷⁶ These issues, such as wages and personnel benefits, are susceptible to prior legislative guidance. While certain arbitrator discretion is inevitable, and often necessary, standards may be established in advance of the dispute to assure that the general policy of the legislature is achieved. For example, by requiring the arbitrator to consider factors such as, the wages paid to comparable employees in the community, the consumer price index or the city's ability to pay, the legislature evinces a public policy. The policy is that public employees should receive a wage that is comparable to similar employees in the community, is sufficient to keep pace with inflation and is affordable by the municipality. A decision by an arbitrator that is guided by these standards effectuates this legislative policy. Thus, the legislature remains politically accountable for this policy which the arbitrator implements by applying the legislature's standards.

When, however, the issue within the scope of the arbitrator's authority is not subject to previously established legislative standards, the citizenry may not legitimately hold the legislators accountable for the arbitration decision.²⁷⁷ Typically these issues involve important matters of social planning. For example, the issue may call upon the arbitrator to determine how many police officers will be assigned to patrol a particular neighborhood. This issue directly relates to the safety of the officer's working conditions and is apparently within the scope for bargaining and hence arbitration. The principal standard, which is employed by a few states, to guide an arbitral

274. See text accompanying notes 75-76 *supra*.

275. See text accompanying notes 80-85 *supra*.

276. Cf. T. KOCHAN, R. EHRENBERG, J. BADERSCHNEIDER, T. JICK & M. MIRONI, AN EVALUATION OF IMPASSE PROCEDURES FOR POLICE AND FIREFIGHTERS IN NEW YORK STATE: A SUMMARY OF THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS 8 (1976), *reprinted in* 687 GOV'T EMPL. REL. REP. E-1 (BNA) (disputes involving the employer's ability to pay were the most likely to go to impasse and hence come before the arbitrator). The study suggested that the New York Public Employee Relations Board work with the various state agencies to develop "ability to pay" data about each community in order to help standardize the information presented to neutrals. *Id.* at 18.

277. The community may certainly legitimately hold the state legislators accountable for their decision to provide for compulsory interest arbitration. At present, the use of arbitration appears to be favored by California citizens. A poll conducted by the Field Research Corporation in June 1977 revealed that 75.2 percent of those polled favor a system of compulsory arbitration to settle police and firefighter disputes; 13.3 percent were opposed to such a plan; and 11.6 percent had no opinion (copy of Field Research Corporation report on file at *Pacific Law Journal*). See note 18 *supra*.

decision of such an issue, is the "public interest."²⁷⁸ The arbitrator is to determine, in light of the evidence presented, what is in the public interest. Few will dispute that arbitrators are conscientious persons who are dedicated to furthering the public interest.²⁷⁹ The crux of the problem, however, concerns the ability of the arbitration process to preserve the essential bond between the formulation of public policy and the political accountability of the local legislator. This bond is destroyed when nonpolitically accountable arbitrators are allowed to formulate public policy. Nevertheless, courts have been satisfied that the "public interest" standard sufficiently limits the discretion of arbitrators to satisfy the requirement of safeguards for a valid delegation of legislative power.²⁸⁰

Another approach to limiting arbitrator discretion, which has become increasingly popular in recent years,²⁸¹ is to limit the arbitrator to the selection of the "final offer" of either of the parties to the dispute.²⁸² In addition, allegedly encouraging the bargaining process by discouraging the frequent use of arbitration,²⁸³ some commentators suggest that this approach removes the arbitrator from the role of formulating social policy.²⁸⁴ Although this approach does indeed severely limit the quantum of

278. IOWA CODE ANN. §20.22(9)(c) (West Supp. 1975) ("interests and welfare of the public"); OKLA. STAT. ANN. tit. 11 §548.10(4) (West Supp. 1974) ("interest and welfare of the public"). See also 1 F. COOPER, STATE ADMINISTRATIVE LAW 85 (1965) (a delegation involving the public interest as a standard has been held to be sufficient to satisfy the requirement for standards of the nondelegation doctrine).

279. Professor Grodin notes that, typically, arbitrators are conscientious and concerned citizens. He states:

Most arbitrators are sensible people, constrained by feelings of responsibility to the community and by a desire for continued acceptability. They are not likely to render a decision they know or believe will bring financial ruin to a community or create a disruptive political reaction. On the contrary, . . . they seek consensus where it is possible.

Grodin, *supra* note 25, at 13-14 (footnote omitted). The arbitration awards typically have not been greatly different from the results of negotiated settlements. For example, a study that examined Michigan's police and firefighter wages during periods prior to and after the enactment of interest arbitration legislation in 1969 revealed that:

Even though there may have been wide fluctuations in wage increases in a given year, the average annual percentage increase in both arbitration and nonarbitration relationships has not differed significantly. . . . [W]hen viewed over a period of time, awarded wage increases do not appear to have been excessive relative to negotiated settlements.

M. Bowers, A Study of Legislated Arbitration and Collective Bargaining in the Public Safety Services in Michigan and Pennsylvania 185 (Jan. 1974) (unpublished Ph.D. dissertation at Cornell University).

Arguably, while a private citizen arbitrator may not be politically responsible, he or she may be responsible *in fact*. The arbitrator's good intentions are not always well received by the community, however. See Ayres, *Firemen's Expensive Pact Award Stuns City*, Oakland Tribune, Feb. 19, 1975, §1, at 1, col. 2. See generally Rehms, *supra* note 3, at 310-11.

280. See, e.g., Harney v. Russo, 435 Pa. 183, 189, 255 A.2d 560, 563 (1969); State ex rel. Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295, 300 (Wyo. 1968).

281. See Morris, *supra* note 2, at 466.

282. There are generally two forms of final-offer arbitration: the total package type, in which the arbitrator is restricted to the selection of either the employer's or employee's total package of offers on all the issues; or the issue-by-issue type, in which the arbitrator is permitted to select either of the parties' offer on each of the issues. There have been numerous studies and commentaries on final-offer arbitration. E.g., J. STERN, *supra* note 19; Zack, *Final Offer Selection-Panacea or Pandora's Box*, 19 N.Y.L. FORUM 567 (1974).

283. See Morris, *supra* note 2, at 465-69.

284. Cf. Pollard, *supra* note 17, at 51 (final-offer often results in mediation-arbitration in which the parties are encouraged to settle on their own thereby actually removing the arbitrator

alternatives available to the arbitrator,²⁸⁵ it does not address the problems created when social policy is set by a nonpolitically accountable person. Thus, this comment suggests that rather than attempting to force the "square peg" of the public sector interest arbitration process into the existing "round hole" requisites of the established nondelegation doctrine, the focus should be placed on making the arbitrator politically accountable to the community he or she will influence. Public sector interest arbitration is an innovative, and apparently successful,²⁸⁶ approach to a grave social and political problem, and it deserves an opportunity to operate within our representative form of government, rather than apart from it. Thus, efforts should be directed at making arbitrators politically accountable to the communities they will serve.

The nondelegation doctrine does not present a significant obstacle to the application of a statewide compulsory and binding arbitration law in California. The first requisite for a valid delegation may be met because the state legislature possesses the power to delegate legislative authority to an arbitrator since it is the source of this power for general law cities,²⁸⁷ and it is constitutionally empowered to effect legislation that deals with a matter of statewide concern in the case of charter cities.²⁸⁸ Since the California courts have announced a policy favoring arbitration,²⁸⁹ it is unlikely that a legislative mandate for compulsory and binding interest arbitration will be judicially impeded by the argument that the legislature has failed to decide the "truly fundamental issue." Thus, the second requisite for a valid delegation will be met.

Only the requirement for sufficient safeguards may interfere with the validity of the delegation. As was suggested,²⁹⁰ however, it is likely that the typical standards will be sufficient for the court to sustain the validity of the arbitration law. Thus, this comment suggests that the legislature should not merely seek to satisfy the requisites of the existing "round hole" doctrines in dealing with this complex political problem. Rather, the arbitration process should be integrated into the political process by making the arbitrators politically accountable to the communities they will influence. The lawmakers should adopt new approaches to satisfy the time tested and proven need for representative government in our democratic society. The procedure for selecting the arbitrator presents just such an opportunity.

from the decisionmaking process).

285. Although the tendency among arbitrators under a conventional system of arbitration appears to be to "split the difference," they in fact have an infinite number of alternatives that fall between the parties' last offer. Under a system of final-offer arbitration, however, the arbitrator is limited to the selection of either the employer's final offer or the employee's final offer.

286. See note 19 *supra*.

287. See note 252 and text accompanying notes 246-252 *supra*.

288. See text accompanying notes 120-242 *supra*.

289. *Fire Fighters Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 622, 526 P.2d 971, 980, 116 Cal. Rptr. 507, 516 (1974).

290. See text accompanying notes 266-294 *supra*.

SELECTING THE ARBITRATOR

The concern over arbitrator selection is not whether a fair decision will result, nor whether arbitration will achieve its purpose of avoiding essential service interruptions. The concern rests on the need to keep continuing political accountability fused with local policymaking in order to preserve the representative character of government. The people must not be stripped of control over the decisions of their elected representatives. When, however, policymaking is vested in a nonpolitically accountable arbitrator, whose decision is final and binding on the community, the people are stripped of their elemental power to reverse the decision by referendum.²⁹¹ Furthermore, the people have no justifiable political recourse against the legislative body whose only fault was to reach a bargaining deadlock with its employees.

The California Supreme Court recently reaffirmed the importance of preserving legislative power in the people.²⁹² It stated:

It is a fundamental tenet of the American system of representative government that the legislative power of a municipality resides in the people thereof, and that the right to exercise it has been conferred by them upon duly chosen representatives. By the enactment of initiative and referendum laws the people have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent legislative power.²⁹³

The difficulty in seeking to preserve the representative character of government is not with convincing the courts that representative government is a worthwhile objective; it is in providing the court with a sound basis for judicial action. Historically, the United States Supreme Court has dismissed claims founded on alleged intrusions on representative government as political questions²⁹⁴ devoid of judicially manageable standards.²⁹⁵ Hence, the courts have not entertained these claims, but have referred the complainants to the legislative branch.²⁹⁶ Recently, however, two state supreme courts examined their respective state arbitration laws on the purported constitutional ground that the laws failed to provide for continuing political accountability.²⁹⁷ Only one of these courts was able to find support for its decision

291. CAL. CONST. art IV, §1. In *El Dorado Sherrif's Ass'n v. Board of Supervisors*, 3 Civ. No. 15, 465 (filed Aug. 20, 1976), the court stated: "The power of initiative and referendum is a power reserved to the people, *not a granted power*, and as such is to be liberally construed in order to uphold it whenever that can be done." (emphasis added).

292. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 146, 550 P.2d 1001, 1014, 130 Cal. Rptr. 465, 478 (1976) (quoting from *Dwyer v. City Council*, 200 Cal. 505, 513, 253 P. 932, 935 (1927)).

293. 17 Cal. 3d at 146, 550 P.2d at 1014, 130 Cal. Rptr. at 478.

294. *E.g.*, *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79-80. *But see Baker v. Carr*, 369 U.S. 186, 210 (1962).

295. *Reynolds v. Sims*, 377 U.S. 533, 582 (1964).

296. *See Town of Arlington v. Board of Concil. & Arb.*, — Mass. —, —, 352 N.E.2d 914, 921-22 (1976).

297. *Greeley Police Union v. City Council*, — Colo. —, —, 553 P.2d 790, 792 (1976); *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 241-42, 231 N.W.2d 226,

in a constitutional provision.²⁹⁸ There are, however, two potential constitutional bases for judicial intervention to exact political accountability in the arbitration process. The first basis for judicial intervention relies on preservation of the people's elemental constitutional power of initiative and referendum.²⁹⁹ The second basis is the application of the "one person one vote" principle³⁰⁰ in arbitrator selection.

While each of the constitutional principles³⁰¹ may provide the basis for judicial action, the concern for political accountability properly belongs in the political forum. Therefore, the key question for the legislature is not to determine what it can get away with, but what it ought to do.

A. *The Power of Initiative and Referendum is Reserved in the People*

The California Constitution explicitly reserves to the people the power of initiative and referendum.³⁰² The scope of initiative and referendum is limited to matters that are legislative in character³⁰³ and that are within the legislative body's power of resolution.³⁰⁴ The California Legislature has

228 (1975). The *Dearborn* Justices were evenly split on the constitutionality of the arbitration law. Two justices contended that the law was clearly unconstitutional while a third argued that it was constitutional. The fourth justice stated that the law was constitutional only as applied in this case, which was in a manner not intended by the legislature. Thus, it can be argued that the arbitration law, *as enacted*, was held unconstitutional by the Michigan Supreme Court, although this is not the precise holding since the divided supreme court decision had the effect of affirming the lower court opinion, in which the law was held constitutional. Shortly after the supreme court opinion, the Michigan Legislature amended the arbitration law, 1976 MICH. PUB. ACTS 84, into conformity with Justice Williams' opinion.

298. The *Greeley* court held the arbitrator selection procedure violated article XXI, section 4 of the Colorado Constitution, which provides in part:

Every person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which said elective officers shall be subject to the recall provision of the constitution

COLO. CONST. art. XXI, §4.

299. CAL. CONST. art. IV, §1 provides: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

300. The concern of the U.S. Supreme Court for preserving the individual's right to vote from dilution, has led to numerous cases in the 1960's in which the Court directed the apportionment of legislative districts to bring them in line with the urban and rural conditions of the mid-20th century. *See generally* Schattschneider, *Urbanization and Reapportionment*, 72 YALE L.J. 7 (1962). On the application of the "one person one vote" principle to local government, *see generally*, Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965).

301. The "one person one vote" principle is founded on the equal protection clause of the fourteenth amendment to the United States Constitution. *See Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964); *Baker v. Carr*, 369 U.S. 186, 226 (1962). *See also* *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

302. CAL. CONST. art. IV, §1.

303. *Wheelright v. County of Marin*, 2 Cal. 3d 448, 457, 467 P.2d 537, 543, 85 Cal. Rptr. 809, 815 (1970), *cert. denied*, 400 U.S. 807 (1970); *Valentine v. Town of Ross*, 39 Cal. App. 3d 954, 957, 114 Cal. Rptr. 678, 680 (1974). Administrative or executive acts are outside the scope of the referendum power. *Simpson v. Hite*, 36 Cal. 2d 125, 129, 222 P.2d 225, 228 (1950). *See* Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966).

304. *Hurst v. City of Burlingame*, 207 Cal. 134, 140, 277 P. 308, 311 (1929). *See* Note, *Judicial Limitations on the Initiative and Referendum in California Municipalities*, 17 HASTINGS L.J. 805, 813-15 (1966).

provided for the power of initiative³⁰⁵ and referendum,³⁰⁶ in accordance with the constitutional mandate,³⁰⁷ to all counties and general law cities. Charter cities may provide these powers in their charters.³⁰⁸

The decision to mandate arbitration as the means for averting strikes by essential employees is legislative in character and is, therefore, capable of enactment by initiative or repeal by referendum.³⁰⁹ The pertinent problem arises once the state arbitration law is enacted and applied to the municipality. If the California courts follow the reasoning in *Glendale*, which permits a court to direct the legislative enactment of an ordinance to effect a memorandum of understanding that was approved by the city council,³¹⁰ the people will be unable to reverse an arbitration award because their power of referendum will be lost.³¹¹ For example, suppose the arbitrator awards the firefighters a twenty percent pay raise. This arbitrator's decision involves the setting of wage rates that has consistently been held to be an exercise of legislative power.³¹² Once this power is exercised by the arbitrator, however, the legislative body is bound by the award. Thus, the people may not reverse this decision because it does not meet the two requirements to fall within the scope of their referendum power. Since the decision is legislative in character, it satisfies the first requirement. It fails the second requirement, however, because power over the decision was transferred from the local legislative body to the arbitrator. Therefore, since the legislative body subject to the people's initiative and referendum power may not alter the arbitrator's award, neither may the people. Furthermore, since the arbitrator is not a local officer, he or she is not subject to recall.³¹³ Consequently, the arbitration process is totally insulated from the community.

One way to avoid this potential abridgement of constitutional right to referendum is expressly to provide, in the arbitration law, that the award is binding on the city only if not reversed by a special election.³¹⁴ This would

305. CAL. ELEC. CODE §§3709, 3711 (counties); CAL. ELEC. CODE §§4010, 4011 (cities).

306. CAL. ELEC. CODE §§3753, 3754 (counties); CAL. ELEC. CODE §§4051, 4055 (cities).

307. CAL. CONST. art. II, §11.

308. CAL. CONST. art. II, §11.

309. In *Geiger v. Board of Supervisors*, 48 Cal. 2d 832, 839, 313 P.2d 545, 549 (1957), the California Supreme Court stated, "If essential governmental functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions will assume that no such result was intended." The argument could be made that the repeal of a state interest arbitration law or of a local ordinance implementing an arbitration award should not be within the scope of the referendum power because the repeal of either law could result in a strike. Thus, the courts would be called upon to weigh the advantages of the exercise of this power versus the impact of strikes on the community.

310. See note 257 *supra*.

311. See note 257 *supra*.

312. See *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 25, 553 P.2d 1140, 1142, 132 Cal. Rptr. 668, 670 (1976).

313. CAL. CONST. art. II, §19 provides: "The Legislature shall provide for recall of local officers. This section does not affect counties and cities whose charters provide for recall."

314. A similar approach is presently employed by the City of Englewood, Colorado. In that city, public employer-employee bargaining impasses are submitted for resolution by a "Career Service Board" composed of five local citizens; two appointed by the city council, two elected by city employees, and these four then appoint the fifth member. The members of the board

serve to place the final decisionmaking power with the people over the specific matters decided by the arbitrator, but its exercise could be reserved to issues whose community interest is such that their resolution should properly be left to the political processes of the ballot box. Another way to preserve the representative character of government is to make the arbitrator politically accountable. Two problems are created by this approach. The first is the level on which the "public arbitrators" should be selected. If they are selected on a statewide basis, decisionmaking is removed from the community that the arbitrator will affect. Further, an arbitrator from a primarily urban area may not be aware of, and hence sensitive to, the peculiar problems faced by a rural community and vice versa. On the other hand, if the arbitrator is selected on the local level, public employee confidence may drop as the arbitrator will be identified as a member of the city's management team. This could frustrate rather than advance the legislative aim of arbitration. This comment suggests that the solution to this dilemma is to select arbitrators to serve on regional panels. The members of the regional arbitrator panels need only be paid when they serve³¹⁵ and, while each member would be a public official, he or she would only be called into service when needed to settle a dispute. By being a resident of, or knowledgeable of the region, the individual members would arguably share the community's social and economic concerns. Appreciating the needs of the community, however, only provides for representative panel members. The next step is to insure that responsible decisions are made. This may be achieved by requiring the panel members to be, either formally or through experience, trained in such matters as public finance.³¹⁶ Finally, the ultimate decisionmaking power must not be removed from the hands of the electorate. However representative or responsible the panel member's decision, the community should be empowered to reverse it at the polls. While the

serve for four years. If either the city council or the employees are dissatisfied with the decision of the board, a special election is called and the final decision is thus left with the electorate. For a discussion of this approach, see UNITED STATES CONFERENCE OF MAYORS, LMRS Newsletter, June 1977, at 2. In San Francisco, California, the voters have by charter amendment, reserved the power to set the salaries for their public employees at the polls. SAN FRANCISCO, CAL. CHARTER §9.108(b), *reprinted in* [1977] GOV'T. EMPL. REL. REP. (BNA) 51:1440.

See also SB 164, 1977-78 Regular Session, *as amended*, June 22, 1977, which provided for local option removal of the provision for arbitration. Each community would have been permitted to render the arbitration law inapplicable by majority vote. Arguably, giving the people the power to reverse an arbitrator decision is akin to leaving the determination of the final terms of the agreement in the hands of the local legislators since these legislators are the representatives of the people and reflect their interests.

315. The approach of paying public officials on an as-needed basis is presently used by the Occupational Safety and Health Standards Board. The members meet when necessary and are paid on a per meeting basis. *See* CAL. LAB. CODE §§140(a), 141(b). The cost of arbitration is regarded as playing an important role in encouraging bargaining and deterring the excessive use of the process. *See* Morris, *supra* note 2, at 473-74. Typically, state statutes require the parties to share the cost of arbitration equally. *E.g.*, CONN. GEN. STAT. §7-473c (Supp. 1976); MINN. STAT. §179.72 (Supp. 1976). In Michigan, the state shares the cost with the parties, MICH. COMP. LAWS §423.236 (Supp. 1975), and in Alaska, the costs are allocated by the arbitration award, ALASKA STAT. §09.43.100 (1973). For a discussion and analysis of the procedural costs of public sector interest arbitration, see Polland, *supra* note 17, at 53-63.

316. *See* Grodin, *supra* note 25, at 18.

retention of this power in the people is theoretically important, due to the normally high cost of waging election campaigns, this power is not likely to be frequently exercised. Thus, the importance of political accountability of the panel members re-emerges. Unless the panel members are politically *accountable* to the community of the region, the community is powerless in affecting its labor relations destiny. It would appear that the most forthright manner of affecting political accountability of panel members is for them to serve for definite terms subject to their removal without cause. If they are elected, they should be capable of removal by their electorate; and if they are appointed, by their appointor.

B. "One Person One Vote" Principle

The second problem resulting from making arbitrators public officials requires a determination of whether arbitrators must be elected or may be appointed. In *Sailors v. Board of Education*,³¹⁷ the United States Supreme Court faced the issue whether a county board of education may be appointed rather than elected. To decide this question, the court suggested an important consideration was the nature of the duties of the board. Noting that "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions,"³¹⁸ the *Sailors* Court refused to decide whether the state may constitute local governments on an appointive, rather than elective basis.³¹⁹ Since the board of education performed "essentially administrative functions,"³²⁰ rather than legislative duties "in the classical sense,"³²¹ the Court ruled that the state was permitted to appoint the members of the board.³²² Thus, where an official operates in a *nonlegislative* capacity,³²³ "a State can appoint local officials or elect them or combine the elective and appointive systems"³²⁴ The *Sailors* decision suggests that arbitrators must be elected since their duties involve the exercise of legislative power.³²⁵

The California Supreme Court faced a related issue in *People ex rel. Younger v. County of El Dorado*.³²⁶ Noting that the "one person one vote" principle does not apply when *nonlegislative* offices are filled by appointment rather than by election³²⁷ and that the Tahoe Regional Planning

317. 387 U.S. 105 (1967).

318. *Id.* at 110-11.

319. *Id.* at 109-10.

320. *Id.* at 110. The Court noted that the duties of the board included the "appointment of a county school superintendent . . . , preparation of an annual budget and levy of taxes . . . , distribution of delinquent taxes . . . , [and the board had] the power to transfer areas from one school district to another." *Id.* at 110 n.7.

321. *Id.* at 110.

322. *Id.* at 111.

323. *Id.* at 108.

324. *Id.* at 111.

325. See notes 38 & 245 *supra*.

326. 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

327. *Id.* at 505, 487 P.2d at 1209, 96 Cal. Rptr. at 569.

Agency was clearly engaged in legislative activities,³²⁸ the court was called upon to decide whether a legislative office may be filled by appointment.³²⁹ The unanimous court reasoned that the administrative-legislative distinction was unmanageable since "governmental activities 'cannot easily be classified in the neat categories favored by civics texts' . . ."³³⁰ and, consequently, rejected the distinction as "irrelevant."³³¹ Thus, the *Younger* court suggests that whether an official is to be appointed or elected is a question for the legislature. The resolution of this question by the legislature involves important public policy considerations. By appointing the arbitrator, the legislature may exercise greater control over the qualifications of the arbitrators than it could if they were elected.

One important consideration in selecting an arbitrator is the individual's training in such matters as public finance and his or her sensitivity to the policy issues with which the person can expect to be presented.³³² This factor militates in favor of selection by appointment. While political accountability is crucial to preserving the representative character of local government, this may be achieved through the appointment of arbitrators by politically accountable officials. The court concluded that the "one person one vote" principle would be applied only when the officer is elected.³³³ If he or she is appointed, the "one person one vote" doctrine is inapplicable.³³⁴ Thus, if the arbitrator is appointed, the "one person one vote" principle will not apply.

This comment proposes that regional panels of arbitrators be appointed by politically accountable officials for definite terms.³³⁵ Each arbitrator could be administered a constitutional oath and would be selected³³⁶ for service by

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* In *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969), the Supreme Court of Pennsylvania dismissed the "one person one vote" argument when it concluded that an arbitration panel could not be considered legislative when its functions are compared with those ruled nonlegislative by the Supreme Court in *Sailors*. *Id.* at 192, 255 A.2d at 564. See note 299 *supra*. In *Town of Arlington v. Board of Concil. & Arb.*, — Mass. —, 352 N.E.2d 914 (1976), the Supreme Judicial Court of Massachusetts reasoned that the arbitration panel is not a unit of local government and has powers narrower in scope than the powers of the county board in *Sailors*. The court concluded that for the "one person one vote" principle to apply, the panel must exercise "general legislative powers," — Mass. at —, 352 N.E.2d at 920-21.

332. See Grodin, *supra* note 25, at 17-18.

333. 5 Cal. 3d at 505, 487 P.2d at 1209, 96 Cal. Rptr. at 569.

334. *Id.*

335. Requiring appointments to be for definite terms, thereby requiring the reappointment of arbitration board members by elected officials may add political sensitivity to the arbitrator.

336. Selection of the neutral chairman could be done at random or by each party alternatively striking names from a list containing the names of the members of the panel. While the element of risk may be an important consideration should the propensities of the arbitrators become known, the element of selection by the parties may be countervailing because it creates more confidence in the panel. A combination of the alternatives may induce both the desired conditions. The introduction of uncertainty as to which party's final offer the arbitrator will select has been recognized as an element contributing to the success of final offer arbitration. See Morris, *supra* note 2, at 466-67.

the deadlocked parties to the dispute. Finally, the mediative benefits³³⁷ inherent in the presence of the partisan arbitrators is an element of the arbitration process that should not be overlooked.

CONCLUSION

The importance of preserving political accountability for local decision-making must not be obfuscated by the attractiveness of binding interest arbitration as a way to avoid public employee strikes. California lawmakers should not, however, discount arbitration as providing the nucleus for a resolution that both accommodates the needs of public employees and preserves the representative character of local government. The gravamen of the solution must be to integrate the arbitrator into the democratic process by making him or her politically accountable to the region that is affected by the bargaining deadlock to be resolved by the arbitral decision. In order to assure that the arbitrator's decisions are fair, in light of all circumstances, the legislature should retain control over the qualifications of the members of the regional arbitrator panels by directing their appointment by politically accountable officials.

A legislative mandate for compulsory and binding interest arbitration will encounter three potential problems. Charter cities will seek exemption from a statewide arbitration law by claiming interference with its municipal affairs. This claim has merit unless the state limits the application of the arbitration law to essential employees. This limitation will sufficiently manifest a statewide concern to outweigh the charter city's constitutionally rooted power over its municipal affairs. The concern for preserving local accountability for decisions that affect the locality, from which stems the municipal affairs doctrine, is however, shared by citizens of both charter and general law cities. Thus, the second attack to the propriety of the arbitration law will assert that the arbitration process will result in an unlawful delegation of legislative power and thereby insulate the government from the governed. This argument, which consists of two prongs, will contend that the legislative decision to mandate arbitration will not meet the requirement that the fundamental policy determination be made by the legislature and that there will not be sufficient safeguards to prevent an abuse of discretion by an arbitrator. This comment discussed, however, the weakness of the first prong when it is scrutinized in light of the current judicial climate. Although safeguards present an effective approach to preserving political accountability for decisionmaking, it eludes application to the spectrum of issues potentially confronting an arbitrator.

337. See J. STERN, *supra* note 19, at 124. But see Gallagher, *San Bernadino County's Experiment with Final-Offer, Issue-by-Issue, Advisory Med-Arb*, 31 CAL. PUB. EMP. REL. 23 (1976).

The final attack on the arbitration process will be aimed at the selection procedure of arbitrators. The claim is that a system that places legislative power in the hands of private persons results in stripping the people of their elemental power of referendum and initiative. This assertion strikes at a judicially honored constitutional nerve, and promises to present a thorny obstacle in the path of an arbitration law. Thus, this comment concluded that the proper focus for the drafters of an arbitration law should be on making arbitrators public officials who are politically accountable. Significantly, however, this comment noted the inapplicability of the "one person one vote" principle to the arbitrator selection procedure, which therefore permits arbitrator selection by appointment in California.

An alternative to politically accountable arbitrators, which this comment considered, is to make the scope of arbitral jurisdiction narrower than the scope for negotiation in order to leave politically sensitive issues to the political arena. This alternative was quickly dismissed when it became apparent that an incongruity of scope would frustrate the legislative purpose for arbitration. Thus, this comment settled upon an arbitration procedure aimed at avoiding essential employee strikes through the establishment of regional panels of politically accountable arbitrators appointed by elected officials.

California lawmakers are at an important juncture in their formulation of public sector labor relations policy. While they must be attentive to their constituent's demand for an effective mechanism to avoid the occurrence of strikes by essential employees, they must be alert to their responsibility for the preservation of our democratic form of government. Regional panels of politically accountable arbitrators presents one solution to a complex political question of grave social concern. Whatever the solution, while the California courts are unlikely to frustrate a legislative attempt to satisfy this concern, it is likely that they will intervene when they sense that the process is endangering our democratic form of local government.

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