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A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: A Far, Far Better Thing Than the Workplace Fairness Act

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A PROPOSAL FOR PROCEDURAL LIMITATIONS ON HIRING PERMANENT STRIKER REPLACEMENTS: "A FAR, FAR BETTER THING" THAN THE WORKPLACE FAIRNESS ACT

WILLIAM R. CORBETT*

Since the Supreme Court's decision in NLRB v. Mackay Radio & Telegraph Co. in 1938, employers have been permitted to hire permanent replacements for striking employees. The hiring of permanent replacements deprives employees engaged in an economic strike of their right to immediate reinstatement to their jobs at the conclusion of the strike. Although, under the substantive law, the "Mackay doctrine" applies to economic strikes but not unfair labor practice strikes, in practice employers permanently replace employees engaged in both types of strikes. This is possible because the unfair labor practice proceedings, which determine the type of strike, occur long after employers hire permanent replacements.

In recent years the Mackay doctrine has come under increasing attack. Numerous proposals to modify or overturn the doctrine have been made, including bills introduced in Congress during the past six years. Indeed, in the 103d Congress, the House of Representatives passed a bill that would overturn Mackay, and a companion bill awaits action on the Senate floor. In this Article, Professor Corbett argues that, although the current law regarding striker replacement should be changed, some aspects of the law should be preserved—principally, the distinction between economic strikes and unfair labor practice strikes.

After considering prior proposals to reform the law, Professor Corbett advocates a new proposal that would use procedural devices to limit permanent replacement in practice to economic strikes. The proposal would require employers to notify the National Labor Relations Board of their intention to hire permanent replacements. That notification would trigger an interim ban on

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such hiring until expedited proceedings determined the characterization of the strike. Professor Corbett argues that this proposal would reduce the uncertainty faced by all parties to a labor dispute and enable them to act based on knowledge of the applicable replacement rights of the employer and reinstatement rights of the striking employees.

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[A] union takes a bull by the horns when it determines the cause of a strike. It may strike over what it thinks is an unfair labor practice only to be told years later by the Board and the courts that no violation occurred. Then strikers take potluck as strikers who may be replaced. An employer's margin for error is no wider.¹

PROLOGUE: A TALE OF TWO LABOR BATTLES

"It was the best of times, it was the worst of times . . ."² The year was 1992, and for organized labor it was a time when two great battles were fought against management in two cities. Notwithstanding great expectations of at least one victory, organized labor, after waging determined campaigns, lost both. But in those losses, labor may have set the stage for a future victory—the demise of the much-maligned fifty-six-year-old doc-

1. Frank H. Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 VA. L. REV. 1322, 1326 (1959) (footnotes omitted).

2. CHARLES DICKENS, *A TALE OF TWO CITIES* 2 (Silver Burdett 1982) (1859).

trine from the Supreme Court decision *NLRB v. Mackay Radio & Telegraph Co.*³

In October 1935, the union representing a unit of employees at Mackay Radio and Telegraph Company called a strike because the employer would not agree to the terms of a collective bargaining agreement. To maintain operations during the strike, the employer moved employees from its other offices to San Francisco.⁴ The strike failed and the strikers requested that the employer allow them to return to work. The employer agreed, subject to the promise it had made to eleven of the replacements brought in from other offices that they could stay in the San Francisco office if they wished. Eventually, only five of the replacements wished to remain in San Francisco. As a result, the employer reinstated all strikers except five of the most active union supporters who had played prominent roles in the strike.⁵ The employees who were not reinstated filed unfair labor practice (ULP)⁶ charges with the National Labor Relations Board

3. 304 U.S. 333 (1938). According to Professor Weiler, "[F]ew rules of American labor law have been as heavily criticized as the legality of hiring permanent strike replacements." Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 393 (1984).

4. *Mackay Radio*, 304 U.S. at 337.

5. *Id.* at 339.

6. Section 7 of the National Labor Relations Act establishes the basic rights of employees covered by the Act: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1988). The Act also provides that covered employees have the right to refrain from engaging in the foregoing activities. *Id.* Section 8 of the Act creates the means for enforcing the substantive rights created by § 7 by declaring specific types of conduct by employers and labor organizations to be unfair labor practices. *Id.* § 158. "The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other." 55 NLRB ANN. REP. 3 (1992) (covering fiscal year 1990).

Section 8(a) of the Act describes conduct of employers that constitutes ULPs. It is a violation of § 8(a)(1) to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1988). An example of a § 8(a)(1) violation is an employer's threatening to fire employees or take other retaliatory actions if the employees elect a union as their collective bargaining representative. An employer violates § 8(a)(2) if it "dominate[s] or interfere[s] with the formation or administration of any labor organization or contribute[s] financial or other support to it." *Id.* § 158(a)(2). Examples of such a ULP include forming a company union or forming and dominating employee participation committees. *See, e.g.,* *Electromation, Inc.*, 309 N.L.R.B. 990, 998 (1992). Section 8(a)(3) prohibits employers from discriminating "in regard to hire or tenure of employment or any other term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158 (a)(3) (1988). This most commonly filed ULP charge, 55 NLRB ANN. REP., *supra*, at 137 tbl. 2, is exemplified by an employer's discharging an employee because of the employee's engaging in union support or activities. An employer violates § 8(a)(4) of the Act if it "discharge[s] or otherwise discriminate[s] against an employee because he has filed charges or given testimony under [the Act]." 29 U.S.C. § 158(a)(4)(1988). Section 8(a)(5) prohibits an employer from "refus[ing] to bargain collectively with the representatives of [its] employees." *Id.* § 158(a)(5). An em-

(NLRB or "the Board"). The Board held that the employer had committed ULPs by discriminating against the five employees because of their union support and activities.⁷ The Ninth Circuit Court of Appeals denied enforcement of the Board's order,⁸ and the Supreme Court reversed, holding that the Board's finding was supported by the evidence.⁹ In addition to approving the Board's finding of discrimination, the Court stated as follows:

Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 [of the National Labor Relations Act] provides, "nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.¹⁰

With that *statement*¹¹ the *Mackay* doctrine was born. Under that

ployer engages in bad faith bargaining in violation of § 8(a)(5) if, for example, it refuses to meet and bargain with the bargaining representatives, engages in surface bargaining (not directed toward reaching an agreement), or refuses to provide the bargaining representatives with relevant information to which they are entitled upon request.

Section 8(b), added to the Act by the Taft-Hartley amendments of 1947, ch. 120, 61 Stat. 136 (1947), establishes certain conduct by labor organizations to be ULPs. The number of annual ULP charges alleging violations by unions is far smaller than the number of charges alleging employer violations. 55 NLRB ANN. REP., *supra*, at 137 tbl. 2. Included among union ULPs are the following types of conduct: "restrain[ing] or coerc[ing]" employees in the exercise of their § 7 rights, or an employer in the selection of its collective bargaining representatives, 29 U.S.C. § 158(b)(1); generally, "caus[ing] or attempt[ing] to cause an employer to discriminate against an employee in violation of [§ 8(a)(3)]." *id.* § 158(b)(2); failing to satisfy the duty to bargain in good faith, *id.* § 158(b)(3); engaging in secondary boycotts, *id.* § 158(b)(4); charging discriminatory or excessive initiation fees under a union shop agreement, *id.* § 158(b)(5); causing or attempting to cause an employer to pay for work that has neither been performed nor is to be performed, *id.* § 158(b)(6); and engaging in recognition picketing under specified circumstances, *id.* § 158(b)(7). Section 8(e) prohibits unions and employers from entering into "hot cargo" agreements, in which an employer agrees to refrain from dealing with the products of another employer. *id.* § 158(e).

7. *Mackay Radio & Tel. Co.*, 1 N.L.R.B. 201, 218 (1936).

8. *NLRB v. Mackay Radio & Tel. Co.*, 92 F.2d 761, 765, *adhering on reh'g* to 87 F.2d 611 (9th Cir. 1937).

9. *Mackay Radio*, 304 U.S. at 346-47.

10. *Id.* at 345-46.

11. Numerous commentators have argued that the Supreme Court's statement in *Mackay* regarding an employer's right to hire permanent replacements is merely dicta. *E.g.*, JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 139 (1988); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 299-300 (1991); Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 631 (1966). Although often repeated, this view is not unanimous. Professor Baird has argued that, since the Wagner Act was silent on whether an employer could hire replacements for striking employees, the Court found it necessary to make this determination before addressing the more specific ques-

doctrine, employers may lawfully hire "permanent"¹² replacements for employees engaged in economic strikes. Thus, employers invoking the *Mackay* doctrine have been permitted to hire permanent replacements and deny immediate reinstatement to economic strikers if their positions have been filled. In the last decade the doctrine has become one of the most vehemently debated issues in labor law.¹³ The battles of 1992 threatened to overthrow *Mackay*, and they presaged future conflicts.

tion of whether the selection of strikers for reinstatement was discriminatory. If the Court had interpreted the Act as prohibiting the hiring of permanent replacements, then the more specific question would have been moot. Charles W. Baird, *On Strikers and Their Replacements*, 12 GOV'T UNION REV., Summer 1991, at 1, 8; see also DANIEL V. YAGER, EMPLOYMENT POLICY FOUNDATION, *LOADING THE SCALES: IS THE BALANCE BETWEEN THE RIGHT TO STRIKE AND THE RIGHT TO OPERATE IN NEED OF REFORM?* 40 (1993) (arguing that it was essential for the Court to clarify rule regarding permanent replacement of strikers).

Regardless of whether the *Mackay* doctrine is dicta, the point is practically insignificant, since the courts and the Board have repeatedly reaffirmed the doctrine. See, e.g., Samuel Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287, 289 (1987) ("It is simply too late in the day to reopen *Mackay Radio*."); George Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 385 (1969) (recognizing that *Mackay* is uncontroverted doctrine). The Supreme Court's continued adherence to *Mackay*'s permanent replacement doctrine is demonstrated by the Court's decision in *Belknap, Inc. v. Hale*, 463 U.S. 491, 504-05 n.8 (1983) (recognizing that an employer's refusal to fire permanent replacements to reinstate returning strikers does not constitute a ULP). Moreover, Congress ratified the doctrine by enacting that portion of the Landrum-Griffin Act in 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959), which gave employees "engaged in an economic strike who are not entitled to reinstatement," 29 U.S.C. § 159(c)(3) (1988), voting rights in NLRB elections held within 12 months of the commencement of a strike. Estreicher, *supra*, at 289 (recognizing the 1959 amendment as congressional ratification of the *Mackay* doctrine).

12. "Permanent," as used in this context, has a meaning quite different from the commonly used definition. In short, permanent replacement means the employer does not intend to discharge the replacement in order to reinstate a striking employee when the strike ends or when the striker otherwise requests reinstatement. *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1293 (1993) (Raudabaugh, Member, concurring in part and dissenting in part) (stating that, in lexicon of labor law, "permanent" means employer intends to retain replacement even after strike is over); DOUGLAS E. RAY & EMERY W. BARTLE, *LABOR-MANAGEMENT RELATIONS: STRIKES, LOCKOUTS AND BOYCOTTS* § 6.03, at 5 (1992) (explaining distinctions between temporary and permanent replacements); David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 LAB. LAW. 137, 143 (1991) (noting that permanent means employment term is not "explicitly limited" to duration of strike); see also Burr E. Anderson, "Permanent" Replacements of Strikers After *Belknap: The Employer's Quandary*, 18 J. MARSHALL L. REV. 321, 325-37 (1985) (discussing evolution of meaning of "permanent" replacement).

13. Introducing a roundtable discussion of the *Mackay* doctrine at a conference in 1990, Professor Samuel Estreicher noted some of the proposals to abrogate the doctrine that have been made in recent years:

[I]f there is to be change, what form should it take? A flat prohibition on permanent replacements . . . ? A provision barring replacements during, say, the first ten weeks of a strike . . . ? A provision requiring proof that the employer could not maintain operations with temporary replacements? A provision requiring an employer to offer to submit to interest arbitration and, only if that offer is spurned by the union, can the employer resort to replacements?

Samuel Estreicher, *Strikers and Replacements: Introductory Comments*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR 17, 22 (Bruno Stein ed.,

Rising Action

The first of the battles was fought in Congress. In Washington, D.C., labor and management engaged in one of the most important legislative struggles of the 102d Congress. On July 17, 1991, the United States House of Representatives passed H.R. 5,¹⁴ a bill to overturn *Mackay*; the bill would have amended the National Labor Relations Act (NLRA or "the Act"),¹⁵ making it a ULP for employers to hire or threaten to hire permanent replacements during strikes.¹⁶ An almost identical bill, S. 55,¹⁷ was soon under consideration in Senate committees.¹⁸

As the battle continued in Washington, another conflict began in Peoria, Illinois where Caterpillar, Illinois's largest manufacturer, is based. Caterpillar is the world's largest manufacturer of heavy equipment and the nation's second-leading net export manufacturer.¹⁹ In recent times, however, it had suffered losses due, in part, to increased foreign competition. Sales had dropped twenty percent since 1990, and in 1991 Caterpillar lost \$404 million.²⁰ The United Auto Workers of America (UAW) is the powerful union, 900,000 members strong,²¹ which represented approximately 16,000 Caterpillar employees at plants in four states.²² The collective bargaining agreement between the UAW and Caterpillar was to expire at midnight on September 30, 1991.²³ As the expiration date drew near,

1990). For a discussion of legislation proposed in the last six years to overturn or modify the doctrine, see *infra* note 74. For a sampling of books and articles written on the doctrine, see *infra* notes 84-86.

14. H.R. 5, 102d Cong., 1st Sess. (1991). The margin of 247 to 182 indicated that the House would not have been able to override a promised veto by President Bush. *Striker Replacement Bill Faces Uncertain Future in Senate*, Daily Lab. Rep. (BNA) No. 143, at A-17 (July 25, 1991).

15. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-69 (1988).

16. 137 CONG. REC. H5518-90 (daily ed. July 17, 1991) (debate and passage of bill); Gail McCallion, *Strike Replacements*, CRS ISSUE BRIEF (Cong. Res. Serv., Libr. of Cong., Wash. D.C.), July 1, 1992, at CRS-3; John G. McDonald, Note, *Leveling the Playing Field or Tipping the Scales? Pending Strike Legislation: The Latest Battlefield Between Labor and Management—An Alternative Solution*, 42 SYRACUSE L. REV. 971, 971-72 (1991).

17. S. 55, 102d Cong., 1st Sess. (1991).

18. See McCallion, *supra* note 16, at CRS-3.

19. Philip Dine, *Bitter Feelings on Labor War Engulf Peoria*, ST. LOUIS POST-DISPATCH, Apr. 10, 1992, at 12D.

20. *Rally Backing Caterpillar Strikers Draws 20,000 Union Members to Peoria*, Daily Lab. Rep. (BNA) No. 57, at A-7 (Mar. 24, 1992).

21. *Strikers Disobey Caterpillar Order to Report to Work*, TIMES-PICAYUNE (New Orleans), Apr. 7, 1992, at D-2.

22. *Auto Workers Reach Tentative Agreement with Deere & Co.*, Daily Lab. Rep. (BNA) No. 195, at A-9 (Oct. 8, 1991).

23. *Negotiators Extend Caterpillar Pact While Talks for New Contract Underway*, Daily Lab. Rep. (BNA) No. 190, at A-6 (Oct. 1, 1991).

negotiators for the UAW and Caterpillar agreed to extend the contract indefinitely to avoid a strike.²⁴

The UAW announced that Deere & Co. (Deere), Caterpillar's chief domestic rival, had been selected as the target for establishing a pattern collective bargaining agreement for the agricultural, construction, and heavy equipment industry.²⁵ On October 5, 1991, the UAW reached a tentative agreement with Deere²⁶ and turned its attention to Caterpillar. The prospect for an agreement between the UAW and Caterpillar looked bleak because Caterpillar, for the first time in the relationship between the union and the employer, announced that it would not be a part of pattern bargaining.²⁷

On November 4, 1991, the UAW launched a limited strike against Caterpillar at two of its Illinois plants.²⁸ On November 7, Caterpillar retaliated by announcing a selective lockout of employees in specific departments of its plants in Peoria, East Peoria, and Aurora, Illinois.²⁹ Caterpillar moved managerial and salaried employees into jobs vacated by strikers in order to maintain production and meet customer demand.³⁰ On December 5, the UAW filed a ULP charge against Caterpillar, alleging that the employer had violated section 8(a)(5)³¹ of the NLRA by refusing to provide the union with information necessary to process a grievance and fulfill its duty as the exclusive collective bargaining representative of the employees and section 8(a)(4)³² by discriminating and retaliating against employees because they

24. *Id.* In their tumultuous bargaining history, there had been a 205-day strike in 1982-83. *Rally Backing Caterpillar Strikers Draws 20,000 Union Members to Peoria*, *supra* note 20.

25. *Negotiators Extend Caterpillar Pact While Talks for New Contract Underway*, *supra* note 23. The announcement meant that the UAW would take a bargaining position that Caterpillar must agree to a contract like that which the UAW negotiated with Deere.

26. *Auto Workers Reach Tentative Agreement with Deere & Co.*, *supra* note 22.

27. *See UAW's Bieber Tells Locked-Out Caterpillar Workers to Stay Home*, *Daily Lab. Rep.* (BNA) No. 29, at A-6 (Feb. 12, 1992). Caterpillar claimed that it could not remain globally competitive if it agreed to a contract like that which existed between the UAW and Deere. *See About 300 Caterpillar Strikers Have Crossed Picket Lines, Company Says*, *Daily Lab. Rep.* (BNA) No. 67, at A-9 (Apr. 7, 1992) (reporting Caterpillar Group President Gerald Flaherty's assertion that the company viewed pattern bargaining as outdated); *Rally Backing Caterpillar Strikers Draws 20,000 Union Members to Peoria*, *supra* note 20. A UAW officer characterized Caterpillar's resistance to pattern bargaining as "bottom line greed" and "a philosophical bent that they want to take on the UAW and do what nobody else has been able to do, so they can be the darlings of Wall Street." *Rally Backing Caterpillar Strikers Draws 20,000 Union Members to Peoria*, *supra* note 20 (quoting UAW secretary-treasurer Bill Casstevens).

28. *Auto Workers Launches Limited Strike at Two Caterpillar Inc. Plants in Illinois*, *Daily Lab. Rep.* (BNA) No. 214, at A-3 (Nov. 5, 1991).

29. *Caterpillar Announces Selective Lockout of About 6,000 UAW-Represented Employees*, *Daily Lab. Rep.* (BNA) No. 217, at A-10 (Nov. 8, 1991).

30. *Managers, Salaried Employees Taking Up Slack at Caterpillar Plants Affected By Strike*, *Daily Lab. Rep.* (BNA) No. 230, at A-1 (Nov. 29, 1991).

31. 29 U.S.C. § 158(a)(5) (1988).

32. *Id.* § 158(a)(4).

had filed ULP charges against the employer.³³ In January 1992, Caterpillar announced that it had suffered losses of \$318 million for the fourth quarter of 1991.³⁴

After sporadic negotiations between the union and the employer, Caterpillar announced on February 7, 1992, that it was ending the lockout of employees at its East Peoria and Aurora plants and was asking that the employees return to work by February 16.³⁵ The UAW responded by expanding the strike and instructing the employees who had been locked out not to report to work without a collective bargaining agreement.³⁶

Negotiations in February remained unavailing, as the union continued to insist on a collective bargaining agreement patterned on the Deere contract.³⁷ On February 19, the UAW rejected what Caterpillar declared to be its final offer.³⁸ Two days after rejecting the offer, the union expanded the strike to Caterpillar's Mossville, Illinois plant, adding 2,750 employees to the 8,000 already on strike.³⁹

On March 6, after the union had rejected three of its contract proposals, Caterpillar announced that the parties were at an impasse in their negotiations.⁴⁰ Negotiations resumed on March 25.⁴¹ Two days later, the UAW filed additional ULP charges against Caterpillar, alleging that the employer had violated the Act by conducting surveillance of picketing employees, conducting surveillance of union officials, stealing picket signs, physically threatening picketing employees, and threatening them with discharge.⁴² With the collapse of negotiations and the filing of ULP charges, the UAW

33. Charge Against Employer, Case 33-CA-9624 (Nat'l Labor Relations Bd.) (filed Dec. 5, 1991).

34. *Caterpillar Absorbs \$318 Million Loss*, Daily Lab. Rep. (BNA) No. 15, at A-20 (Jan. 23, 1992).

35. *Caterpillar Trying to Renew Talks With UAW, Says it Will End Lockout*, Daily Lab. Rep. (BNA) No. 28, at A-4 (Feb. 11, 1992).

36. *UAW's Bieber Tells Locked-Out Caterpillar Workers to Stay Home*, *supra* note 27.

37. *Id.*; *UAW Rejects New Contract Proposal That Caterpillar Says Is Final Offer*, Daily Lab. Rep. (BNA) No. 35, at A-9 (Feb. 21, 1992).

38. *UAW Rejects New Contract Proposal That Caterpillar Says Is Final Offer*, *supra* note 37.

39. *UAW Expands Strike Against Caterpillar*, Daily Lab. Rep. (BNA) No. 37, at A-19 (Feb. 25, 1992).

40. *Caterpillar Declares Impasse in UAW Talks*, Daily Lab. Rep. (BNA) No. 46, at A-16 (Mar. 9, 1992). The union invited Caterpillar to return to the bargaining table on March 17, but the employer declined, claiming its negotiators were unavailable. *UAW Wants Meeting With Caterpillar*, Daily Lab. Rep. (BNA) No. 54, at A-16 (Mar. 19, 1992).

41. *Caterpillar-UAW Talks Resume*, Daily Lab. Rep. (BNA) No. 59, at A-16 (Mar. 26, 1992).

42. Charge Against Employer, Case 33-CA-9768 (Nat'l Labor Relations Bd.) (filed Mar. 27, 1992).

declared that it considered the strike an unfair labor practice strike rather than an economic strike.⁴³

As the conflict between Caterpillar and the UAW escalated, the relationship between the battles in Peoria and Washington, D.C. became increasingly clear. Both were battles about strikes and the balance between the rights of employees and employers. After months of negotiations and strategic maneuvers by one of the strongest unions and one of the most powerful employers in the nation, the reason for the legislative confrontation in the nation's Capital was on the verge of graphic depiction in Peoria, Illinois.

Climax

On April 1, 1992, Caterpillar deployed its ultimate weapon—the *MacKay* doctrine. After five months of a strike by its UAW-represented employees, Caterpillar announced that strikers who did not return to work by April 6 might lose their positions to returning strikers, employees recalled from layoff, or permanent replacements.⁴⁴ Furthermore, the announcement stated that Caterpillar would reduce its workforce by ten to fifteen percent.⁴⁵ The UAW responded to the ultimatum by expanding the strike and

43. *UAW Files ULP Charges Against Caterpillar; Contract Talks Break Off Without Resolution*, Daily Lab. Rep. (BNA) No. 61, at A-12 (March 30, 1992). For discussion of the distinctions between ULP strikes and economic strikes, see *infra* Part II.A and note 116.

44. *Caterpillar Tells Strikers to Return to Work; UAW Authorizes Strikes Against Four More Plants*, Daily Lab. Rep. (BNA) No. 64, at A-12 (Apr. 2, 1992); *Caterpillar Threatens Strikers' Jobs*, ST. LOUIS POST-DISPATCH, Apr. 2, 1992, at 5B. The article in the *Daily Labor Report* actually stated that Caterpillar "said it will fire workers who refuse [to return to work]." *Caterpillar Tells Strikers to Return to Work; UAW Authorizes Strikes Against Four More Plants*, *supra*. A correction was published in the next day's issue: "[A] statement from Caterpillar warned that strikers who choose not to return 'may lose their place in a reduced work force. They could be replaced by a returning striker, an employee recalled from layoff, or a permanent new hire.'" *Correction*, Daily Lab. Rep. (BNA) No. 65, at 1 (Apr. 3, 1992). The difference between the two reported announcements may seem insignificant; if Caterpillar had made the announcement as first reported, however, it would have violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), and perhaps converted what may have been an economic strike into a ULP strike, with drastic consequences to be described below. See, e.g., *Trident Seafoods Corp.*, 244 N.L.R.B. 566, 570 (1979) (holding that, by issuing *discharge* notices to employees engaged in economic strike, employer committed ULP that converted strike from economic to ULP strike), *enforced*, 642 F.2d 1148 (9th Cir. 1981); see also 2 AMERICAN BAR ASS'N, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 1102 (Patrick Hardin et al. eds., 3d ed. 1992) [hereinafter *THE DEVELOPING LABOR LAW*] (recognizing that employer's statements regarding replacement or reinstatement of striking employees may be basis on which strike is characterized as ULP or economic strike). That the *Daily Labor Report* would inadvertently substitute "fire" for "permanently replace" is, in the view of many commentators, consistent with the fact that employees are likely to perceive no difference between permanent replacement and discharge. See *infra* note 106.

45. *Analysts Say UAW-Caterpillar Dispute Could Have Significant Ramifications*, Daily Lab. Rep. (BNA) No. 65, at A-15 (Apr. 3, 1992). This announced reduction in force further jeopardized the striking employees' prospects for reinstatement. An employer that does not reinstate

authorizing members to strike at four additional Illinois plants.⁴⁶ On April 2, the UAW continued its counteroffensive by filing another set of ULP charges against Caterpillar.⁴⁷ The union subsequently filed additional ULP charges, with at least one specifically alleging that the strike had been converted to a ULP strike.⁴⁸

The employer, by announcing its decision to hire permanent replacements, transformed the employees' picket line into a moat between certain jobs and uncertain reinstatement rights. The striking employees were confronted with the difficult decision of whether to cross that moat.⁴⁹ As the strikers considered their options and the prospect of losing their livelihoods, observers speculated about the impact of the UAW-Caterpillar labor dispute on the future of collective bargaining in the United States.⁵⁰

With the battle at its height in Peoria, the importance of the conflict was not lost on politicians.⁵¹ Proponents of the bills to ban the hiring of

economic strikers can avoid liability for a ULP if it can satisfy the burden of proving a "legitimate and substantial business justification[]" for refusing to reinstate them. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Changes in operations such as downsizing, if not motivated by intent to discriminate against union activities, can satisfy the employer's burden. *Id.* at 379.

46. *Caterpillar Tells Strikers to Return to Work; UAW Authorizes Strikes Against Four More Plants*, *supra* note 44; *Caterpillar Threatens Strikers' Jobs*, *supra* note 44.

47. Charge Against Employer, Case 33-CA-9767 (Nat'l Labor Relations Bd.) (filed Apr. 2, 1992). The charge alleged various violations of §§ 8(a)(1) and 8(a)(5) of the Act: bad faith bargaining by Caterpillar as evidenced by the implementation of its final contract offer without reaching an impasse in bargaining; illegal surveillance of union activity; manipulation of employees' seniority and job retention rights; interference with the right of strikers to picket near plants' gates; refusal to provide the union with information relevant to the fulfillment of its duties as collective bargaining representative; bargaining to impasse on a nonmandatory bargaining subject; and bad faith bargaining as evidenced by direct dealing with union members.

48. Charge Against Employer, Case 33-CA-9775 (Nat'l Labor Relations Bd.) (filed Apr. 8, 1992). The charge stated, in relevant part, that "[s]ince on or about April 1, 1992, the current strike has been converted to an unfair labor practice strike by the Employer's announcement that it intends to hire permanent replacements for bargaining unit employees who are engaged in the lawful exercise of their Section 7 rights."

49. Strikers were receiving \$100 per week from the UAW's \$800 million strike fund. *Rally Backing Caterpillar Strikers Draws 20,000 Union Members to Peoria*, *supra* note 20. Additionally, the UAW paid a \$2,000 bonus to those who had been on strike since the beginning. *Id.*

50. Professor Harley Shaiken assessed Caterpillar's ultimatum as "redefining the rules" of collective bargaining. He suggested that the resolution of the UAW-Caterpillar dispute could shape labor relations for the 1990s. *Analysts Say UAW-Caterpillar Dispute Could Have Significant Ramifications*, *supra* note 45; see also *For UAW, "A Question of Survival": Caterpillar's "Hardball" Step Called a Gamble*, CHI. TRIB., Apr. 3, 1992, at C1 (quoting various analysts on potential ramifications of the dispute).

51. On April 8, Governor Clinton, then the front-runner for the Democratic presidential nomination, visited the striking employees at the Peoria plant in a show of support, Cynthia Todd, *Clinton Backs Strikers' Rights*, ST. LOUIS POST-DISPATCH, Apr. 9, 1992, at A1, and a group of senators sent a letter to the Secretary of Labor encouraging her to intervene in the dispute, *15 Senators Urge Martin to Intervene in Caterpillar Strike, Appoint Mediator*, Daily Lab. Rep. (BNA) No. 69, at A-18 (Apr. 9, 1992).

permanent replacements pointed to the dispute as a stark example of the need for the legislation; conversely, opponents of the legislation argued that the confrontation demonstrated why employers need the right to hire permanent replacements when they have offered unions fair contracts that unions reject.⁵²

Falling Action

On April 6, approximately 300 striking Caterpillar employees returned to work.⁵³ Caterpillar then raised the stakes by placing advertisements in local newspapers seeking "permanent employees to replace non-returning striking workers" and offering wages from \$16.12 to \$17.85 per hour with "excellent benefits" and pensions.⁵⁴ Caterpillar reported receiving an overwhelming response to the advertisements from people interested in the replacement positions.⁵⁵ Even striking employees who had not crossed the picket lines with the "first wave" acknowledged both the increasing pressure to return in order to preserve their jobs⁵⁶ and the frustration of feeling that the battle and their livelihoods were slipping beyond their control.⁵⁷ As of April 13, an estimated 750 strikers had crossed the picket lines and returned to work.⁵⁸ As the "crossovers" drove through the picket line, their coemployees shouted insults and filmed them so their names could be posted at the union hall.⁵⁹

52. See *Lobbyists Weigh Impact of Caterpillar Strike on Bill to Ban Strike Replacements*, Daily Lab. Rep. (BNA), No. 74, at A-12 (Apr. 16, 1992).

53. *About 300 Caterpillar Strikers Have Crossed Picket Lines, Company Says*, Daily Lab. Rep. (BNA) No. 67, at A-10 (Apr. 7, 1992).

54. Philip Dine, *Job Seekers' Calls Flood Caterpillar*, ST. LOUIS POST-DISPATCH, Apr. 8, 1992, at A1; Stephen Franklin, *Once Again, Strike Tears at Peoria*, CHI. TRIB., Apr. 8, 1992, at C-1.

55. Dine, *supra* note 54, at A1; Franklin, *supra* note 54, at C-1.

56. One Caterpillar employee expressed the tension many strikers felt:

"There's a lot of guys who can't make up their minds—you're caught between the union and the company . . . I can't say when, [but] at some point, something will snap and I'll go in—no ifs, ands or buts. You've got to pay for the house, for the car and put food on the table."

Michael Abramowitz, *The Agony of Crossing the Line—Caterpillar Strikers Torn Between Principles and Pocketbook*, WASH. POST, Apr. 8, 1992, at C-1 (quoting Caterpillar assembly line employee Bob Piper) (alteration in original).

57. "The guys on top who made this decision, they do not have anything to bet . . . We're all angry. We're all afraid, and at this point, we are all going hour by hour." Franklin, *supra* note 54, at C-1 (quoting Rich Gilbert, a third-generation Caterpillar worker). "It's like two kids fighting over a candy bar sometimes, and who's caught in between? Us." Michael Martinez, *For UAW, "A Question of Survival": Showdown Tightens the Squeeze on Strikers*, CHI. TRIB., Apr. 3, 1992, at C1 (quoting an unidentified striker).

58. *Caterpillar, UAW Meet Under Auspices of FMCS*, Daily Lab. Rep. (BNA) No. 72, at A-16 (Apr. 14, 1992).

59. See Kevin Johnson & Andrea Stone, *Caterpillar Tests Striking UAW's Will*, USA TODAY, Apr. 7, 1992, at A1. At the Aurora, Illinois plant, striking employees erected a mock gal-

Caterpillar and UAW negotiators began meeting with the director of the Federal Mediation and Conciliation Service on April 13 in an effort to resolve the strike.⁶⁰ On April 14, 1992, five months and ten days after the strike had begun, the UAW called off the strike and advised its members to return to work under the terms of Caterpillar's final offer—with the employer's agreement to end its efforts to hire replacements, but without a collective bargaining agreement.⁶¹ The union pointed to the employer's threat to hire permanent replacements and the resulting, as well as potential further, striker crossover as reasons for terminating the strike.⁶²

The confrontation did not end, however, with the strike "busted" and the employees returning to work on the employer's terms. When employees reported for work on April 15, they were told to wait until they were recalled by the company; Caterpillar suggested that due to modernization during the lockout and strike, the company might not recall ten to fifteen percent of the strikers.⁶³ Caterpillar decided, however, that despite its reduced need, it would recall all strikers as a gesture of good will.⁶⁴ The battle in Peoria was finally over, and management had defeated the mighty UAW—one of labor's strongest warriors.

In the aftermath of "one of the key labor combat fields of the decade,"⁶⁵ labor leaders and advocates described the strike, generally regarded as the ultimate weapon in labor's arsenal,⁶⁶ as a "suicide mission"⁶⁷ and

lows and noose to send crossovers a message. *Id.* One striker expressed the feelings of those refusing to return for the crossovers: "It makes me sick . . . They are screwing my family and they're screwing themselves. If we hold out another week, we can win this thing. This is the last card that Caterpillar has to play." *Strikers Disobey Caterpillar Order to Report to Work*, TIMES-PICAYUNE (New Orleans), Apr. 7, 1992, at D2 (quoting Bob Hughes, Caterpillar employee for 24 years).

60. *Caterpillar, UAW Meet Under Auspices of FMCS*, *supra* note 58.

61. *Caterpillar Says It Will Begin Recall of Strikers on April 20*, Daily Lab. Rep. (BNA) No. 75, at A-17 (Apr. 17, 1992); *UAW Agrees to End Strike at Caterpillar*, ST. LOUIS POST-DISPATCH, Apr. 15, 1992, at 1A.

62. Local 751 president Larry Solomon stated that although fewer than 1,000 strikers had crossed over in response to Caterpillar's ultimatum, many more were on the verge of crossing over. *Caterpillar Says It Will Begin Recall of Strikers on April 20*, *supra* note 61, at A-17.

63. Cynthia Todd, *Caterpillar Locks Its Gates On UAW*, ST. LOUIS POST-DISPATCH, Apr. 16, 1992, at 1C.

64. John Lippert, *Caterpillar Will Recall All Strikers*, DETROIT FREE PRESS, Apr. 17, 1992, at 1E; *Caterpillar Says It Will Begin Recall of Strikers on April 20*, *supra* note 61. As a result of Caterpillar's turning away employees reporting on April 15, some of those employees filed a class action against the employer alleging breach of individual employment contracts. *Caterpillar Sued Over Delayed Return*, Daily Lab. Rep. (BNA) No. 114, at A-14 (June 12, 1992).

65. *Analysts Say UAW-Caterpillar Dispute Could Have Significant Ramifications*, *supra* note 45.

66. See, e.g., Stewart, *supra* note 1, at 1322.

67. *More In-Plant Actions Expected In Wake of UAW's Failed Strike at Caterpillar*, Daily Lab. Rep. (BNA) No. 90, at A-7 (May 8, 1992) (quoting Charles McDonald, executive assistant to the secretary-treasurer of the AFL-CIO).

suggested that unions would resort to other tactics, including in-plant activities (such as work slow downs), product boycotts, media campaigns, and informational picketing.⁶⁸ Labor leaders also emphasized that Caterpillar's successful use of the permanent replacement ultimatum demonstrated the necessity of passing the pending legislation overturning *Mackay*.⁶⁹

Labor lost the battle in Washington, D.C. as well, when S. 55 died in the Senate. First, the Senate bill banning the hiring of permanent replacements during economic strikes was killed by filibuster as a motion to invoke cloture failed.⁷⁰ Then, Senator Packwood proposed an amended version of the bill as a substitute, which would have prohibited the hiring of permanent replacements by an employer if a union agreed both to submit the labor dispute to a three-member fact-finding panel and to be bound by the panel's recommendations.⁷¹ A cloture vote on the amended bill also failed.⁷² With that vote, organized labor lost the second great battle of 1992. But the war was far from over.

I. INTRODUCTION

The UAW-Caterpillar labor dispute was a remarkable display of the weapons and strategies of labor and management—lockout, strike, posturing by union and employer, filing of ULP charges, threat to hire permanent replacements, and consequent breaking of the strike. The dispute is also, as both sides contend, a model of the issues involved in one of the most important debates in labor law: whether an employer should be allowed to hire permanent replacements during a strike.⁷³

68. *Id.*

69. *Id.*; Lippert, *supra* note 64, at 1E (quoting UAW Secretary-Treasurer Bill Casstevens saying that the dispute would increase support for the legislation).

70. 138 CONG. REC. S7919-65 (daily ed. June 11, 1992) (debate and failure of cloture motion); McCallion, *supra* note 16, at CRS-3; *Senate Fails to Invoke Cloture on Striker Replacement Bill*, Daily Lab. Rep. (BNA) No. 114, at A-10 (June 12, 1992).

71. 138 CONG. REC. S8056-89 (daily ed. June 11, 1992) (amendments 2047-94).

72. 138 CONG. REC. S8236-39 (daily ed. June 16, 1992) (debate and failure of cloture motion); McCallion, *supra* note 16, at CRS-4; *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 117, at A8 (June 17, 1992).

73. The most significant aspect of the hiring of permanent replacements is that it changes (adversely from the strikers' perspective) the reinstatement rights of the striking employees if the strike is an economic strike. See *infra* Part II.A. The hiring of permanent replacements and the concomitant altering of strikers' reinstatement rights is one manifestation of perhaps the most pervasive struggle in labor law—the struggle between an employer's right to manage its business as it wishes and the employees' § 7 rights to organize and engage in concerted activities. Boe W. Martin, *The Rights of Economic Strikers to Reinstatement: A Search for Certainty*, 1970 Wis. L. Rev. 1062, 1062; cf. Deborah Eberts, Comment, *The Mackay Doctrine: The Grand Dame of Labor Law Clashes With the Current State of the Union*, 57 J. AIR L. & COM. 257, 258 (1991) (stating that permanent replacement debate “captures the essence of labor management relations,” pitting rights of employers against rights of employees) (quoting Randall Samborn, “Replacements” Spur Labor Action, NAT'L L.J., May 28, 1990, at 1, 28).

During the UAW-Caterpillar clash, many observers focused on the implications of the dispute for the then-pending striker replacement legislation. The proposed legislation, like the strike, failed, and the *Mackay* doctrine, in its fifty-fourth year, had vanquished its most recent challenger.⁷⁴ At the time, it appeared there might be no further efforts to overturn *Mackay* legislatively for several years.⁷⁵ With the election of a Democratic President who had pledged his support for such legislation,⁷⁶ however, the striker replacement bills were resurrected in the 103d Congress.⁷⁷ The United States House of Representatives passed the Cesar Cha-

74. H.R. 5 and S. 55 were, at the time, the latest unsuccessful attempts to overrule *Mackay* legislatively. The following bills, which would have abrogated the *Mackay* doctrine had they been enacted, were introduced in Congress from 1988 through 1991: H.R. 2620, 102d Cong., 1st Sess. (1991); S. 2112, 101st Cong., 2d Sess. (1990); H.R. 3936, 101st Cong., 2d Sess. (1990); H.R. 2969, 101st Cong., 1st Sess. (1989); H.R. 1383, 101st Cong., 1st Sess. (1989); and H.R. 4552, 100th Cong., 2d Sess. (1988).

In 1991, Representative Goodling introduced H.R. 2620 as a substitute amendment to H.R. 5. The bill, which was introduced on June 12, 1991, would have made it a ULP for an employer to hire permanent replacements during the first eight weeks of an economic strike. It also would have amended § 9(c)(3) of the Act, 29 U.S.C. § 159(c)(3) (1988), by extending the period during which economic strikers not entitled to reinstatement are entitled to vote in an NLRB election from 12 months to 18 months (after the commencement of a strike). McCallion, *supra* note 16, at CRS-7.

In 1990, S. 2112 and H.R. 3936 were introduced in the 101st Congress. These bills were the substantive precursors of the bills introduced in the 102d and 103d Congresses; they would have made it a ULP either to hire permanent replacements at any time during a strike or to give preference to strike crossovers. McCallion, *supra*, note 16, at CRS-4; McDonald, *supra* note 16, at 985.

In 1989, H.R. 2969 was introduced in the 101st Congress. This bill would have prohibited the hiring of replacements who would prejudice the reinstatement status of legal strikers. McDonald, *supra* note 16, at 985. Also introduced in 1989 was H.R. 1383, first introduced in 1988 as H.R. 4552, which would have made it a ULP to hire permanent replacements during the first 10 weeks of a strike. McCallion, *supra* note 16, at CRS-4; McDonald, *supra* note 16, at 985.

For a succinct summary of the types of legislative proposals to limit or overturn *Mackay*, see Douglas E. Ray, *Some Overlooked Aspects of the Strike Replacement Issue*, 41 KAN. L. REV. 363, 370-72 (1992).

75. *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, *supra* note 72 (reporting union and business leaders' predictions that striker replacement legislation would not be considered again by Congress while President Bush was in office).

76. *Clinton Transition Aide Says Family Leave, Striker Replacement Bills Are Priorities*, Daily Lab. Rep. (BNA) No. 5, at A-17 (Jan. 8, 1993).

77. The House bill was introduced by Representative Clay on January 5, 1993. H.R. 5, 103d Cong., 1st Sess. (1993). The Senate bill was introduced by Senator Metzenbaum on January 21, 1993. S. 55, 103d Cong., 1st Sess. (1993). Passage of the bills is organized labor's top priority in the 103d Congress. See, e.g., *Kirkland Lauds Clinton on Issues Vital to Labor, But Rejects NAFTA*, Daily Lab. Rep. (BNA) No. 56, at A-11 (Mar. 25, 1993); *Unions See Striker Replacement Bill as Beginning of Wider Labor Law Reform*, Daily Lab. Rep. (BNA) No. 221, at A-2 (Nov. 16, 1992). Labor's disdain for *Mackay* is matched by employers' affinity for it. E.g., *Bill to Ban Striker Replacements Still Faces Tough Climb in Senate*, Daily Lab. Rep. (BNA) No. 71, at AA-1 (Apr. 15, 1993) (discussing business community's efforts to solidify cloture-proof block of votes in the Senate to defeat S. 55); *Employers Converge on Capitol to Oppose Senate Passage of Striker Replacement Bill*, Daily Lab. Rep. (BNA) No. 134, at A-11 (July 15, 1993) (discussing business leaders' rally on July 14, 1993).

vez Workplace Fairness Act⁷⁸ on June 15, 1993.⁷⁹ The bill, like its 1992 precursor, would amend the NLRA to make it a ULP for an employer to hire or threaten to hire permanent replacements for striking employees.⁸⁰ The Senate Labor and Human Resources Committee approved a similar bill,⁸¹ which currently awaits action on the Senate floor.⁸² In view of the passage of the bill in the House in 1991, the 1993 result there was never in doubt. The battle will be won or lost in the Senate just as it was in 1992. As of this writing, it appears that the Senate will debate the bill in late April or early May 1994, but supporters appear to be a few votes short of the sixty needed to defeat a filibuster.⁸³

Commentators have presented various arguments for and against the *Mackay* doctrine and striker replacement legislation. Some conclude that *Mackay* should be overturned and employers absolutely banned from hiring permanent replacements as in the Workplace Fairness Act.⁸⁴ Others con-

78. H.R. 5, 103d Cong., 1st Sess. (1993). The House Education and Labor Committee adopted an amendment that renamed the act in honor of the president of the United Farm Workers, who died on April 23, 1993. *Striker Replacement Bill Clears House, Senate Panels*, Daily Lab. Rep. (BNA) No. 86, at AA-1 (May 6, 1993).

79. The House passed the bill by a vote of 239-190. 139 CONG. REC. H3527-69 (daily ed. June 15, 1993) (debate and passage of bill); *House Approves Bill That Would Ban Permanent Replacement of Economic Strikers*, Daily Lab. Rep. (BNA) No. 114, at AA-1 (June 16, 1993).

80. H.R. REP. NO. 116, 103d Cong., 1st Sess., pt. 1, at 2, 39 (1993). The prohibition on hiring permanent replacements would protect employees who were in a bargaining unit if either of two conditions existed: a labor organization was the certified or recognized bargaining representative of the bargaining unit; or at least 30 days prior to the dispute, a labor organization had filed a petition, based on written authorization by a majority of the bargaining unit, for a representation election. The bill similarly would amend the Railway Labor Act, 45 U.S.C. §§ 151-88 (1988). The bill also would overrule the Supreme Court's decision in *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989). H.R. REP. NO. 116, *supra*, at 1, 2, 39. In that case, the Court held that an employer did not violate the Railway Labor Act by refusing, at the conclusion of a strike, to replace (or "bump") junior crossover employees from their jobs with more senior employees who did not cross over. *Trans World Airlines*, 489 U.S. at 432. Discussion of *Trans World Airlines* is beyond the scope of this Article. For an analysis of that decision, see Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 556-59.

81. S. 55, 103d Cong., 1st Sess. (1993). The prohibition on hiring permanent replacements in the Senate bill has potentially broader application than the House bill, in that it applies if a union—on the basis of signed authorization cards by a majority of the employees in the bargaining unit—is seeking to be recognized or certified, even if the union has not filed a petition for an election. *Id.*

82. *Striker Replacement Bill Clears House, Senate Panels*, *supra* note 78.

83. See David R. Sands, *Unions Seek Senate Support to Protest Strikers*, WASH. TIMES, Mar. 21, 1994, at A17 (reporting that Senator Mitchell promised to schedule the bill for debate in late April or early May). Thus, earlier forecasts of the unlikelihood of the bill's passage appear to be correct. See, e.g., *Bill to Ban Striker Replacements Still Faces Tough Climb in Senate*, Daily Lab. Rep. (BNA) No. 71, at AA-1 (Apr. 15, 1993); *Senate Ratio Changes with Hutchison Victory*, Daily Lab. Rep. (BNA) No. 108, at A-10 (June 8, 1993).

84. E.g., Walter Kamiat, *Strikers and Replacements: A Labor Union Perspective*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR, *supra*

clude that the current law should be modified, but that employers should not be banned under all circumstances from hiring permanent replacements.⁸⁵ Finally, some conclude that *Mackay* should be left alone.⁸⁶

note 13, at 23, 26-27, 51; Michael H. LeRoy, *Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert, and Cartelization*, 34 B.C. L. REV. 257, 306-07 (1993); Schatzki, *supra* note 11, at 392; Jack J. Canzoneri, Comment, *Management's Attitudes and the Need For The Workplace Fairness Act*, 41 BUFF. L. REV. 205, 243-44 (1993); David Radtke, Comment, *Banning the Use of Permanent Replacements: Slaying Its Opponent's Trojan Horse*, 1992 DET. C.L. REV. 881, 901, 906-07; Jonathan Axelrod, Speech Delivered to the ABA's Mid-Winter Meeting (Mar. 5, 1991), reprinted in Daily Lab. Rep. (BNA) No. 44, at F-1 (Mar. 6, 1991); cf. Finkin, *supra* note 80, at 574 (urging abrogation of *Mackay*). Professor Weiler's proposal calls for an absolute ban for a specified period. See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 268 (1990). Professor Weiler proposes amending the NLRA to provide that striking employees can return to their jobs within six months of the commencement of the strike even if replacements have been hired. *Id.* This proposal is modeled on the law of Ontario before it was amended in 1992. *Id.*; see R.S.O. ch. 228, § 73 (1980). It is not clear whether the change advocated by Professor Weiler would permit employers, after six months from the commencement of a strike, to retain replacements rather than reinstating strikers offering to return even if the employer had no supporting business justification for preferring to retain the replacements. Under the law of Ontario prior to 1992, the Ontario Labour Board held that, even after the six-month period provided by § 73, retaining replacements rather than reinstating strikers constituted a ULP, discrimination in violation of R.S.O. ch. 228 § 66(a) (1980), if an employer could establish no justification for retaining the replacements in preference to the strikers. *United Steelworkers of Am. v. Shaw-Almex Indus., Ltd.*, O.L.R.B. Rep. 1800, 1825 (1986), *aff'd sub nom. Shaw Almex Indus., Ltd. v. Ontario (Labour Relations Board)*, 28 O.A.C. 71 (1988); see also Katherine Van Wezel Stone, *Legal Regulation of Economic Weapons: A Comparative Perspective*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR, *supra* note 13, at 79, 89-90 (discussing Ontario law regarding replacement and the *Shaw-Almex* decision). In 1992, the Ontario law that appeared to allow employers to retain replacements after six months was repealed. 1992 Canadian Labour Law Reports (CCH) ¶¶ 60,373-60,375. Bill 40, which was approved on November 5, 1992 and became effective on January 1, 1993, makes it more difficult for employers to operate during strikes; it prohibits employers from having strikers' work performed by permanent or temporary replacements or by transferred employees except under specific circumstances. Act of Nov. 5th, 1992, ch. 21, 1992 S.O. 363.

85. E.g., Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 423 (1992); Ray, *supra* note 74, at 400; George S. Roukis & Mamdouh I. Farid, *An Alternative Approach to the Permanent Striker Replacement Strategy*, 44 LAB. L.J. 80, 89-91 (1993); Eberts, *supra* note 73, at 294-96; Hal K. Gillespie, Comment, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 782-87 (1972); McDonald, *supra* note 16, at 991-94; Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 669-70 (1993) [hereinafter Note, *One Strike*]; Note, *The Unfair Labor Practice Strike: A Critique and a Proposal for Change*, 46 N.Y.U. L. REV. 988, 1009-11 (1971) [hereinafter Note, *The Unfair Labor Practice Strike*]; Leonard Bierman & Rafael Gely, *Striker Replacements: A "Negotiations Approach,"* 31-36 (Nov. 1993) (on file with the North Carolina Law Review).

86. YAGER, *supra* note 11, *passim*; Baird, *supra* note 11, at 1, 22-26; Brendan Dolan, MacKay Radio: *If It Isn't Broken, Don't Fix It*, 25 U.S.F. L. REV. 313 *passim* (1991); Peter G. Nash & Jonathan R. Mook, *Strike Replacement Legislation: If It Ain't Broke, Don't Fix It*, 16 EMPLOYEE REL. L.J. 317, 328 (1990-91); Westfall, *supra* note 12, at 158; William C. Zifchak, *Strikers, Replacements, and S. 2112: Full Employment Law for Organized Labor?*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR, *supra* note 13, at 53, 69-75 (favoring retaining *Mackay* as is, but discussing alternatives that are preferable to banning

The Workplace Fairness Act should not become law; on the other hand, the current law should not be left alone. It is not necessary to sweep away the existing regime to remedy the most palpable injustice in labor law manifested in the UAW-Caterpillar dispute and the many others like it—the inability of the parties to know *at the time that they must make important decisions* whether the employer lawfully may hire permanent replacements. It is necessary, however, to implement procedural changes to address that injustice. The current substantive law does not bestow upon employers an unfettered right to hire permanent replacements for strikers. Under the *Mackay* doctrine, employers are permitted to hire permanent replacements only for economic strikers—not ULP strikers.⁸⁷ This distinction between economic and ULP strikes performs important functions by deterring employers from committing ULPs and providing a market check on the bargaining demands of unions and employers.⁸⁸ Procedural reforms, however, could both alleviate the uncertainty of the parties regarding the legality of hiring permanent replacements and preserve the useful distinction between economic and ULP strikes.

The UAW-Caterpillar showdown demonstrates the need for procedural reform of the law on hiring permanent striker replacements. The UAW filed several ULP charges against Caterpillar.⁸⁹ In one of those charges, the union expressly alleged that the ULPs had converted the strike into a ULP strike.⁹⁰ If the strike was converted from an economic strike to a ULP strike, the employer did not have the right to hire permanent replacements from the time of conversion. Although it is beyond debate that *Mackay* is so limited,⁹¹ the limitation was of no practical use to the striking Caterpillar employees faced with the guillotine of permanent replacement. They could accept the UAW's assertion that the strike was a ULP strike and that Caterpillar could not lawfully hire permanent replacements. They could even proclaim that message themselves by carrying picket signs declaring they were striking in protest of ULPs. But the employees could not know whether the union's characterization of the strike would be accepted by the Board until it rendered a decision, which might occur two or more years

the hiring of permanent replacements); Matthew T. Golden, Student Article, *On Replacing the Replacement Worker Doctrine*, 25 COLUM. J.L. & SOC. PROBS. 51, 85-90 (1991); cf. George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR, *supra* note 13, at 109, 111, 117-19 (arguing that *Mackay* and other law regarding striker replacement promote efficient outcomes).

87. See *infra* notes 101-10 and accompanying text.

88. See *infra* Part IV.

89. See *supra* notes 33, 42, 47 & 48.

90. See *supra* note 48.

91. See, e.g., Ray, *supra* note 74, at 368 (identifying the different reinstatement rights associated with the two types of strikers as the most important limitation on *Mackay*).

from the filing of the charges.⁹² Even then the Board's determination might be reviewed by a United States Court of Appeals.⁹³

Thus, under the current striker replacement law there is a gap between what the substantive law allows and what the procedural framework for effectuating that law permits. Delay in the decisional process results in uncertainty at the times when strikers, unions, and employers must make crucial decisions. That uncertainty regarding the characterization of the strike and the associated reinstatement rights of the strikers creates problems not only for the employees, but for all the parties in a labor dispute. Employers, unions, and potential striker replacements also must act in ignorance and potentially face adverse consequences if their predictions regarding the nature of the strike subsequently prove incorrect.⁹⁴ Thus, the moral of the UAW-Caterpillar story is that the law should make it possible for all the parties in a labor dispute involving a strike and threat of permanent replacement to know, with the greatest degree of certainty possible, the characterization of the strike and the accompanying reinstatement rights of the strikers before an employer hires permanent replacements. *Mackay*, unbridled by procedural restraints, can be destructive. Properly controlled, it would not be nearly so formidable, but it would continue to serve significant purposes.

This Article proposes a legislative amendment of the NLRA. Using the current distinction between economic and ULP strikes, this proposal would impose procedures designed to limit the doctrine to its intended area of application—economic strikes. The amendment would require employers to notify the NLRB before they hire permanent replacements and temporarily prohibit employers from hiring them until expedited ULP proceedings determine the nature of the strike. The parties to a labor dispute would then know whether the employer can hire permanent replacements at the critical moment when they must take actions likely to have significant consequences.

Part II of this Article examines the distinctions between economic and ULP strikes. Part III considers the perceived increase in use of permanent

92. The median time for a Board decision from the filing of a ULP charge was 688 days in the fiscal year ending September 30, 1990. NLRB, *supra* note 6, at 196 tbl. 23. A 1991 General Accounting Office report found that in 1989, 21% of the cases decided by the Board had been pending for more than two years, and 10% had been pending for more than four years. *See, e.g.*, GENERAL ACCOUNTING OFFICE, NATIONAL LABOR RELATIONS BOARD: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS (Jan. 1991) (cited in 139 CONG. REC. S3044-45 (daily ed. Mar. 17, 1993) (statement of Sen. Durenberger in support of S. 598)).

93. 29 U.S.C. § 160 (e) & (f) (1988) (establishing procedures for petitioning for enforcement and review, respectively).

94. For discussion of the risks associated with the decisions of all the parties, see *infra* Part II.C.

replacements and the declining number and effectiveness of strikes as an argument for overturning *Mackay*. Part IV discusses why the principal distinction between the types of strikes should not be abrogated by categorically prohibiting employers from hiring permanent replacements. After describing and evaluating prior proposals to modify the *Mackay* doctrine in Part V, this Article sets forth the details of a new proposal in Part VI.

II. THE DISTINCTION BETWEEN ECONOMIC STRIKES AND UNFAIR LABOR PRACTICE STRIKES

A. *The Different Reinstatement Rights and Voting Rights of Economic Strikers and Unfair Labor Practice Strikers*

The characterization of a strike as an economic strike or an unfair labor practice strike determines the reinstatement rights and voting rights (in NLRB elections) of striking employees. A ULP strike is initiated or prolonged either wholly or partially in protest of an employer's ULPs.⁹⁵ In contrast, an economic strike is neither initially caused nor prolonged by an employer's ULPs.⁹⁶ Thus, economic strikes are lawful strikes that are not in protest of an employer's ULPs.⁹⁷ The objective of an economic strike is usually, although not always, to force an employer to agree to a union's economic demands, such as better wages, hours, health care benefits, or other terms and conditions of employment.⁹⁸ A strike that begins as an economic strike can be converted into a ULP strike if the employer commits ULPs that prolong the strike (or perhaps aggravate or expand the strike).⁹⁹ Similarly, a strike that either begins as a ULP strike or is converted to a ULP strike can be converted or reconverted to an economic strike.¹⁰⁰

The primary significance of the distinction between economic and ULP strikes is the different rights of employers to hire replacements and the

95. *E.g.*, *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989) ("A strike that is caused in whole or in part by an employer's unfair labor practices is an unfair labor practice strike."); 2 *THE DEVELOPING LABOR LAW*, *supra* note 44, at 1100; ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 339 (1976); Martin, *supra* note 73, at 1063. For a discussion of the types of practices or acts by an employer that may constitute ULPs, see *supra* note 6.

96. 2 *THE DEVELOPING LABOR LAW*, *supra* note 44, at 1100; GORMAN, *supra* note 95, at 339; Martin, *supra* note 73, at 1063.

97. See Martin, *supra* note 73, at 1063.

98. See, *e.g.*, 2 *THE DEVELOPING LABOR LAW*, *supra* note 44, at 1100 (noting that demand for consent election also can be basis of economic strike); Martin, *supra* note 73, at 1063 (recognizing that strikes for recognition of a bargaining representative and for consent election have been classified as economic).

99. 2 *THE DEVELOPING LABOR LAW*, *supra* note 44, at 1102-03; GORMAN, *supra* note 95, at 339; Martin, *supra* note 73, at 1063; see *infra* notes 292-95 and accompanying text.

100. RAY & BARTLE, *supra* note 12, § 5.06, at 11-12.

corresponding reinstatement rights of the strikers. As discussed above, under the *Mackay* doctrine, employers may hire "permanent" replacements for economic strikers;¹⁰¹ *Mackay* is limited, however, to economic strikes.¹⁰² Employers are not permitted to hire permanent replacements for employees engaged in a ULP strike; they may hire only temporary replacements.¹⁰³

Based on the differing replacement rights of employers depending on the characterization of the strike, there is a corresponding dichotomy of reinstatement rights of striking employees. Economic strikers are entitled to immediate reinstatement upon making an unconditional offer to return to work, as long as the employer has not hired permanent replacements.¹⁰⁴ If an employer exercises its *Mackay* right by permanently replacing economic strikers, the strikers are only entitled to reinstatement to their jobs or substantially equivalent jobs, if and when vacancies occur.¹⁰⁵ An employer is

101. See *supra* notes 10-13 and accompanying text.

102. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

103. See, e.g., *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989); JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 31 (1983) (stating that, if a strike is deemed a ULP strike, all replacements are considered temporary) (citing *NLRB v. Lightner Publishing Co.*, 113 F.2d 621, 625-26 (7th Cir. 1940); *C.G. Conn. Ltd. v. NLRB*, 108 F.2d 390, 401 (7th Cir. 1939); *Jacob Hunkele*, 7 N.L.R.B. 1276, 1288-89 (1938), *modified sub nom. Tri-State Towel Serv.*, 20 N.L.R.B. 123 (1940)); RAY & BARTLE, *supra* note 12, § 5.01, at 1 ("[E]mployer may not hire permanent replacements during an unfair labor practice strike . . ."); Martin, *supra* note 73, at 1064 (stating that ULP strikers have right to immediate reinstatement and employer cannot hire permanent replacements).

104. *Hansen Bros. Enters.*, 279 N.L.R.B. 741, 741 (1986), *review denied mem.*, 812 F.2d 1443 (D.C. Cir.), *cert. denied*, 484 U.S. 845 (1987); 2 *THE DEVELOPING LABOR LAW*, *supra* note 44, at 1105. If it is determined that the replacements are temporary replacements (hired only for the duration of the strike), the economic strikers have the right to immediate reinstatement, displacing the temporary replacements. E.g., *Hansen Bros. Enters.*, 279 N.L.R.B. at 741; RAY & BARTLE, *supra* note 12, § 6.02, at 3. The burden is on the employer to establish that the replacements are permanent replacements. *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1290 (1993); RAY & BARTLE, *supra* note 12, § 6.03, at 5. The employer can satisfy that burden by establishing that replacements and employer had a "mutual understanding and commitment on the permanent nature of their employment." *Gibson Greetings, Inc.*, 310 N.L.R.B. at 1290; see also *Hansen Bros.*, 279 N.L.R.B. at 741 (holding that it is employer's burden to establish mutual understanding). For discussion of cases in which employers failed to satisfy their burden of establishing permanent replacement, see *infra* notes 210-15 and accompanying text.

105. 2 *THE DEVELOPING LABOR LAW*, *supra* note 44, at 1104-05; GORMAN, *supra* note 95, at 341-42; Martin, *supra* note 73, at 1064. The Board and the courts recognize the employer's continuing duty to reinstate economic strikers even if there are no vacancies at the time they make unconditional requests for reinstatement. Because economic strikers remain employees, the employer has a continuing duty to reinstate them when vacancies occur, unless those employees have obtained regular and substantially equivalent employment or the employer can prove a legitimate and substantial business reason for refusing to reinstate them. *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

not permitted, however, to discharge economic strikers based on their participation in a strike.¹⁰⁶

In contrast, ULP strikers are entitled to immediate reinstatement upon submission of an unconditional request to return to work.¹⁰⁷ The employer has no right to hire permanent replacements; thus, if the employer hires replacements, regardless of how it characterizes them, it must discharge them if necessary to reinstate the returning ULP strikers.¹⁰⁸ When a strike is converted from an economic to a ULP strike, the strikers have the reinstatement rights of economic strikers prior to conversion and the rights of ULP strikers after conversion.¹⁰⁹ Complementary principles apply to reinstatement rights when a ULP strike is converted to an economic strike.¹¹⁰ Thus, the keys to determining the reinstatement rights of any particular striker during a converted strike are the moments when the strike is converted and when the employer hires a permanent replacement for that striker.

A second major difference between ULP strikers and economic strik-

106. Many commentators question whether employees can understand and take comfort in the distinction between permanent replacement and discharge. *E.g.*, Schatzki, *supra* note 11, at 383 (describing the distinction as a "word game" that employees cannot understand and that is practically meaningless to employers as well as employees); *see also* Weiler, *supra* note 3, at 390 (observing that employee "may be excused for not perceiving a practical difference" between discharge and permanent replacement). On the other hand, a number of commentators reject the idea that permanent replacement is, in effect, the equivalent of termination. *See, e.g.*, Baird, *supra* note 11, at 12-13 (arguing that there is a significant difference between permanent replacement and termination as evidenced by the rights of preferential reinstatement and continued voting in NLRB elections within 12 months of commencement of strike); Estreicher, *supra* note 11, at 290 (recognizing that replaced strikers have a "not insignificant prospect" of reinstatement); Golden, *supra* note 86, at 64-65 (stating that voting and reinstatement rights distinguish permanently replaced striker from fired individual).

In a recent article, Professor Ray acknowledges that permanent replacement differs from discharge in that replaced economic strikers have reinstatement rights as well as voting rights (for a limited period). Ray, *supra* note 74, at 381-82. He criticizes the Board, however, for restricting the reinstatement rights of economic strikers. He argues that the Board, in recent decisions, has reduced the reinstatement rights by liberally defining what constitutes hiring of permanent replacements, limiting the range of positions to which strikers have reinstatement rights, and limiting the circumstances under which strikers have reinstatement rights when a striker replacement is laid off. *Id.* at 384-98.

107. *E.g.*, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989).

108. *See* cases cited *supra* note 107.

109. *E.g.*, *SKS Die Casting & Mach., Inc. v. NLRB*, 941 F.2d 984, 990, 993 (9th Cir. 1991); *see also* GORMAN, *supra* note 95, at 341-42 (stating that strikers replaced during period when strike is considered ULP strike are entitled to immediate reinstatement); Martin, *supra* note 73, at 1064 (same); Brandon C. Janes, Comment, *The Illusion of Permanency for Mackay Doctrine Replacement Workers*, 54 TEX. L. REV. 126, 128 (1975) (same).

110. *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1088 (1990) (holding that after ULP strike converted to economic strike, employer could hire permanent replacements), *enforced*, *General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308 (D.C. Cir. 1991).

ers is in voting rights. ULP strikers, who cannot be permanently replaced, are entitled to vote in an NLRB election, such as a representation election to determine whether employees wish to be represented in collective bargaining by a union, or, more significantly when a strike is in progress, a decertification election to determine whether an incumbent bargaining representative retains that status.¹¹¹ Replacements for ULP strikers are not eligible to vote.¹¹² Economic strikers who are not entitled to immediate reinstatement because they have been permanently replaced have the statutory right to vote in elections held within twelve months of the commencement of a strike.¹¹³ Permanent replacements for economic strikers generally also have the right to vote in an election.¹¹⁴ This distinction between the voting rights of economic and ULP strikers has significant ramifications for the ability of the incumbent union to retain its status as the certified collective bargaining representative of the bargaining unit, and thus for the future of the collective bargaining relationship.¹¹⁵

B. Bases for the Distinction Between Unfair Labor Practice Strikes and Economic Strikes

It is settled law that ULP strikers are accorded more favorable treatment than economic strikers.¹¹⁶ Although well established, that dichotomy

111. Kellburn Mfg. Co., 45 N.L.R.B. 322, 325 (1942); 1 THE DEVELOPING LABOR LAW, *supra* note 44, at 424. This right stems from the fact that ULP strikers are entitled to immediate reinstatement upon unconditional request.

112. Larand Leisureslies, Inc., 222 N.L.R.B. 838, 838 (1976); Tampa Sand & Material Co., 137 N.L.R.B. 1549, 1549 (1962).

113. 29 U.S.C. § 159(c)(3) (1988). The NLRA was amended in 1959 to provide economic strikers with this limited voting right. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, sec. 702, § 9(c)(3), 73 Stat. 519, 542. Prior to that amendment, economic strikers who had been permanently replaced did not have a right to vote. See generally Joan Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 TEMPLE L. REV. 691, 694-97 (1988) (tracing history of the NLRA's treatment of the rights of economic strikers); Note, *supra* note 11, at 635 (outlining the development of the permanent replacement rule). Economic strikers may lose their eligibility to vote under § 9(c)(3) if they have accepted other permanent employment, they have been discharged for cause (such as strike misconduct), or their jobs have been eliminated for economic reasons. W. Wilton Wood, Inc., 127 N.L.R.B. 1675, 1677 (1960).

114. Pacific Tile & Porcelain Co., 137 N.L.R.B. 1358, 1360 (1962); Axelrod, *supra* note 84, at n.30. Temporary replacements generally do not have a right to vote. William E. Locke, 137 N.L.R.B. 1610, 1612 (1962). For further discussion of the voting rights of strikers and replacements, see Janes, *supra* note 109, at 130-33 and Note, *Voting Rights of Economic Strikers and Replacements: The Impact of the Timing of the Strike*, 24 RUTGERS L. REV. 171 *passim* (1969).

115. For discussion of the threat to a union's status posed by permanent replacement, see *infra* Part II.C.2.

116. Superior reinstatement rights and voting rights are not the only distinctions between the treatment of ULP and economic strikers. First, strikers protesting ULPs are not subject to the "cooling off" period and other provisions of § 8(d) of the Act, 29 U.S.C. § 158(d) (1988), which are designed to delay an economic strike in the hope that it can be averted. See, e.g., Mastro

has received mixed reviews among commentators.¹¹⁷ Two principal bases exist for granting ULP strikers immediate reinstatement rights and back pay from the date of their unconditional offers to return. First, the remedy ordered by the Board for the employer's ULP would be ineffective without such protections for the ULP strikers. Second, the only express authorization in the Act for the Board to order reinstatement is in situations in which an employer has committed a ULP.¹¹⁸ In the absence of such statutory

Plastics Corp. v. NLRB, 350 U.S. 270, 288-89 (1956); Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 1001-02. Unlike economic strikers who violate the requirements of § 8(d), ULP strikers do not lose their status as employees. *Mastro Plastics*, 350 U.S. at 284-89; Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 1001-02. Second, a no-strike clause in a collective bargaining agreement will render an economic strike unprotected activity; such a clause, however, does not always render a ULP strike unprotected. If the ULP under protest is so serious that it is "destructive of the foundations on which collective bargaining must rest," then the strike is protected activity notwithstanding the no-strike clause. *Arlan's Dep't Store, Inc.*, 133 N.L.R.B. 802, 808 (1961) (quoting *Mastro Plastics Corp.*, 350 U.S. at 281); *see also* *Studio 44, Inc.*, 284 N.L.R.B. 597, 599 (1987) (applying the *Arlan's* standard); Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 999-1001 (discussing the distinction between the effect of contractual restraints on ULP strikes and economic strikes). Finally, ULP strikers generally have been granted more latitude in picket line misconduct without the loss of reinstatement rights than have economic strikers. *See* Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 997-99. Under the *Thayer-Kohler* approach (*NLRB v. Thayer Co.*, 213 F.2d 748, 756 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954); *Local 833, UAW v. NLRB*, 300 F.2d 699, 702-03 (D.C. Cir.), *cert. denied sub nom. Kohler Co. v. International Union, UAW*, 370 U.S. 911 (1962)), the severity of the employer's ULP is balanced against the employees' misconduct to determine whether the employees should be deprived of their reinstatement rights. That distinction was rejected by a plurality of the Board, however, in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1047 (1984), *enforced mem.*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986). Because a majority decision of the Board has not rejected *Thayer-Kohler*, it is not clear whether the Board will apply it in the future. *See* *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1075-76 n.3 (1990) (recognizing that *Clear Pine* was not a holding of the Board on the continued applicability of *Thayer-Kohler*), *enforced and review denied sub nom. General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308 (D.C. Cir. 1991). For general discussion of the more favorable status accorded the ULP strike, *see* Note, *The Unfair Labor Practice Strike*, *supra* note 85, *passim*.

117. One writer observes that, although there is disagreement on the issue among commentators, "employees who are striking to protest unfair labor practices or whose strike has been prolonged by wrongful employer action arguably merit more protection than those who strike to advance their own economic interests." *Janes*, *supra* note 109, at 127 (footnotes omitted) (citing, *inter alia*, *Stewart*, *supra* note 1). Viewing the different protections from the employer's perspective, another writer asks why an employer that lawfully resists a union's demands and economic strike should be subject to the same sanctions (prohibition on hiring of permanent replacements) as an employer that violates the law (commits ULPs). *Baird*, *supra* note 11, at 25; *see also* *YAGER*, *supra* note 11, at 81 (arguing that an employer guilty of ULP should not be allowed to compound injury through hiring of permanent replacements, but an employer guilty of no unlawful conduct should not be prevented from defending its business against economic injury). On the other hand, one commentator has argued that according more favorable status to ULP strikes has the deleterious effect of encouraging employees to act as "little Boards" by striking as a self-help remedy for ULPs. Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 988, 1002-03, 1011. For an argument that the employees' acting as little Boards may be the most effective deterrent against employers' committing ULPs, *see* Ray, *supra* note 74, at 365-66, 372-75. *See also* discussion *infra* Part IV.A.

118. 29 U.S.C. § 160 (c) (1988).

authorization, the Board and courts follow the common law. Two court decisions rendered soon after passage of the Wagner Act recognized these reasons.

In *Jeffery-De Witt Insulator Co. v. NLRB*,¹¹⁹ the union called a strike over economic demands and the employer closed the plant. The employer later reopened the plant with a smaller work force and the strike continued. The employer refused to meet with the union or conciliators because, it contended, the strikers had ceased to be employees. The Board found the employer guilty of a refusal to bargain. In ordering a remedy for the employer's ULP, the Board recognized that it could achieve no effective remedy by merely ordering the employer to bargain with the union because the employer, through its refusal to bargain, had obviated the possibility of the strikers' returning to work with a contract.¹²⁰ The Fourth Circuit agreed and affirmed the Board's order.¹²¹

In *Black Diamond S.S. Corp. v. NLRB*,¹²² the employer refused to bargain with the union after a strike commenced and then refused to reinstate the strikers. The Board found a ULP and ordered the employer to reinstate, with back pay, strikers replaced after the date on which the employer had refused to bargain, even if it was necessary to dismiss replacements.¹²³ The Second Circuit, relying on *Jeffery-De Witt Insulator Co.*, enforced the Board's order. The court observed that only those employees who were replaced after the employer committed a ULP were entitled to immediate reinstatement because "[t]he act so far as reinstatement is concerned only applies after there has been an unfair labor practice."¹²⁴ As in *Jeffery-De*

119. 91 F.2d 134 (4th Cir.), enforcing *Jeffery-De Witt Insulator Co.*, 1 N.L.R.B. 618 (1936), cert. denied, 302 U.S. 731 (1937).

120. *Jeffery-De Witt Insulator Co.*, 1 N.L.R.B. at 626-27. The § 8(a)(5) refusal-to-bargain ULP that causes or prolongs a strike best illustrates the ineffectiveness of a remedy in the absence of reinstatement:

But if the employer need not reinstate the strikers, with whom is he to bargain? Certainly not with the strikebreakers whom the strikers' union does not represent; nor with the strikers if they are to be barred from rehiring. It is manifest that an employer could provoke strikes with impunity by means of this unfair labor practice, in the absence of his duty to reinstate strikers.

Leonard B. Boudin, *The Rights of Strikers*, 35 ILL. L. REV. 817, 819 (1941). In theory, a union does represent the "strikebreakers," Louis Natt, 44 N.L.R.B. 1099, 1107 (1942), but in practice its principal concern is usually achieving their discharge and reinstatement of the union's striking members. For discussion of this tension inherent in a union's duty to represent a bargaining unit, see *infra* text accompanying notes 173-82.

121. *Jeffery-De Witt Insulator Co.*, 91 F.2d at 140.

122. 94 F.2d 875 (2d Cir.), enforcing *Black Diamond S.S. Corp.*, 3 N.L.R.B. 84 (1937), cert. denied, 304 U.S. 579 (1938).

123. *Black Diamond S.S. Corp.*, 3 N.L.R.B. at 93.

124. *Black Diamond S.S. Corp.*, 94 F.2d at 879; see also *NLRB v. Lightner Publishing Corp.*, 113 F.2d 621, 626 (7th Cir. 1940) (holding that employer's right to hire employees was "unqualified" until it committed a ULP).

Witt Insulator Co., ordering reinstatement was necessary to maintain the status quo as it existed at the time of the ULP.¹²⁵

Although section 10(c) of the Act authorizes reinstatement when a ULP has been committed, in the absence of a ULP, the Board and courts have resorted to the common-law rule that employers are not required to rehire employees who have stopped work.¹²⁶ Indeed, the Board has explained reinstatement rights of ULP strikers in terms of an employer's *right* to replace strikers and control its jobs as becoming "vulnerable and defeasible" when the employer commits a ULP.¹²⁷

The NLRA does not include any reference to a right of an employer to replace striking employees permanently, but *Mackay* and subsequent Board and court decisions refer to such a right.¹²⁸ Given this approach to employers' rights vis-à-vis employees' statutory rights under the Act, Professor Atleson posits that the *Mackay* doctrine is based on "deep-seated" common-law notions that predate the NLRA.¹²⁹ In short, these beliefs are that employers have the right to maintain their businesses and productivity and the right to hire whomever they wish because the business is the property of the employer. Accordingly, management's prerogative to continue operations, hierarchical control, and property rights survive the enactment of the NLRA.¹³⁰

125. *Black Diamond S.S. Corp.*, 94 F.2d at 879.

126. Janes, *supra* note 109, at 127 n.11 (citing *Adair v. United States*, 208 U.S. 161 (1908)).

127. Boudin, *supra* note 120, at 818-19 (citing 4 NLRB ANN. REP. (1940)); *see also Black Diamond S.S. Corp.*, 94 F.2d at 879 (explaining that because of employer's ULP, "its ordinary right to select its employees became vulnerable"); *Manville Jenckes Corp.*, 30 N.L.R.B. 382, 413 (1941) (holding that employer's "normal right" to select employees became "vulnerable" when strike converted into ULP strike).

128. *See supra* text accompanying note 10.

129. ATLESON, *supra* note 103, at 32.

130. *Id.* at 32-33; *see also* Nicholas Unkovic & James Q. Harty, *Management's Legal Problems in Continuing Plant Operations During an Economic Strike Under Federal and Pennsylvania Law*, 67 DICK. L. REV. 63, 63 (1962) (footnotes omitted):

Management has the right to attempt to continue the operation of its business when subjected to an economic strike. While the *Mackay* court did not develop the origin of this right, it clearly flows from the "right of property" guaranteed under both federal and state constitutions. This is a well settled and basic rule of law.

Atleson argues that courts often use these property rights to overcome employees' assertion of their rights conferred by the NLRA. ATLESON, *supra* note 103, at 91-94. He discusses, as illustrative of judicial propagation of pre-Act property values, the Supreme Court's decision limiting nonemployee union organizers' access to an employer's property for organizational purposes. *Id.* at 93 (discussing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)). Certainly, Atleson would find the Court's recent interpretation of *Babcock & Wilcox* an even more striking example of the vitality of a judicially recognized employer right emanating from these amorphous property/hierarchical control values. In its 1992 decision in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992), the Court held that an employer did not violate § 8(a)(1) of the Act by denying union organizers access to its parking lots for the purpose of organizing the employer's employees. The Court rejected the Board's test from *Jean Country*, 291 N.L.R.B. 11 (1988), in which the Board

Thus, one of the bases for the distinction between reinstatement rights of ULP strikers and economic strikers is practical: enhanced reinstatement

determined whether an employer must grant access to its property by balancing the § 7 rights of the employees against the private property rights of the employer. *Lechmere*, 112 S. Ct. at 848. The Court held that, when the persons seeking access are not employees of the employer, the balancing test is not performed unless there is no reasonable alternative means of access. *Id.* at 849. Further, it limited that exception to the general no-access rule to situations in which the employees live on the employer's premises. *Id.*

The Court's holding in *Lechmere* seems at odds with the policy of the NLRA favoring organization of employees. The Court, nevertheless, couched its rationale in terms of rights under the Act, explaining that employees, not nonemployee union organizers, have rights under § 7 of the Act. That characterization, however, cannot withstand scrutiny. As the dissent notes, employees have a right to learn from others about organization. *Id.* at 851 (White, J., dissenting). What appears to be the driving force behind this decision, one at odds with the policies of the NLRA, is the Court's deference to the property and control rights of the employer. Consider the numerous references in the majority opinion to the employer's property and the union organizers' trespass on the employer's property. *Id.* at 845-50. For recent criticism of the *Lechmere* Court's expansive conception of employers' property rights and restrictive conception of employees' § 7 rights, see Cynthia L. Estlund, *Labor, Property and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994).

Thus, notwithstanding enactment of the NLRA, there remains a realm of employer rights emanating from values of ownership and concomitant control and prerogative regarding operations. Among the rights the Supreme Court has found to emanate from those values are the rights to expel nonemployee union organizers from the employer's private property (in most circumstances) and to hire permanent replacement employees for economic strikers. *Cf.* Martin, *supra* note 73, at 1062 ("[T]he controversy over the reinstatement rights of economic strikers is but one facet of the continuing struggle which permeates the field of labor relations between the employer's right to manage his business and the employee's right to organize and participate in concerted activities.").

The debate over the correct relationship between the Act and the earlier common law on issues of employees' and employers' rights has generated a body of scholarship. Some commentators are critical of the role of the common-law decisions and values regarding employers' property rights in modern labor law, viewing them as inimical to the NLRA and its purposes. *E.g.*, ATLESON, *supra* note 103, at 171 ("The employment relationship is viewed by courts through a set of assumptions, involving status and class views, and the NLRA is treated as if it overlaps, but barely alters, this presumed relationship. Indeed, the statute is often used to enforce those aspects of the contractual relationship that courts create."). Others point out, however, that neither the NLRA nor its legislative history indicate that it repealed common-law jurisprudence permitting the hiring of permanent replacements. LeRoy, *supra* note 84, at 290-91; *see also* YAGER, *supra* note 11, at 56 (arguing that NLRA said nothing about restrictions on employers' responses to employees' concerted action when such action is wielded as an economic weapon). Still others are critical of the intrusions that the NLRA has made on common-law concepts of property rights. *E.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L. J. 1357, 1388-89 (1983) (criticizing balancing tests for determining whether an employer has violated § 8(a)(1) of the Act as "cut[ting] back upon the absolute power to exclude that is the hallmark of any system of private property"). Professor Fried challenges Epstein's analysis for its failure to explain why the original Wagner Act did not represent society's redefinition of the social convention of common-law property rights. Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, in LABOR LAW AND THE EMPLOYMENT MARKET: FOUNDATIONS AND APPLICATIONS 68, 72 (Richard A. Epstein & Jeffrey Paul eds., 1985); *see also* Estlund, *supra*, at 310 (arguing that "the NLRA should be interpreted to abrogate property rights . . . to the extent that their enforcement interferes with or inhibits conduct protected by the Act.").

rights are necessary to an effective remedy when there is a ULP strike. The second basis is largely theoretical, stemming from the interaction of the NLRA and the common law: the Act authorizes reinstatement only when an employer commits a ULP, and the common law prior to the Act, which retains vitality in the absence of express legislative abrogation, recognizes an employer's right to control its business as it chooses.

C. *Importance of the Distinction*

It would be difficult to overstate the importance to all parties to a labor dispute—striking employees, employers, unions, and replacement employees—of the characterization of a strike as a ULP strike or an economic strike *when an employer hires permanent replacements or announces that it will do so*. For employees, the characterization determines whether they are entitled to immediate reinstatement to their jobs,¹³¹ and perhaps whether they have the right to vote in an NLRB election (if the election is held more than twelve months after the commencement of the strike).¹³² For a union, the characterization ultimately may determine whether the union retains its status as the collective bargaining representative for the bargaining unit. For an employer, the characterization determines whether it committed a ULP by hiring permanent replacements and denying strikers reinstatement, and consequently whether the employer is liable for back pay. For replacements, characterization of the strike is one of the factors determining whether they retain their jobs.¹³³ Thus, all parties to a labor dispute face risks associated with the characterization of a strike as an economic or ULP strike.

1. What Are the Risks to the Striking Employees?

As discussed above, the reinstatement rights of ULP strikers are superior to those of economic strikers who have been permanently replaced.¹³⁴ Although permanently replaced economic strikers remain employees and have reinstatement rights, as a practical matter they are without jobs and will not reacquire their jobs until vacancies occur in those or substantially

131. See *supra* notes 104-10 and accompanying text.

132. See *supra* notes 111-15 and accompanying text.

133. Even permanent replacements may be, as Professor Atleson words it, "depermanentize[d]." ATLESON, *supra* note 103, at 31. If a strike is characterized as an economic strike and the employer offers the replacements "permanent" employment, the employer and the union subsequently may agree that a condition of settling the strike is reinstatement of the strikers at the expense of the replacements. For example, see the discussion of the United Steelworkers-Ravenswood Aluminum dispute *infra* at notes 216-26 and accompanying text.

134. See *supra* notes 101-10 and accompanying text.

equivalent jobs.¹³⁵ A recent example of economic strikers' long-term loss of their jobs is the strike by the United Paperworkers at International Paper Company's mill in Jay, Maine. Employees began striking at the Jay mill and two others in June 1987.¹³⁶ The employer hired permanent replacements for the strikers, and the employees unconditionally ended their strike in October 1988, sixteen months after it began.¹³⁷ Because the strike was an economic strike when the permanent replacements were hired, the striking employees who had been replaced were placed on preferential hiring lists. As of July 1992, almost four years after the strike ended, 500 former strikers were still on the lists awaiting reinstatement.¹³⁸

Moreover, although employees who embark on a strike are affected by the characterization of the strike if the employer hires permanent replacements, the importance of the characterization is greater to some than others. The effect of replacement is potentially greatest on small workforces, unskilled workers, and junior employees. When an employer has a small workforce and the entire workforce goes on strike, it will often be easier for the employer to replace employees more quickly than for an employer with a large workforce.¹³⁹ For example, in *Hot Shoppes, Inc.*,¹⁴⁰ the Teamsters represented a bargaining unit of twenty-two employees. The union called a strike when bargaining was unavailing; three days later the employer replaced the entire workforce. Obviously the employer's advantage is even further enhanced when the striking employees are relatively unskilled such that replacements can be hired and put to work quickly with little training.¹⁴¹

135. *E.g.*, *Rose Printing Co.*, 304 N.L.R.B. 1076, 1076 (1991). Professor Ray criticizes the Board for limiting replaced economic strikers' chances for reinstatement by not extending reinstatement rights to vacancies in other positions for which those employees are qualified. *See* Ray, *supra* note 74, at 384-92.

136. *Paperworkers Woo Striker Replacements to Keep Maine Paper Mill Unionized*, Daily Lab. Rep. (BNA) No. 130, at A-1 (July 7, 1992).

137. *Id.*

138. *Id.* In July 1992, the workforce at the Jay mill consisted of 707 replacements, 53 employees who crossed the picket line, and 315 strikers who had been recalled. *Id.* For a discussion of the effect on the union of hiring permanent replacements at the Jay mill, *see infra* notes 156-58 and accompanying text.

139. Weiler, *supra* note 3, at 394. On the other hand, a union may be able to maintain a strike for a longer period in a small unit than in a large unit because the union's strike fund will not be as quickly depleted. The UAW strike at Caterpillar involved such a large number of employees that it would have been difficult to maintain but for the UAW's \$800 million strike fund. *See* Robert L. Rose, *Caterpillar's Success in Ending Strike May Curtail Unions' Use of Walkouts*, WALL ST. J., Apr. 20, 1992, at A3.

140. 146 N.L.R.B. 802, 802-03 (1964).

141. Weiler, *supra* note 3, at 394. The size and skill level of the workforce are characteristics of the employees that affect the employer's ability to hire replacements. A number of factors beyond the employees themselves can affect an employer's ability to utilize replacements, such as the level of unemployment in the region and the community's attitudes toward unions or strikes.

In addition, employees with relatively little seniority are more likely than senior employees to be adversely affected by economic strikes when permanent replacements are hired. First, if an employer hires and retains permanent replacements for less than all of the employees on strike, the more junior employees are most likely to be denied reinstatement at the conclusion of the strike.¹⁴² Second, for strikers placed on a preferential hiring list, the junior employees are generally subordinated to senior employees.¹⁴³

Some of the heightened risk to junior employees appeared to be alleviated by the Supreme Court in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*,¹⁴⁴ in which the Court held that an employer is not required to "bump" junior strike crossovers to make room for more senior striking employees requesting reinstatement. However, the decision does not help junior employees who wish to remain on strike. In fact, it places a premium on junior employees' abandoning the strike to obtain jobs over their seniors. Thus, the decision actually increased employers' leverage over striking junior employees. Indeed, the decision is seen as so divisive to strike efforts that both the House and Senate versions of the Workplace Fairness Act would legislatively overrule it.¹⁴⁵

2. What Are the Risks to the Union?

If it is true that replacements generally oppose the incumbent union (perhaps for no reason other than unions usually seek to have the replacements discharged in order to effect reinstatement of the striking union members),¹⁴⁶ then hiring permanent replacements for economic strikers can be the first step by the employer toward ending the collective bargaining relationship with the union through decertification.¹⁴⁷ An employer may even attempt to ensure the anti-union sentiments of the replacements by carefully

ATLESON, *supra* note 103, at 28 (listing union's strength and ability to hurt the employer, norms and nature of surrounding community, tightness of labor market, and strikers' skill levels as relevant factors).

142. See Robert W. Schupp, *Legal Status of Incentives for Replacement and Striking Workers*, 41 LAB. L.J. 311, 312 (1990).

143. *Id.* at 317-18. In the absence of either a provision in a collective bargaining agreement or an established past practice, it is not necessarily a ULP for an employer to order recall on some other basis; seniority is, however, the usual basis for ordering recall. RAY & BARTLE, *supra* note 12, § 6.07, at 13.

144. 489 U.S. 426, 432 (1989).

145. H.R. 5, 103d Cong., 1st Sess. § 2 (1993); S. 55, 103d Cong., 1st Sess. (1993).

146. *E.g.*, Flynn, *supra* note 113, at 704 ("Another and more powerful reason for replacements to oppose the union is the desire for economic survival, pure and simple; if the union successfully settles the strike, the replacements will themselves be replaced to make room for the returning strikers.").

147. ATLESON, *supra* note 103, at 27; Weiler, *supra* note 3, at 390; Note, *supra* note 11, at 634.

screening the replacements it hires,¹⁴⁸ although such a practice is fraught with potential for the filing of ULP charges and liability.¹⁴⁹ An employer's potential use of permanent replacements to terminate the bargaining relationship is, for its critics, one of the most objectionable facets of the *MacKay* doctrine.¹⁵⁰

Even though economic strikers who have been permanently replaced retain voting rights for twelve months from the commencement of a strike,¹⁵¹ an employer may create a situation in which the union will be decertified within that year by hiring enough anti-union permanent replacements to outnumber the striking employees.¹⁵² Alternatively, the employer may achieve the same result, regardless of whether the replacements outnumber the strikers, if the election is not held until the statutory voting rights of the economic strikers have expired.¹⁵³ Thus, Professor Finkin characterizes an employer's power to hire permanent replacements as making a strike "a fight to the death, rather than a periodic test of wills."¹⁵⁴

The numerous examples of such decertifications alleviate the need to speculate whether decertification is a possibility when an employer hires permanent replacements.¹⁵⁵ On July 17, 1992, the employees at the Jay,

148. Axelrod, *supra* note 84; see also Janes, *supra* note 109, at 132 ("An employer in the *MacKay* situation has the unique opportunity to hand-pick many of the voters in the upcoming representation election.").

149. A refusal to hire an applicant because of the applicant's union sympathies is a clear violation of §§ 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. § 158(a)(1) & (a)(3) (1988).

150. See, e.g., Estreicher, *supra* note 11, at 291-92. Professor Estreicher views the battle between labor and management, in which each brings its economic weapons to bear, as a "bounded conflict." *Id.* at 288. The warfare should be limited by rules that prevent the battle from becoming a life-and-death struggle with the future of the collective bargaining relationship at stake. *Id.* at 291-94.

151. 29 U.S.C. § 159(c)(3) (1988). As discussed *supra* note 113, the NLRA was amended in 1959 by the Landrum-Griffin Act to give permanently replaced economic strikers this voting right. Prior to the amendment, economic strikers had no right to vote in elections if they had been permanently replaced. Consequently, unions were in immediate danger of decertification upon the hiring of permanent replacements. For example, in *United Rubber, Cork, Linoleum & Plastic Workers*, 121 N.L.R.B. 1439 (1958), the employer hired permanent replacements, and the replacements alone voted in a decertification election less than a year after the commencement of the strike; the economic strikers were not entitled to vote. *Id.* at 1442. The union lost the election 288-5. *Id.* Lest it appear that all danger of decertification was removed by the 1959 amendment, consider the decertifications that occurred notwithstanding the limited voting rights of the striking employees discussed in the text below. See *infra* notes 155-62 and accompanying text.

152. ATLESON, *supra* note 103, at 27 n.25.

153. *Id.*; see also Note, *One Strike*, *supra* note 85, at 674 (recognizing that if employer can "sweat [the union] out" for a year, it can probably get the union decertified).

154. Finkin, *supra* note 80, at 568 n.141; cf. Estreicher, *supra* note 11, at 288 (arguing that strike-and-replacement situation should not provide opportunity to terminate bargaining relationship).

155. See, e.g., David B. Stephens & John P. Kohl, *The Replacement Worker Phenomenon in the Southwest: Two Years After Belknap, Inc. v. Hale*, 37 LAB. L.J. 41, 48 (1986) (studying five major strikes in the Southwest in the early 1980s, the authors note that the use of permanent

Maine International Paper Company mill voted to decertify United Paperworkers Local 14 and Firemen and Oilers Local 246.¹⁵⁶ More than two-thirds of the bargaining unit voting in the decertification election consisted of replacements who were hired after the union called an unsuccessful sixteen-month strike in 1987.¹⁵⁷ The margin of the vote was 616 to 361 with 94 challenged ballots; thus, almost two-thirds of the unchallenged ballots were cast against the union.¹⁵⁸

In another of the most publicized permanent replacement cases in the last decade, Diamond Walnut, the largest walnut producer cooperative in the United States, permanently replaced more than 500 workers who went on strike in September 1991.¹⁵⁹ Prior to the one-year anniversary of the strike, the Teamsters local filed a petition for a certification election as a "preemptive move" to avoid decertification when the strikers' voting rights expired.¹⁶⁰ The Board ordered a bifurcated election in which about 450 strikers voted in one session and approximately 725 permanent replacements voted in the second.¹⁶¹ Despite its efforts to avert decertification by the preemptive petition, the union lost by a vote of 592 to 366, with a number of challenged ballots.¹⁶²

Recent decisions by the Supreme Court and the Board have made it more difficult for employers to rid themselves of unions by hiring striker

replacements was followed in some strikes by ousting the unions). The article states that Continental Airlines achieved nonunion status in bankruptcy proceedings. Subsequent to the bankruptcy court's approval of Continental's repudiation of its collective bargaining agreement, the union and Continental reached a settlement. The agreement was allegedly so bad for the former strikers that some brought an unsuccessful class action against the union for breach of its duty of fair representation. See *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 81 (1991).

156. *Maine Paper Mill Workers Vote to Decertify Unions*, Daily Lab. Rep. (BNA) No. 139, at A-1 (July 20, 1992).

157. The employees eligible to vote included 760 replacements and 315 recalled former strikers, with about 500 ineligible former strikers on a recall list. *Id.*

158. *Id.*

159. *Resolution of Ballots at Diamond Walnut Shows Apparent Loss for Teamsters Local*, Daily Lab. Rep. (BNA) No. 67, at A-9 (Apr. 9, 1993).

160. *House Field Hearing Scheduled to Examine Strike at Diamond Walnut*, Daily Lab. Rep. (BNA) No. 164, at A-1 (Aug. 24, 1992).

161. *Resolution of Ballots at Diamond Walnut Shows Apparent Loss for Teamsters Local*, *supra* note 159, at A-9.

162. *Id.* The union filed objections to the election. Sandy Kleffman, *Labor Official Visits Struck Plant: Stockton Workers, Diamond Walnut Officials Give Versions of Dispute*, S.F. CHRON., Aug. 7, 1993, at B5. The NLRB ruled that the employer's conduct tainted the results of the bifurcated election. *Second Vote at Diamond Walnut Is Inconclusive Due to Challenges*, Daily Lab. Rep. (BNA) No. 197, at A-5 (Oct. 14, 1993). Consequently, the Board ordered a second election. *Id.* The results of that election indicated 310 for representation by the union and 195 against. *Id.* The ultimate result is still very much in doubt, however, because another 635 ballots were challenged and have not yet been opened. *Id.*

replacements. In *NLRB v. Curtin Matheson Scientific, Inc.*,¹⁶³ the Supreme Court approved the Board's position that, for purposes of challenges to an incumbent union's majority status, it should adopt no presumption regarding the pro- or anti-union sympathies of striker replacements.¹⁶⁴ The decision is significant because an employer violates section 8(a)(5) if it withdraws recognition without either proof that the union has lost majority status in the bargaining unit or a good faith doubt based on objective facts.¹⁶⁵ The Board's decision in *Phoenix Pipe & Tube, L.P.*¹⁶⁶ appears to collapse this two-part defense into one by requiring that, in order to show good faith doubt, the employer, must establish that a majority of the employees in the bargaining unit unequivocally repudiated the union.¹⁶⁷ The Board has made it even more difficult to satisfy this standard by declaring it a ULP for an employer to conduct a poll of its employees to establish a good faith doubt unless the employer can satisfy the good faith doubt standard before conducting the poll.¹⁶⁸ Moreover, an employer risks committing a ULP if it initiates or participates in employees' efforts to decertify a union.¹⁶⁹

163. 494 U.S. 775 (1990). For a more extensive discussion of *Curtin Matheson* and its implications for employers' withdrawing recognition from unions, see Douglas E. Ray, *Withdrawal of Recognition After Curtin Matheson: A House Built Upon Sand*, 25 U.S.F. L. REV. 265 *passim* (1991).

164. *Curtin Matheson*, 494 U.S. at 796. The Board's no-presumption approach means that an employer cannot lawfully withdraw recognition from a union, alleging that the union no longer has majority support, based on the mere fact that a majority of the bargaining unit consists of permanent replacements who probably would not vote for the union. Professors Cohen and Wachter argue that *Mackay* and the other rules governing striker replacement promote economic efficiency. See Cohen & Wachter, *supra* note 86, at 111. They posit that Board and court rulings in labor law can increase the likelihood of efficient outcomes in labor disputes by deterring opportunistic behavior by the parties. *Id.* at 117. The authors view *Curtin Matheson* as a case involving intervention by the Board and the Court to prevent opportunistic behavior by an employer that treats the dispute as an opportunity to oust the union. *Id.* at 122-24.

165. *E.g.*, *Station KKHJ*, 284 N.L.R.B. 1339, 1340 (1987), *enforced sub nom.* *NLRB v. Buckley Broadcasting Corp.*, 891 F.2d 230 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

166. 302 N.L.R.B. 122, *enforced*, 955 F.2d 852 (3d Cir. 1991).

167. *Id.* at 122. The Board's apparent merging of good faith doubt with actual loss of majority status is consistent with Professor Ray's recommendation that the good faith doubt standard be eliminated. See Ray, *supra* note 163, at 290-91.

168. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1059 (1989), *modified and remanded* by 923 F.2d 398 (5th Cir. 1991). In his concurring opinion in *Curtin Matheson*, Chief Justice Rehnquist criticized this Board doctrine, which limits the employer's ability to challenge the majority status of a union. *Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring). Justice Blackmun also expressed his concern with the Board's decision. *Id.* at 799 & n.3 (Blackmun, J., dissenting). Professor Ray argues that "[t]he problem is not with the policy behind *Texas Petrochemicals*"—to prevent the undermining of a union's majority status—but is the good faith doubt standard itself. Ray, *supra* note 163, at 286-87.

169. See, e.g., *Warehouse Mkt., Inc.*, 216 N.L.R.B. 216, 216 (1975) (holding that employer who "aided and abetted employee decertification activity" committed a ULP). Even if an employer does not commit a ULP, it may be prohibited from relying on an employee petition as a basis for a good faith doubt of the union's majority status because of its actions or statements

In addition to the Board and courts erecting barriers against employers' use of permanent replacement as a device to terminate the collective bargaining relationship, the distinction between economic and ULP strikes itself provides a check. If an employer resists union demands in an attempt to provoke an economic strike—so that it can hire permanent replacements and decertify a union—the employer may commit ULPs; indeed, a bargaining strategy of provoking a strike is rife with potential ULPs.¹⁷⁰ If the employer is found to have committed a ULP, the strike may be deemed a ULP strike either at its inception or later under the conversion doctrine.¹⁷¹ If that occurs, the replacements hired after the strike becomes a ULP strike are temporary and have no voting rights,¹⁷² which thwarts efforts to oust the union.

A second *potential* problem for a union whose members have been permanently replaced during an economic strike arises when the union negotiates for a strike settlement with the condition that the employer reinstate the strikers. It is standard practice for a union to require this condition—if necessary, at the expense of the permanent replacements.¹⁷³ Indeed, a dramatic example of a union's successful efforts to save its members' jobs by having the employer summarily dispatch its "permanent" replacements occurred in June 1992. A nineteen-month strike (following a lockout) by members of the United Steelworkers against Ravenswood Aluminum was settled after the Ravenswood board ousted the company's chairperson and chief executive officer. The strike ended with the execution of a new collective bargaining agreement that called for the reinstatement of the strikers and the termination of 1,100 permanent replacements hired by the com-

regarding the petition. See *Laverdiere's Enters.*, 297 N.L.R.B. 826, 826 (1990) (holding that decertification petition could not be used to support good faith doubt when employer's vice president incorrectly advised employees that the only purpose for which the petition could be used was to support holding a decertification election), *enforcement granted on relevant grounds, denied on other grounds*, 933 F.2d 1045 (1st Cir. 1991).

170. See Ray, *supra* note 74, at 375-81 (recognizing that there is no bright line between good faith and bad faith bargaining).

171. Baird, *supra* note 11, at 11-12; Ray, *supra* note 74, at 368, 372-73; Westfall, *supra* note 12, at 66-67.

172. *E.g.*, *Larand Leisurelies, Inc.*, 222 N.L.R.B. 838, 838 (1976); *Tampa Sand & Material Co.*, 137 N.L.R.B. 1549, 1549 (1962).

173. See, e.g., *Return of Striking Workers Top Issue in Daily News Strike, Union Adviser Says*, Daily Lab. Rep. (BNA) No. 239, at A-13 (Dec. 12, 1990) (reporting that union spokesman discussing strike settlement negotiations said union "'hope[d] . . . that the end result will be that all our members will get their jobs back, and that the permanent replacements will no longer be permanent'"); cf. *Leader of Greyhound Strike Tells Congress Permanent Replacements Have Blocked Settlement*, Daily Lab. Rep. (BNA) No. 115, at A-12 (June 14, 1990) (reporting that the union president, testifying before Senate committee on H.R. 3936 to ban the hiring of permanent replacements, stated that Greyhound had "frozen itself into a position" blocking settlement by hiring and retaining permanent replacements).

pany.¹⁷⁴ The question thus arises whether permanent replacements who are discharged at a union's insistence could prevail if they filed ULP charges against the union, alleging violations of sections 8(b)(1)(A) and 8(b)(2) of the NLRA.¹⁷⁵ A related question is whether such permanent replacements could prevail if they brought an action in federal or state court for breach of the duty of fair representation against the union that sought their discharge.¹⁷⁶

At first blush, both means of recourse seem viable. Replacements are employees as that term is defined in the Act,¹⁷⁷ and they are members of the bargaining unit represented by the union because they occupy job classifications included in the unit.¹⁷⁸ However, there are no reported Board decisions in which replacements have prevailed on such ULP charges and no reported court decisions in which they have prevailed on breach of duty of representation cases.¹⁷⁹ The Board, although never deciding the issue, has made statements in its decisions indicating its recognition that unions routinely seek the discharge of replacements and its belief that the practice is a necessary incident of a union's duty to represent the strikers.¹⁸⁰ Although there is little law on this issue, apparently unions would be able to defend successfully both the ULP charges and the civil actions on the ground that they sought to have employees placed in the jobs on the basis of seniority

174. *Steelworkers Ratify Pact Ending Ravenswood Dispute*, Daily Lab. Rep. (BNA) No. 115, at A-11 (June 15, 1992). For further discussion of the Steelworkers-Ravenswood dispute, see *infra* notes 216-26 and accompanying text.

175. Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1988), is the union analogue to the employer's ULP under § 8(a)(1). Section 8(b)(1)(A) prohibits the union from "restrain[ing] or coerc[ing]" employees in the exercise of their § 7 rights, which include the right to refrain from engaging in union activity. Section 8(b)(2), 29 U.S.C. § 158(b)(2) (1988), is a more specific provision that makes it a ULP for a union to "cause or attempt to cause an employer to discriminate against an employee" for the purpose of "encourag[ing] or discourag[ing] membership in any labor organization," which would constitute a violation of § 8(a)(3).

176. *Cf. Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967) (defining the duty of fair representation and articulating the standard for breach of that duty).

177. *Mooremack Gulf Lines, Inc.*, 28 N.L.R.B. 869, 880-81 (1941).

178. *See Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350 (1975); *Louis Natt*, 44 N.L.R.B. 1099, 1107 (1942).

179. *See generally* Estreicher, *supra* note 11, at 294-95 (considering the rights of discharged replacement workers); Flynn, *supra* note 113, at 704-05 (recognizing the possibility that bumping agreements may violate the duty of fair representation); Janes, *supra* note 109, at 141-45 (discussing rights of discharged replacement workers).

180. *Goldsmith Motors Corp.*, 310 N.L.R.B. 1279, 1279 (1993) ("[A]s a practical matter, a union is not expected simultaneously to represent the interests of the replacements as it would the interests of the strikers."); *see also Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350 (1975) ("It would be asking a great deal of any union to require it to negotiate in the best interests of strike replacements during the pendency of a strike, where the strikers are on the picket line." (quoting from the administrative law judge's opinion that was adopted by the Board)).

rather than union affiliation.¹⁸¹ Regardless of the articulated rationale for not holding a union liable under these circumstances, Professor Estreicher suggests that the result actually goes back to an idea expressed by Judge Learned Hand soon after the enactment of the NLRA: "It is of course true that the consequences are harsh to those who have taken the strikers' places; . . . it is probably true today that most men taking jobs so made vacant, realize from the outset how tenuous is their hold."¹⁸² Thus, the potential liability for unions that seek the discharge of permanent replacements and the reinstatement of striking union members, although theoretically viable, appears to be realistically nonexistent.

3. What Are the Risks to the Employer?

When an employer hires permanent replacements for its striking em-

181. See sources cited *supra* note 179. Regarding the ULP charges, a General Counsel advice memorandum states as follows:

It is well established that a union may not discriminate against employees who exercise their Section 7 right not to join a strike. However, a union may lawfully seek to parcel out a limited number of jobs between strikers and permanent replacements on a nondiscriminatory basis, such as seniority and/or job qualifications.

United Steelworkers of Am., Local 8560, 103 L.R.R.M. (BNA) 1238, 1239 (Nat'l Labor Relations Bd.) (Dec. 31, 1979) (Advice Mem., Datz) (footnotes omitted), *quoted in* Estreicher, *supra* note 11, at 294; Flynn, *supra* note 113, at 705 n.99.

As for the civil action for breach of the duty of fair representation, the principal obstacle is that the Supreme Court applies a difficult standard for plaintiffs to satisfy: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Supreme Court decisions regarding discharge based on seniority suggest that a union's use of seniority to give preference for placement in jobs does not run afoul of the *Vaca* standard for breach of the union's duty. See Janes, *supra* note 109, at 144-45 (discussing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) and *Humphrey v. Moore*, 375 U.S. 335 (1964)). The Supreme Court's decision in *Air Line Pilots Ass'n, Int'l v. O'Neill*, 111 S. Ct. 1127 (1991), appears to make a successful action by replacements against a union, on a breach of the duty of fair representation claim, even more unlikely if the union can articulate some basis other than union affiliation for the allocation of positions. A class of striking pilots represented by the Air Line Pilots Association brought an action against the union, asserting, in part, that the agreement negotiated by the union and the employer, Continental Airlines, Inc., "arbitrarily discriminated against striking pilots." *Id.* at 1132. The Court held that the duty of fair representation does apply to a union in its negotiations, and not just in its administration of a contract. *Id.* at 1135. However, it also held that, when conducting a substantive examination of a union's performance in negotiations, a court must be "highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Id.* Thus, a product of bargaining, such as a contract, is evidence of breach of the duty of fair representation only if "it can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" *Id.* at 1136 (quoting *Huffman*, 345 U.S. at 338) (citation omitted). The Court further held that the alleged discrimination between strikers and pilots who continued working did not constitute a breach of the duty of fair representation. Because the agreement was a compromise on the rights of the two groups, some system of allocation of jobs was inevitable. *Id.* at 1137.

182. *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 871 (2d Cir.) *cert. denied*, 304 U.S. 576, *and cert. denied*, 304 U.S. 585 (1938), *quoted in* Estreicher, *supra* note 11, at 294.

ployees, the employer is gambling, predicting that, if the union or employees file ULP charges, the Board will determine that the strike was an economic strike at its inception *and* continued to be so at the time the replacements were hired. If the employer's prediction is wrong—and the Board determining either that the strike began as a ULP strike *or* that it was converted to a ULP strike—the employer loses the gamble and must pay—and perhaps pay a considerable sum.¹⁸³ As discussed above, ULP strikers have a right to immediate reinstatement to their jobs or substantially equivalent jobs upon making unconditional offers to return to work.¹⁸⁴ If the employer unjustifiably refuses to reinstate ULP strikers, then it is liable for back pay and for making the strikers whole from the date of the refusal to reinstate.¹⁸⁵ The usual delay between the filing of a ULP charge and a decision by the NLRB¹⁸⁶ greatly increases the potential liability of an employer because the back pay and other make-whole liability of the employer continues to accrue pending a decision by the Board. This may impose an enormous liability on the employer that denies reinstatement to a large number of ULP strikers.¹⁸⁷

A recent example portrays the staggering liability incurred by an employer that gambles and loses regarding the characterization of a strike. The highly publicized strike of Greyhound Lines, Inc. by the Amalgamated

183. UAW International President Owen Bieber, testifying before a House subcommittee on H.R. 3936 in 1990, acknowledged the plight of an employer as it contemplates hiring permanent replacements:

[T]he employer has no way of knowing with any real certainty whether a strike will be an economic strike or an unfair labor practice strike at the time the decision is made to hire replacements on a temporary or permanent basis. If the employer guesses wrong, the strike then becomes a purely legal contest with an enormous potential backpay liability.

Hearings on H.R. 3936 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 101st Cong., 2d Sess. 229 (1990) (statement of Owen Bieber, UAW Int'l President); *see also* Schatzki, *supra* note 11, at 387 (recognizing that employer, if it is wrong about characterization of the strike, can be subject to "enormous backpay sanctions").

184. *See supra* text accompanying notes 107-08.

185. *See, e.g.*, Gibson Greetings, Inc., 310 N.L.R.B. 1286, 1292 (1993) (ordering employer to reinstate ULP strikers and make them whole, including interest); *see also* Baird, *supra* note 11, at 12 (stating that employer is liable for back pay from time of offer to return to work); Ray, *supra* note 74, at 373-75 (noting that remedy ordered by the Board to make ULP strikers whole may include not only lost wages, but also benefits and health insurance, interim raises, interest, etc.).

186. *See supra* note 92.

187. As Professor Ray observes, "It will often take at least two years before the Board issues a decision in a contested case. An employer who improperly fails to reinstate one hundred strikers after they request reinstatement can easily be exposed to millions of dollars in liability." Ray, *supra* note 74, at 375 (footnotes omitted); *see also* Dolan, *supra* note 86, at 317-19 (discussing several cases in which Board and courts determined, several years after permanent replacements were hired, that strikers were ULP strikers and ordered back pay and make-whole relief); Golden, *supra* note 86, at 75-76 (recognizing that the long delay in NLRB proceedings can result in "harsh liability").

Transit Union began on March 2, 1990. Greyhound hired more than 2,000 permanent replacements.¹⁸⁸ After several months of a violent strike, Greyhound filed for bankruptcy in June 1990.¹⁸⁹ The union and strikers had filed over 200 ULP charges against Greyhound.¹⁹⁰ The bankruptcy court confirmed a reorganization plan for Greyhound, which capped the company's back pay liability at \$31.25 million in the event the NLRB imposed liability.¹⁹¹ Some observers estimated that Greyhound could have owed the strikers as much as \$125 million absent the cap.¹⁹² The union and Greyhound negotiated a settlement, eventually approved by the union's members, providing for the recall of many of the strikers without the termination of the replacements and payment of \$22 million in back pay to the strikers, who numbered more than 6,000.¹⁹³

A second potential problem for employers who predict the Board's characterization of the strike and hire permanent replacements is civil liability to the replacements. Such liability can arise if an employer must discharge replacements to reinstate ULP strikers under a Board order or if it discharges them to settle a strike. In 1983, the Supreme Court addressed the question of whether such civil actions are preempted by federal labor law in *Belknap, Inc. v. Hale*.¹⁹⁴ In that case, the employer hired permanent

188. *Proposed Greyhound Settlement Includes \$22 Million In Back Pay*, Daily Lab. Rep. (BNA) No. 75, at C-1 (Apr. 21, 1993); see STEPHEN R. SLEIGH ET AL., AFL-CIO, *THE COST OF AGGRESSION* 2-3 (1992); *Amalgamated Transit Union Members Narrowly Approve Greyhound Settlement*, Daily Lab. Rep. (BNA) No. 88, at A-8 (May 10, 1993).

189. *Greyhound's Reorganization Plan Confirmed; Ceiling Set On Back Pay Liability to Strikers*, Daily Lab. Rep. (BNA) No. 170, at A-9 (Sept. 3, 1991).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Amalgamated Transit Union Members Narrowly Approve Greyhound Settlement*, *supra* note 188. The Greyhound strike and hiring of permanent replacements is by no means an isolated case in which an employer was hit with an enormous make-whole liability. When Colt Industries, a gun manufacturer, was struck, the employer hired permanent replacements. *UAW Strike Against Colt Enters Fourth Week; Company in Three-Year Pact with Sister Local*, Daily Lab. Rep. (BNA) No. 41, at A-2 (March 3, 1986). Three years later, an administrative law judge determined that the strike was a ULP strike and ordered the employer to make offers of reinstatement and pay back pay with interest from September 1986 until valid offers of reinstatement were made. *NLRB Administrative Law Judge Finds Colt Strike Caused by Unfair Practices*, Daily Lab. Rep. (BNA) No. 177, at A-11 (Sept. 14, 1989). As a result, the employer settled the case for \$13 million (\$10 million in back pay and \$3 million for related matters), terminated the replacements, offered reinstatement to the strikers, and sold its firearms division to a newly formed company partially owned by the employees. *Four-Year Colt Strike Concludes With Sale of Company, \$13 Million Settlement*, Daily Lab. Rep. (BNA) No. 57, at A-13 (Mar. 23, 1990); see also Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 MINN. L. REV. 843, 852 n.58 (1993) (discussing Colt strike and administrative law judge's ruling); Golden, *supra* note 86, at 75 n.148 (discussing conversion of strike and settlement).

194. 463 U.S. 491 (1983). For articles focusing on *Belknap*, see Anderson, *supra* note 12; Janet L. Braun, Case Comment, *Belknap, Inc. v. Hale—Problems with Preemption and the Rights*

replacements for its striking employees. The employer repeatedly emphasized that the replacements were permanent.¹⁹⁵ Indeed, the employer went to great lengths to ensure the permanent status of the replacements, having them sign a statement acknowledging their permanent status as they were hired¹⁹⁶ and thereafter reasserting their permanent status in writing.¹⁹⁷ The employer's plan began to unravel when the union filed a ULP charge against the employer, alleging that its unilateral implementation of a wage increase violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act.¹⁹⁸ The regional director thereafter issued a complaint, further undermining the employer's plan.¹⁹⁹ Faced with the prospect of liability for ULPs and a ULP strike, the employer agreed to a settlement of the ULP charges that required it to recall all of the striking workers.²⁰⁰ After being laid off to make room for recalled strikers, Hale and other replacements brought an action against Belknap in state court, asserting misrepresentation and breach of contract claims.²⁰¹ The employer raised as a defense preemption of the state causes of action. The Supreme Court held that the replacements' state causes of action were not preempted.²⁰² Accordingly, the case was remanded to the state court.²⁰³

Many observers believed that *Belknap* would make employers either reluctant to hire permanent replacements in the first instance or, if an employer chose to hire them, reluctant to agree to a strike settlement requiring discharge of replacements because of the potential liability to the replacements.²⁰⁴ Notwithstanding the logic of those predictions, neither appears to

of *Economic Strikers*, 46 OHIO ST. L.J. 381 (1985); Stephanie L. Stromire, Recent Development, *The National Labor Relations Act Does Not Preempt a Discharged Permanent Replacement Worker's State Cause of Action*, 37 VAND. L. REV. 1205 (1984).

195. *Belknap*, 463 U.S. at 494-96.

196. The statement read as follows:

I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. at its Louisville, Kentucky, facility as a *regular full time permanent replacement to permanently replace* _____ in the job classification of _____.

Id. at 494-95 (emphasis added). The employer's apparent objective in clearly proclaiming the permanent status of the replacements was to satisfy the Board's test for lawfully retaining the replacements rather than reinstating the strikers. *Id.* at 537 n.11 (Brennan, J., dissenting) ("More than likely, it was the need to carry this burden that caused [the employer] to have [the replacements] sign the statements involved in this case.").

197. *Id.* at 495-96.

198. *Id.* at 495. For a general explanation of these types of ULPs, see *supra* note 6.

199. *Belknap*, 463 U.S. at 495.

200. *Id.* at 496.

201. *Id.*

202. *Id.* at 512.

203. The Supreme Court's decision in *Belknap* did not address the merits of the replacement employees' state causes of action. Finkin, *supra* note 80, at 553; McDonald, *supra* note 16, at 983.

204. Stephens & Kohl, *supra* note 155, at 43-44 (discussing early assessments of implications of *Belknap*); McDonald, *supra* note 16, at 983 (predicting decision would make employers reluc-

be accurate.²⁰⁵ While *Belknap* preserves the permanent replacements' state causes of action, it also purports to instruct an employer how to insulate itself from liability through use of the correct language in the offer of permanent employment.²⁰⁶ Some courts have held that *Belknap*-type agreements do insulate employers from liability.²⁰⁷ Still, the easiest way out of such cases for employers, summary judgment on the basis of preemption, has been removed by *Belknap*,²⁰⁸ and discharged permanent replacements have recovered in some post-*Belknap* cases.²⁰⁹

Belknap raises an additional problem for employers. Out of concern

tant to guarantee permanent positions); cf. Anderson, *supra* note 12, at 322 (stating that, after *Belknap*, employers are faced with "perhaps the most significant challenge to [their] use of replacement workers"); Finkin, *supra* note 80, at 555-56 (noting that settling claims of discharged permanent replacements may cost employer or union—if the union has entered into an indemnity agreement with the employer—tens of thousands of dollars per replacement).

205. Professors Stephens and Kohl observe that, in four out of the five strikes they studied, the employers "aggressively and publically proclaimed" the permanent status of the replacements. Stephens & Kohl, *supra* note 155, at 47. In the fifth, the Nevada resorts strike, the employers first hired temporary replacements, but changed their status to permanent when it appeared that there would be no quick settlement. *Id.* at 48. These commentators suggest that, despite these results, *Belknap* has not necessarily made employers more likely to hire permanent replacements. They note that, in the Greyhound strike and at a majority of the resorts, the settlements resulted in the dismissal of the permanent replacements and the reinstatement of the strikers. *Id.* Rather, the authors conclude that financially healthy employers will consider the potential for liability to discharged "permanent" replacements, while "financially distressed" employers will hire permanent replacements despite the potential liability. *Id.* at 48-49.

206. The majority recommended that employers indicate to "permanent" replacements that they may not *really* be permanent if the strike is deemed a ULP strike or if the employer agrees to a settlement with the union that requires the reinstatement of the strikers. *Belknap*, 463 U.S. at 503. This "conditionally permanent" replacement language has been criticized as creating an even more confusing situation for the employer. Anderson, *supra* note 12, at 336. It is likely that this language creates even greater confusion for replacements. See *infra* note 232.

207. E.g., Walker v. Teledyne Continental Motors, No. 91-0128-T-S, 1991 U.S. Dist. LEXIS 18089, at *7-*10 (S.D. Ala. Dec. 10, 1991), *aff'd mem.*, 969 F.2d 1048 (11th Cir. 1992). Even absent the "*Belknap* waiver," the employment-at-will doctrine, which retains much of its strength in many states, makes recovery by a discharged "permanent" replacement unlikely. See, e.g., Jacobs v. Georgia-Pac. Corp., 323 S.E.2d 238, 239 (Ga. Ct. App. 1984) (holding that oral promises of permanent employment and advertisements for permanent replacements do not give rise to cause of action because employment relationship is terminable at will). But see Finkin, *supra* note 80, at 552 ("*Belknap, Inc. v. Hale* takes on importance because of a fundamental shift in the state law of individual employment.").

208. E.g., Varnum v. Nu-Car Carriers, Inc., 804 F.2d 638, 640 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987); Anderson v. Ford Motor Co., 803 F.2d 953, 958-59 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987); Bubbel v. Wien Air Alaska, Inc., 682 P.2d 374, 380 (Alaska 1984).

209. Wien Air Alaska, Inc. v. Bubbel, 723 P.2d 627, 629-30 (Alaska 1986). After the Alaska Supreme Court held that the replacement's breach of employment contract action was not preempted in *Bubbel I*, 682 P.2d at 380, the trial court entered summary judgment for the replacement, and the supreme court affirmed the trial court's grant of summary judgment. *Bubbel II*, 723 P.2d at 629-30; see also Verway v. Blincoe Packing Co., 698 P.2d 377, 379 (Idaho Ct. App. 1985) (allowing replacements to recover in wrongful discharge action). Arguably, the results would have been different in both of those cases if the employers had used the *Belknap* waiver language and discharged the permanent replacements as a result of an NLRB order or a strike settlement.

for potential civil liability to replacements in the event the employers agreed, or were ordered, to reinstate the strikers, some employers made offers of employment to replacements using ambiguous language regarding permanent status. Relying on their assumption that the replacements would be deemed permanent, the employers refused to reinstate economic strikers when the strikers unconditionally offered to return to work. As illustrated by *Hansen Bros. Enterprises*,²¹⁰ however, the Board has determined that ambiguous offers do not constitute offers of permanent replacement status and accordingly has held the employer liable for ULPs. In *Hansen*, the company's president told the replacements that he "wanted" to consider them as permanent employees and "wanted" them to consider themselves as permanent employees.²¹¹ The employer also sent letters to striking employees informing them that they "may" lose their reemployment rights if replacements were hired.²¹² Because the employer thought it had hired permanent replacements, it denied the striking employees reinstatement when they offered to return. The Board held, however, that the employer could not satisfy its burden of proving that there was a mutual understanding between the employer and replacements that they were permanent.²¹³ The Board explained that "vague statements" regarding the employer's intent do not satisfy the employer's burden and that *Belknap* does not require a contrary result.²¹⁴ The consequence to the employer was a Board order requiring the employer to make offers of reinstatement and to pay two-and-a-half

In *Bubbel*, the employer told the replacements that they were permanent employees and that the only things that could change that status were legal actions by some governmental body, either the courts or the United States Government. *Bubbel*, 723 P.2d at 629. The employer eventually discharged the replacements in compliance with the nonbinding recommendation of the Presidential Emergency Board. The court held that, because the recommendation was not "mandatory, or at least, highly coercive," the employer was not excused from its contractual duty. *Id.* at 629. It appears that discharge pursuant to an NLRB order would have produced a different result, but discharge under a strike settlement would not.

In *Verway*, the discharged replacements testified that the employer promised not to fire them if the strike was settled. *Verway*, 698 P.2d at 378. Thus, it appears that the employer did not use the "conditionally permanent" language recommended in *Belknap*.

210. 279 N.L.R.B. 741 (1986), *review denied mem.*, 812 F.2d 1443 (D.C. Cir.), *cert. denied*, 484 U.S. 845 (1987).

211. *Id.* at 741.

212. *Id.*

213. *Id.*

214. *Id.* & n.6. Chairman Dotson, dissenting, found the language used by the employer to be based upon *Belknap* and sufficient to satisfy the employer's burden. *Id.* at 742-44 (Dotson, Chairman, dissenting). The Chairman found the majority's approach to "reflect[] an undue taste for verbal analysis rather than a recognition of the real world facts." *Id.* at 742 (Dotson, Chairman, dissenting).

years of back pay and other benefits to the strikers who were denied reinstatement.²¹⁵

The labor dispute between the United Steelworkers of America and Ravenswood Aluminum Corporation in West Virginia is perhaps the quintessential *Belknap* strike-and-replacement scenario. After negotiations to reach a new collective bargaining agreement proved unsuccessful, the company declared an impasse, locked out employees, and immediately had temporary replacements, who had been recruited before the lockout, begin work.²¹⁶ The employer subsequently implemented an offer it had made to the union, informed the union that the locked out employees could return to work, and changed the status of the temporary replacements to permanent replacements.²¹⁷ The union filed ULP charges alleging, among other things, that the company had unlawfully locked out its employees.²¹⁸ After investigating the charges, the NLRB issued a complaint charging Ravenswood with bad faith bargaining and an unlawful lockout.²¹⁹ ULP hearings were conducted, but the administrative law judge agreed to withhold his ruling for a period of time to give Ravenswood and the Steelworkers an opportunity to settle the case.²²⁰ The union also engaged in a corporate campaign,²²¹ which included efforts to persuade beverage companies to discontinue their business with Ravenswood and to bring pressure to bear on

215. *Id.* at 742, 744 (Dotson, Chairman, dissenting). For a recent Board decision holding that an employer failed to satisfy its burden regarding permanent status of replacements, see *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1290-91 (1993) (involving employer that announced to replacements that they were "full-time associates").

216. Brief of Counsel for the General Counsel to the Administrative Law Judge at 53-54, *Ravenswood Aluminum Corp.*, Case 9-CA-28235.

217. Brief of Charging Party to the Administrative Law Judge at 133, Case No. 9-CA-28235; *Ravenswood Aluminum Corporation's Post-Hearing Brief* at 94-95, Case No. 9-CA-28235. Recognizing the ramifications of *Belknap*, the company had the replacements sign a form, when it changed their status to permanent, which read, in pertinent part:

I HEREBY ACKNOWLEDGE THAT RAVENSWOOD ALUMINUM CORPORATION MADE ME A PERMANENT EMPLOYEE EFFECTIVE IMMEDIATELY DECEMBER 3, 1990. I UNDERSTAND THAT MY PERMANENT EMPLOYEE STATUS IS SUBJECT TO A SETTLEMENT WITH THE UNION, A SETTLEMENT WITH THE NATIONAL LABOR RELATIONS BOARD, OR AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD DIRECTING THAT RAVENSWOOD ALUMINUM CORPORATION REINSTATE STRIKERS

Brief of Charging Party to the Administrative Law Judge, *supra*, at 133 (alteration in original). This permanent replacement form is unmistakably based on the language suggested by the Supreme Court in *Belknap*. See *supra* note 206.

218. *Steelworkers Ratify Pact Ending Ravenswood Dispute*, *supra* note 174.

219. *NLRB to Issue Complaint Charging Ravenswood With Unlawful Lockout*, Daily Lab. Rep. (BNA) No. 140, at A-6 (July 22, 1991); *Steelworkers-Ravenswood Talks Go Nowhere*, Daily Lab. Rep. (BNA) No. 147, at A-14 (July 31, 1991).

220. *Proposed Ravenswood Agreement Would Restore Steelworkers' Jobs*, Daily Lab. Rep. (BNA) No. 106, at A-4 (June 2, 1992).

221. "Corporate campaign" may be defined as "a campaign utilizing boycotts and other nonworkplace-centered forms of pressure." James G. Pope, *Labor-Community Coalitions and*

the international interests of the person who allegedly controlled Ravenswood.²²²

Under the mounting pressure of NLRB proceedings and the union's corporate campaign, the company's board of directors ousted the chairperson and chief executive officer.²²³ Thereafter the company agreed to a settlement that called for the discharge of 1,100 permanent replacements and the reinstatement of the strikers.²²⁴ The company agreed to this settlement despite the specter of potential civil liability to the replacements.²²⁵ The

Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution, 69 TEX. L. REV. 889, 895 n.38 (1991).

222. *Steelworkers Wage Corporate Campaign at Ravenswood with Aid From AFL-CIO*, Daily Lab. Rep. (BNA) No. 76, at A-9 (Apr. 20, 1992). The campaign was directed at pressuring "metals trader and financier" Marc Rich, who fled the United States in 1983 after indictment on "racketeering, tax fraud, and tax evasion charges." *Id.* The corporate campaign waged against Ravenswood by the workers and the union, with the assistance of the AFL-CIO, was multifaceted. Among the tactics in the campaign were the following: filing of complaints with the Occupational Safety and Health Administration (OSHA) that led to inspections and fines at the company's facilities; hiring environmental consultants to determine whether the company complied with environmental regulations; financing a lawsuit by local residents against Ravenswood for discharging pollutants into the Ohio River without permits; and holding local "stakeholders meetings" to present the union's position to citizens with a stake in the dispute. *Id.*

Although an extensive examination of corporate campaigns is beyond the scope of this Article, there is a growing body of literature examining this approach to labor-management disputes. See generally CHARLES R. PERRY, *UNION CORPORATE CAMPAIGNS* (1987) (analyzing corporate campaigns); Pope, *supra* note 221, at 895 n.38 (same). Recognizing the declining number and potency of strikes, some labor leaders have suggested that corporate campaigns should be used to supplement strikes. Some have even suggested that corporate campaigns should supplant strikes as the primary weapon of labor. See *id.* Professor Pope discusses the effectiveness of labor-community boycotts, which have as an objective turning public opinion against the target employer. *Id.* at 905-08 (detailing campaigns against J.P. Stevens and Coors).

When Ron Carey took office in 1992 as president of the International Brotherhood of Teamsters, he created a new office to assist locals in developing corporate campaigns. *Corporate Campaigns: Teamsters Use New Strategies to Build Bargaining Table Pressure*, Daily Lab. Rep. (BNA) No. 117, at C-1 (June 21, 1993). That office assisted in a campaign against Ryder System, Inc., which resulted in an agreement ending a dispute that had lasted almost a year. *Id.*

223. *Steelworkers Ratify Pact Ending Ravenswood Dispute*, *supra* note 174.

224. *Id.*

225. Although, under *Belknap*, state law claims made by the replacements would not be preempted, Ravenswood had some protection from liability in that the replacements signed the *Belknap*-type waiver. *Tobin v. Ravenswood Aluminum Corp.*, No. CIV.A.6:92-0906, 1993 WL 485552, at *1 (S.D. W. Va. Nov. 15, 1993). Additionally, Ravenswood offered a severance package including placement on a preferential hiring list, one month's pay, accumulated vacation, and the company contribution of medical insurance for three months. *Id.* at *2. The consideration for preferential hiring and continuation of medical coverage was conditioned on the replacements' signing forms releasing all claims against Ravenswood. *Id.* Many of the replacements accepted the full severance package and signed the releases. *Id.*

A group of 905 of the discharged replacements later filed suit against Ravenswood, alleging in part, that the employer promised them permanent employment and job security. *Id.* The federal court granted Ravenswood's motion for summary judgment with respect to the claims of 721 of the replacements who accepted the packages and signed releases. *Id.* at *4. However, the court did not dismiss all the claims of the 184 plaintiffs who did not sign the releases. *Id.* at *8. The

lesson from the Steelworkers-Ravenswood dispute regarding *Belknap*, then, is that employers probably are more concerned with potential back pay liability under an NLRB order²²⁶ than they are with potential civil liability to discharged permanent replacements.

4. What Are the Risks to the Replacement Workers?

Replacements face the risk of job loss in two scenarios: one, the NLRB determines that there was a ULP strike and orders their discharge if necessary to accommodate reinstatement of the strikers; or two, the employer settles the dispute with the union and agrees to discharge the replacements. Consider, for example, the Steelworkers-Ravenswood dispute²²⁷ in which the strike settlement required discharge of 1,100 "conditionally permanent"²²⁸ replacements. Notwithstanding such incidents, the risks encountered by strike replacements are often overlooked in the *Mackay* debate.²²⁹

A principal reason that the risks to replacements are not often raised may be that they are not viewed as sympathetic characters in most permanent replacement situations. The most disdainful treatment of replacements appears to rest on the rationale that striker replacements are stealing the jobs—the property—of the regular employees; therefore, the risk of loss they face is no more than they deserve. They are considered nothing more than "scabs."²³⁰ A less virulent view of replacements, but one that also

court noted that the remaining plaintiffs must satisfy high standards to prevail. *Id.* at *4-*5. Under West Virginia law, the employment-at-will doctrine is still the rule subject to limited exceptions. Although West Virginia law will enforce a contract for a term other than at will, the burden is on the party claiming such a contract to establish it by clear and convincing evidence, and the promises must be "very definite." *Id.* (citing *Adkins v. Inco Alloys Int'l, Inc.*, 417 S.E.2d 910, 916 (W. Va. 1992); *Suter v. Harsco, Corp.*, 403 S.E.2d 751, 754 (W. Va. 1991)). In addition, employers can avoid such contracts by explicit disclaimer. *Suter*, 403 S.E.2d at 754.

226. Regarding the potential for enormous back pay liability if the Board determines that an employer has denied ULP strikers reinstatement, see *supra* notes 185-93 and accompanying text. The settlement between Ravenswood and the union also provided that each striker receive \$2000 and established a "progress sharing" formula. *Steelworkers Ratify Pact Ending Ravenswood Dispute*, *supra* note 174. Thus, the total amount paid by Ravenswood in back pay was estimated at \$3.4 million. *Proposed Ravenswood Agreement Would Restore Steelworkers' Jobs*, *supra* note 220. The make-whole remedy sought in the complaint was estimated as exceeding \$80 million. *Id.*

227. See *supra* notes 216-26 and accompanying text.

228. As discussed above, when the replacements were converted from temporary to permanent by Ravenswood, they signed *Belknap*-type waivers. See *supra* note 217 and accompanying text.

229. See Baird, *supra* note 11, at 6-7 (arguing that those concerned with the rights of strikers ignore the rights of those who choose not to strike). This Article does not suggest that replacements have been wholly ignored. See *infra* note 232.

230. Jack London penned the often-quoted description of the genesis of "scabs": "After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab." Jack London, *The Scab*, reprinted in CARRIER'S CORNER, June 1970 (monthly newsletter of Old Dominion Branch No. 496 of National Ass'n of Letter Carriers), quoted in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 268 (1974).

perceives no reason to protect their interests, regards them as having knowingly assumed the risks associated with such jobs.²³¹

Regardless of whether one considers striker replacements "scabs," believes that replacement workers are people with job rights equal to other workers,²³² or holds a view somewhere in between,²³³ the point is that they, like striking employees, are subject to uncertainties regarding the duration of their employment.²³⁴ For replacements who, prior to accepting the re-

It is not surprising that striker replacements have not been well received on the picket lines. It appears, however, that they have not fared much better in Congress. The hearings on H.R. 3936 included an exchange in which Representative Fawell objected to use of the word "scabs" during the hearings to refer to replacement workers. Representative Ford responded, in part, that the word is a "descriptive term of art" describing one "who steals another person's job," but that it was not being used "to be provocative" or "to offend anybody." *Hearings on H.R. 3936 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101st Cong., 2d Sess. 60-61 (1990).

231. See quotation of Judge Learned Hand, *supra* text accompanying note 182.

232. Baird, *supra* note 11, at 25-26. Others have seen permanent replacements as victims of the battles between employers and unions. *E.g.*, *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983) ("It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but it is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships."). Despite the Court's sympathetic depiction of striker replacements in *Belknap*, it seems that the Court's decision, on the whole, is more harmful than beneficial to these "innocent third parties." See *infra* note 234. One commentator views permanent replacements as "unwitting victims" of the *Mackay* doctrine. Janes, *supra* note 109, at 126. He sees the "permanent" label as deceiving replacements regarding their job security and legal rights. *Id.* at 149. Still, these observations were pre-*Belknap*, and the deceptiveness of a bare designation of "permanent" may be ameliorated by the conditional language suggested by the Court in *Belknap*. See *supra* note 206. That proposition assumes, however, some conditions that actually may not exist. First, it assumes that employers are using the *Belknap* language, although, as discussed above, employers sometimes use variations. See *supra* notes 210-15 and accompanying text. Second, it assumes that replacements understand the conditional language in a *Belknap*-type replacement offer.

233. Cf. *THE RIVER* (Universal City Studios, Inc. 1984) (telling the story of a farmer experiencing financial difficulties who, without knowing that he was replacing strikers, takes a job in a steel plant in order to save his farm).

234. In *Belknap*, 463 U.S. at 512, the Supreme Court purported to protect replacements from injury that might befall them in the war between unions and employers by holding that their state actions stemming from their discharge are not preempted by federal labor law. See *supra* notes 194-203 and accompanying text. By also instructing employers how to word offers to create a "conditionally permanent" status, see *supra* note 206, however, the Court may have created a much worse situation for replacements. For replacements unfamiliar with the law and strategies of the parties in labor disputes, the Court's suggested language may provide little indication of their potentially temporary status. See, e.g., Estreicher, *supra* note 11, at 289 (asserting that "permanency" is illusory because of employment at will, potential for layoffs, and possibilities of Board's finding of ULP strike or settlement with union requiring reinstatement). What the Supreme Court's suggested hybrid replacement status probably does for replacements is deprive them of a viable state action against the employer for misrepresentation or breach of contract. Finkin, *supra* note 80, at 553 ("In the name of solicitude for the rights of 'innocent third parties,' the Court would ask the states to strip them of their common law rights."); A.J. Harper II, Speech to the ABA's Mid-Winter Meeting (Mar. 5, 1991) reprinted in Daily Lab. Rep. (BNA) No. 44, at

placement positions, have no jobs or perhaps substantially less remunerative jobs than the replacement positions, the risk may not be substantial. Still, for those who have fairly secure jobs, though perhaps less remunerative than the replacement positions, the risk of loss is greater.

III. INCREASED RESORT TO PERMANENT REPLACEMENTS AND THE DECLINE OF THE STRIKE—AN ARGUMENT FOR OVERTURNING *MACKAY*?

The Workplace Fairness Act, like some of its precursors, would eliminate the most significant distinction between economic and ULP strikes by prohibiting employers from hiring or threatening to hire permanent replacements during economic strikes, thus overturning *Mackay*.²³⁵ Why has legislation repeatedly been proposed since 1988 to overrule a doctrine that has been established law since 1938? As one commentator posed the question, "[W]hat is different in 1993 than in 1938 that would warrant reconsideration of a principle that for 55 years went without questioning[?]"²³⁶

If the Caterpillar dispute were the only major strike in recent times involving the threat of hiring or hiring of permanent replacements, one might easily dismiss as unwarranted the tempest of calls for legislative reform of the labor laws. Employers, for their part, argue that they hire permanent replacements only as a last resort.²³⁷ According to many analysts, however, the Caterpillar incident is only the latest and most publicized example of a recent trend among employers,²³⁸ which exacerbates the risks faced by striking employees and unions, renders impotent the right to engage in an economic strike, and facilitates the continuing decline in the percentage of the workforce in the United States represented by unions.

Numerous commentators have noted that, for much of its life, the *Mackay* doctrine rarely was summoned into battle by employers.²³⁹ There is a

E-1 (Mar. 6, 1991)) ("*Belknap* . . . holds that to avoid civil liability to the replacements should they be replaced pursuant to a Board order or a settlement agreement providing for reinstatement of the strikers, the employer may promise the replacements permanent employment subject to such conditions subsequent.").

235. See *supra* notes 74-83 and accompanying text.

236. See YAGER, *supra* note 11, at 113.

237. See, e.g., *Hearings on S. 2112 Before the Subcomm. on Labor, Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 3 (1990) (statement of James P. Melican, Senior Vice President of International Paper Co., which permanently replaced employees at its Jay, Maine plant during a strike in 1987-88).

238. See, e.g., LeRoy, *supra* note 84, at 262-63 (listing the following post-1981 strikes in which employers either hired or threatened to hire permanent replacements: Eastern Airlines, United Airlines, Continental Airlines, Trans World Airlines, International Paper Co., Greyhound, Hormel, Ravenswood, New York Daily News, Chicago Tribune, Major League Baseball, and the National Football League).

239. E.g., Estreicher, *supra* note 11, at 287 (stating that in the modern era most employers with established bargaining relationships continued operations without resorting to permanent

perception among labor leaders,²⁴⁰ some commentators on labor law,²⁴¹ and some government officials²⁴² that in recent years employers' traditional reluctance to hire permanent replacements has subsided, and it has now become common procedure for employers to threaten to hire them. They believe the *Mackay* doctrine, dormant for most of its life, recently was awakened by employers, who use it to run roughshod over unions and employees.²⁴³

The opposing camps on *Mackay* simply do not agree on whether there is, in fact, an increasing resort to the threat of hiring, or the actual hiring, of permanent replacements. A recent episode at a meeting of the National Association of Manufacturers demonstrates the disagreement and implicates the studies most often cited by each side. At the meeting, Secretary of Labor Robert Reich delivered an address in which he stated that employers' use of permanent replacements rose in the 1980s.²⁴⁴ During a question-and-answer session, John Irving, a former General Counsel of the NLRB and now an attorney in private practice, challenged the Secretary's

replacements); Finkin, *supra* note 80, at 548 (asserting that the *Mackay* rule was not utilized by large, nationally based unionized companies for much of its history); Eberts, *supra* note 73, at 260 (explaining that, due to deference to unions, industry did not often resort to permanent replacements until recently); Axelrod, *supra* note 84 (asserting that employers were reluctant to permanently replace strikers until the early 1980s).

240. E.g., *Hearings on H.R. 5 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 65 (1991) (statement of Lane Kirkland, President, AFL-CIO), reprinted in *Selected Statements on Striker Replacement Legislation (H.R. 5) Delivered Before House Education and Labor Subcommittee on Labor-Management Relations*, Daily Lab. Rep. (BNA) No. 45, at D-1 (Mar. 7, 1991) (stating that there has been a "quantum increase" in the hiring of permanent replacements).

241. See, e.g., GETMAN & POGREBIN, *supra* note 11, at 140 (stating that the right to permanently replace was not widely used until "quite recently"); Estreicher, *supra* note 11, at 287 (citing use of permanent replacements at Hormel, TWA, and AT&T); Finkin, *supra* note 80, at 548-49 n.12 (providing statistics indicating that, as use of strikes has decreased in recent years, use of permanent replacements has increased); Stephens & Kohl, *supra* note 155, at 44-45 (noting "considerable replacement worker activity" in recent years); Eberts, *supra* note 73, at 290 (asserting that the "full force" of *Mackay* was not felt until the last decade).

242. E.g., *Hearings on H.R. 5 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 103d Cong., 1st Sess. 16 (1993) (statement of Robert B. Reich, Secretary of Labor), reprinted in *Selected Testimony from House, Education, and Labor Committee Hearing on HR 5, Workplace Fairness Act of 1993*, Daily Lab. Rep. (BNA) No. 60, at D-1 (Mar. 31, 1993) (stating that hiring permanent replacements "became a prominent feature of American labor relations only in the last dozen years").

243. "What was a loaded pistol waiting to be fired in 1938, and thereafter for a number of years, is now used with a vengeance, and the victims are the promises of the NLRA." Pollitt, *supra* note 11, at 311.

244. *Reich Challenged On Claim of Rise in Use of Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 53, at AA-1 (Mar. 22, 1993). Earlier that week, Secretary Reich had addressed a UAW political and legislative conference. In that address the Secretary stated, "Before 1981 no manager would have thought about replacing striking workers. No manager would have even contemplated replacing striking workers." *Reich Tells Auto Workers' Conference Workplace Reform Is Crucial to Future*, Daily Lab. Rep. (BNA) No. 50, at A-12 (Mar. 17, 1993).

assertion. Irving disagreed with the Secretary, stating that in his experience it was not true that employers never considered hiring permanent replacements before 1981. In support of his position, he cited a 1991 study by Daniel Yager.²⁴⁵ Irving also asked the Secretary if he had any empirical evidence to support his statements.²⁴⁶ Although the Secretary did not have empirical evidence at the meeting, he thereafter wrote Irving,²⁴⁷ citing a 1990 study by the United States General Accounting Office (GAO)²⁴⁸ and a study by Professor Cynthia Gramm.²⁴⁹

Both proponents and opponents of the movement to abrogate *Mackay* argue that the GAO study supports their position.²⁵⁰ The study considered strikes reported to the Federal Mediation and Conciliation Service in 1985 and 1989.²⁵¹ The study estimates that employers announced that they would hire permanent replacements in a slightly higher percentage of strikes in 1989 than in 1985 (thirty-five percent and thirty-one percent, respectively);²⁵² that the percentage of strikes in which employers actually hired permanent replacements in both years was about seventeen percent;²⁵³ and that about the same percentage of employees was replaced in 1989 and

245. DANIEL V. YAGER, EMPLOYMENT POLICY FOUNDATION, *LOADING THE SCALES: THE PROPOSAL TO OVERTURN THE MACKAY DOCTRINE* 92 (1991) [hereinafter YAGER 1991]. The results of Yager's study are also in YAGER, *supra* note 11, at 109-23.

246. *Reich Challenged On Claim of Rise in Use of Permanent Striker Replacements*, *supra* note 244.

247. *Id.*

248. *Id.* The survey was updated by the GAO in 1991. See U.S. GEN. ACCOUNTING OFFICE, *LABOR-MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970S AND 1980s* 18-19 (1991) [hereinafter GAO].

249. *Reich Challenged on Claim of Rise in Use of Permanent Striker Replacements*, *supra* note 244 (citing Cynthia L. Gramm, *Empirical Evidence on Political Arguments Relating to Replacement Worker Legislation*, 42 LAB. L.J. 491 (1991)).

250. McCallion, *supra* note 16, at CRS-1. Compare Axelrod, *supra* note 84, at F-1 (citing the GAO study to support the proposition that "[t]he threat of permanent replacement now hangs like a Sword of Damocles partially paralyzing the labor movement") with Baird, *supra* note 11, at 16 (citing GAO study in support of proposition that threat of permanent replacements rarely made, even more rarely implemented, and when implemented, most often only after strikes have lasted a long time).

251. GAO, *supra* note 248, at 9.

252. *Id.* at 13.

253. *Id.* at 15. The Bureau of National Affairs conducted surveys of work stoppages as reported in the popular and labor presses for the years 1989, 1990, and 1991. The survey showed that replacements, either temporary or permanent, were hired in 78 of 444 work stoppages in 1989 (17.6%), 72 of 407 work stoppages in 1990 (17.7%), and 47 of 322 work stoppages in 1991 (14.6%). *BNA Data Show Most Work Stoppages Occurred in Units of Fewer Than 200 Workers*, Daily Lab. Rep. (BNA) No. 75, at A-1 (Apr. 17, 1992) (discussing THE BUREAU OF NAT'L AFFAIRS, INC., *REPLACEMENT WORKERS: EVIDENCE FROM THE POPULAR AND LABOR PRESS: 1989 AND 1990* (1991)); YAGER, *supra* note 11, at 108. Because those data include both temporary and permanent replacements, the BNA survey suggests that permanent replacements may be hired somewhat less frequently than is estimated by the GAO study.

1985 (three percent and four percent, respectively).²⁵⁴ No comparable data were available for the 1970s to determine whether threats and replacement increased from the 1970s to the 1980s.²⁵⁵ To compare the incidence of replacement in the 1980s with that in the 1970s, the GAO asked union representatives and employers involved in the 1985 and 1989 strikes to compare use of replacements for those periods. The GAO estimates that seventy-seven percent of the union representatives and forty-five percent of the employers surveyed thought that permanent replacements were used more in the period between 1985-90 than between 1975-80.²⁵⁶ The study thus suggests that, regardless of whether the use of permanent replacements is in fact more common now, there is at least a perception among one of the relevant groups that this is true.

The more significant question would seem to be whether employees perceive employers as now commonly and quickly resorting to the hiring of permanent replacements. If they do, then that perception might dissuade employees from engaging in strikes or perhaps even voting for representation by a labor organization, for fear that such a vote ultimately will lead to their being asked to strike and thus jeopardize their jobs.²⁵⁷ It is likely that the high visibility of the Caterpillar strike and threat of permanent replacement, as well as similar scenarios at Greyhound,²⁵⁸ The New York Daily News,²⁵⁹ and others,²⁶⁰ has produced such a perception among employees.

254. GAO, *supra* note 248, at 17. These figures have been cited by some opponents of abrogating *Mackay* as indicating that even if there is an increasing resort to use of permanent replacements, the number of strikers who are actually being replaced has not increased because there are fewer strikes and union membership is decreasing. Dolan, *supra* note 86, at 320. This argument does not counter the anti-*Mackay* arguments very well; part and parcel of the increased-use-of-*Mackay* argument is the contention that the practice is decimating the strike and contributing to the decline of unions.

255. GAO, *supra* note 248, at 2 (1985 was earliest year for which automated data were available).

256. *Id.* at 18. Yager argues that this opinion survey is of questionable value. YAGER, *supra* note 11, at 96 (explaining that GAO study also indicates that 50% of the union representatives surveyed believed permanent replacements were hired in 50% or more of the strikes in late 1980s—far more than study's estimate of 17%).

257. E.g., *Hearings on S. 2112 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 112-13 (1990) (statement of Julius Getman, Professor, Univ. of Texas Law School) (stating that, in virtually every union organizing campaign, employer announces that, if union is elected, employer will bargain tough, and if strike is called, it will not hesitate to hire permanent replacements); Kamiat, *supra* note 84, at 34-35 (contending that it is "virtually universal" among employers resisting union organizing to tell employees that union victory will eventually result in strike and employer's use of permanent replacements).

258. See Eberts, *supra* note 73, at 257.

259. *Id.* at 258-59.

260. See *supra* note 238.

Moreover, the high-profile incidents of hiring, or threatening to hire, permanent replacements probably have bred emulation by other employers.²⁶¹

The study by Professor Gramm analyzes use of permanent replacements in thirty-two strikes during the period from 1984 to 1988 in a national sample and twenty-one strikes during the same period in a New York sample.²⁶² Professor Gramm found that permanent replacements were hired in 15.63% of the strikes in the national sample and 23.81% of the strikes in the New York sample.²⁶³ Her findings suggest that employers hire permanent replacements "in a substantial minority of [work] stoppages."²⁶⁴

Finally, the study by Daniel Yager surveys the number of NLRB decisions citing *Mackay* from 1935 to 1989.²⁶⁵ He determined that, of those cases, 251 involved employers hiring permanent replacements.²⁶⁶ Of those 251 cases, only 22 involved labor disputes that began in 1981 or later.²⁶⁷ Mr. Yager recently assessed the implications of the study: although it does not show that there has been no increase in the use of permanent replace-

261. See LeRoy, *supra* note 84, at 263-64 (describing the "me-too" effect on small employers of large employers' use of permanent replacements). For example, approximately three months after Caterpillar issued its ultimatum and ended the strike in Peoria, Peterbilt, a "big rig" tractor manufacturer, ended a three-month strike at a plant in Nashville, Tennessee by threatening to hire replacements. *Peterbilt Strike Ends*, BATON ROUGE SUNDAY ADVOCATE (La.), Aug. 2, 1992, at 2A. The striking employees, members of the UAW, approved a contract by a margin of more than 3-1 that they had rejected a week earlier. One might reasonably infer that the factor which produced such a drastically different result in the course of a week was the employer's threat to hire permanent replacements. The president of the UAW local described the contract as "the worst contract that's ever been negotiated in so far as the differences between the old contract and the new contract." *Id.*

262. See Gramm, *supra* note 249, at 491-92.

263. *Id.* at 492.

264. *Id.* at 495. Professor Gramm interprets other findings of the study as suggesting the following: hiring permanent replacements may prolong strikes; hiring permanent replacements may decrease the likelihood that unions will retain their status as collective bargaining representatives; most employers can continue operating without hiring permanent replacements; and temporary replacements are at least as effective as permanent replacements in continuing operations. *Id.* Professor Gramm concludes, in part, that, because of size limitations in her study's samples, further research is needed to determine the effects of hiring permanent replacements on both the unions' survival as the collective bargaining representatives and the employers' ability to operate. *Id.*

265. YAGER 1991, *supra* note 245, at 98. The year used to date the decisions is the year the labor dispute began, rather than the date of the NLRB decision. *Id.* at 97. This explains why decisions designated as 1935-37 could cite the 1938 *Mackay* decision.

266. *Id.* at 98; see also *id.* at 100-02 (providing charts showing data for each year).

267. *Id.* at 102. The year 1981 is significant because that was the year of the PATCO firings. See *infra* note 269 and accompanying text. The high year was 1948, with 12 such cases, and the low year was 1957, with none. YAGER 1991, *supra* note 245, at 98. All years except 1957 had one or more cases. *Id.*

ments since 1981, it does disprove the assertion that employers did not hire permanent replacements before 1981.²⁶⁸

Commentators have speculated on the reasons for an increase in the use of permanent replacements. One of the most commonly repeated theories is that President Reagan set the tone for a new aggressive approach by employers when, in 1981, he fired over 11,000 air traffic controllers who were represented by the Professional Air Traffic Controllers Organization (PATCO) and who were participating in an illegal strike.²⁶⁹ If, assuming *arguendo*, the 1980s witnessed an increase in private sector employers' engaging in hard bargaining and hiring permanent replacements, or threatening to do so, singling out President Reagan's action as the cause is too simplistic. In fact, few of the commentators who highlight that event view it as the principal cause of increased resort to the *Mackay* doctrine. There are many other factors that may have contributed to an increase in employers' use of permanent replacements. Some that have been suggested include the following: the wave of mergers and acquisitions in the 1980s, which resulted in an oversupply of personnel, followed by downsizing, which left a pool of workers willing to work for less than union wages;²⁷⁰ deregulation;²⁷¹ global competition;²⁷² technology;²⁷³ slow economic growth;²⁷⁴ and unreasonable labor contracts and demands.²⁷⁵

268. *Reich Challenged on Claim of Rise in Use of Permanent Striker Replacements*, *supra* note 244.

269. *E.g.*, Craver, *supra* note 85, at 421; Estreicher, *supra* note 11, at 287; Pollitt, *supra* note 11, at 307; Axelrod, *supra* note 84. AFL-CIO secretary-treasurer Thomas Donahue stated that employers "'interpreted this as a declaration of open season on unions and went all-out to block, weaken or be rid of them.'" Janice Castro, *Labor Draws an Empty Gun*, *TIME*, Mar. 26, 1990, at 56. *But see* Baird, *supra* note 11, at 11 (describing this explanation as a fairy tale).

For a detailed account of the PATCO strike, see Herbert R. Northrup, *The Rise and Demise of PATCO*, 37 *INDUS. & LAB. REL. REV.* 167 *passim* (1984). President Reagan fired the air traffic controllers who did not return to work within 48 hours of his announcement and ordered federal agencies not to re-employ them. *Id.* at 178. On August 12, 1993, the Clinton Administration announced that the President had issued an order authorizing the Federal Aviation Administration to hire the former strikers. *Clinton Gives FAA Clearance to Hire Fired PATCO Members*, *Daily Lab. Rep. (BNA)* No. 155, at AA-1 (Aug. 13, 1993).

270. Roukis & Farid, *supra* note 85, at 84-85.

271. *Id.*

272. *Id.*; Randall Samborn, "Replacements" *Spur Labor Action*, *NAT'L L.J.*, May 28, 1990, at 1, 29 (explaining opinion of Joel Kaplan, attorney who represents management).

273. Roukis & Farid, *supra* note 85, at 84.

274. *Id.*

275. Eberts, *supra* note 73, at 260-61; *cf.* Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 143 (Lawrence Mishel & Paula B. Voos eds., 1992). In his recent essay, Professor Freeman elucidates that, when United States companies had technological and productivity leads over companies in the rest of the world, they had potential "monopoly rents." Freeman, *supra*, at 165-66. Unions could bargain for the employees' share of those rents, and employers could agree without hurting the companies' investment. *Id.* at 166. With the "oil shock," the loss of the United States's productivity advantage, and deregulation, the monopoly rents no longer existed, and unions were slow to real-

Proponents of overturning *Mackay* argue that employers' increasing resort to permanent replacements has effected a decline in the number and effectiveness of strikes, once labor's most powerful weapon.²⁷⁶ One cannot dispute that the number of strikes has decreased in recent years.²⁷⁷ As to the effectiveness of strikes, there is no empirical data establishing that strikes have become ineffective economic weapons. Nevertheless, one could infer from the decrease in the number of strikes that unions and employees resort to strikes less often because they perceive them as ineffective.²⁷⁸ Even before the UAW-Caterpillar dispute, labor law commentators suggested that the right to strike had become a "blunt instrument."²⁷⁹

No empirical evidence conclusively establishes a causal connection between an increased use of permanent replacements and the decline in the number and effectiveness of strikes.²⁸⁰ Commentators have recognized

ize that the bargaining strategies of the 1950s and 1960s would not work in the 1970s and 1980s. *Id.*; cf. Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 106-09 (recognizing the role of U.S. industries' monopoly rents and the loss of those rents in both the changing relationship between U.S. employers and organized labor and the precipitous decline in union density in traditional union "strongholds").

276. E.g., Kamiat, *supra* note 84, at 40 (contending that under *Mackay* a strike is not necessarily something an employer wishes to avoid because it provides opportunity to oust union); Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 MINN. L. REV. 843, 850-51 (1993) (recognizing that no study establishes relationship between increased replacement and decreased strikes, but stating that impact on union decision making suggests such a correlation); Pollitt, *supra* note 11, at 300 (asserting that *Mackay* "makes a mockery of the supposed right to strike"); Axelrod, *supra* note 84 (declaring that "[t]he threat of permanent replacement now hangs like a Sword of Damocles, partially paralyzing the labor movement"). Some opponents of legislation to overturn *Mackay* argue that a decrease in the number of strikes is not a malady that needs to be remedied, but is one of the principal objectives of the NLRA. See YAGER, *supra* note 11, at 49-51; Zifchak, *supra* note 86, at 57.

277. The Bureau of Labor Statistics has compiled figures on major work stoppages since 1947. The Bureau defines a "major work stoppage" as including both strikes and lockouts. In 1991, the number of major work stoppages dropped to a record-tying low of 40, the same level as in 1988. *Work Stoppages: Major Strikes and Lockouts Last Year Tied Record Low, Labor Department Says*, Daily Lab. Rep. (BNA) No. 24, at B-1 (Feb. 5, 1992). In 1992, the number fell to a new record low of 35. *Work Stoppages: BLS Report Record Low Number of Major Strikes During 1992*, Daily Lab. Rep. (BNA) No. 22, at B-7 (Feb. 4, 1993).

278. One measure of the effectiveness of a strike is the extent to which the union can impede the employer's operations during the strike. See, e.g., Weiler, *supra* note 3, at 389 (explaining that if employer continues operations despite strike, employees lose paychecks, but employer suffers little loss in revenues). One way a union can effectively disrupt an employer's operation is to prevent the employer from obtaining a sufficient quantity of qualified workers. John G. Kilgour, *Can Unions Strike Anymore? The Impact of Recent Supreme Court Decisions*, 41 LAB. L.J. 259, 259 (1990).

279. See, e.g., *Combination of Many Factors Seen Contributing to Decline in Strikes*, Daily Lab. Rep. (BNA) No 62, at C-1 (Apr. 3, 1989).

280. LeRoy, *supra* note 276, at 850-51 (recognizing that no study establishes relationship between employers' growing willingness to employ permanent replacements and the declining strike rate).

that the decreasing effectiveness of strikes can be attributed to a number of causes, including increased capital mobility, automated technology, deregulation, declining union membership, and increased international competition.²⁸¹ It is likely, however, that a perceived increase in the use of permanent replacements is at least a cause of the decline of strikes.²⁸²

The alleged increase in use of permanent replacements and the decline of the strike are not, however, the only reasons that the *Mackay* doctrine has come under escalating attack in the last few years. Organized labor has been declining as a percentage of the workforce in the United States since 1954.²⁸³ The decline has been most pronounced in the private sector.²⁸⁴ It is widely recognized that a number of factors have contributed to the decline of organized labor,²⁸⁵ and *Mackay* is no more than one of those fac-

281. LeRoy, *supra* note 84, at 301-03 (recognizing that increased job mobility, declining unionization, and broader deregulation have undermined right to strike); Pope, *supra* note 221, at 894 n.35 (stating that economists connect the declining power of strikes with "structural features of the emerging postindustrial order such as capital mobility and automated process technology"); *Combination of Many Factors Seen Contributing to Decline in Strikes*, *supra* note 279 (reporting that labor experts cite the following reasons for the decline in strikes: declining power of unions as they lose members, changes in structure of corporate America, increased foreign competition, and use of permanent replacements).

282. LeRoy, *supra* note 276, at 850-51 (stating that employers' increased willingness to hire replacements has affected union decision making).

283. See, e.g., MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES passim* (1987). According to the Bureau of Labor Statistics, the high point of union membership was approximately 1945, when about 35.5% of all nonagricultural workers were members. *Id.* at 10 tbl. 1; *Union Membership: Proportion of Union Members Declines to Low of 15.8 Percent*, Daily Lab. Rep. (BNA) No. 25, at B-1 (Feb. 9, 1993). From that high point, the percentage decreased in the period between 1946-1952, when it reached 32.5%. GOLDFIELD, *supra*, at 10 tbl.1. Union density increased in 1954 to 34.7%, but thereafter has steadily declined. *Id.* During 1990 and 1991, the decline leveled off at 16.1%, but it resumed in 1992 as the percentage fell to 15.8%. *Union Membership: Proportion of Union Members Declines to Low of 15.8 Percent*, *supra*.

284. See *Union Coverage of U.S. Private Workforce Predicted to Fall Below 5 Percent by 2000*, Daily Lab. Rep. (BNA) No. 241, at A-1 (Dec. 18, 1989) (discussing paper by Professors Stephen Bronars and Donald Deere examining the declining percentage of unionized labor in the private sector between 1973 and 1988). From 1973 to 1988, union representation in the private sector fell from 25% to 12%. *Id.* Bronars and Deere predict that, if current trends continue, the percentage will decrease to below 5% by the year 2000. *Id.*

285. Freeman, *supra* note 275, at 164-66 (citing employers' opposition to organization, deregulation of trucking and airlines, and U.S.'s loss of productivity advantage); William B. Gould, IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937, 942 (1986) (citing foreign competition from Japan, Brazil, Korea, and other countries, deregulation, increased use of permanent replacements, and unions' failure to organize in developing industries); LeRoy, *supra* note 276, at 853 (addressing the declining union numbers in particular industries and increased international wage competition); see also YAGER, *supra* note 11, at 63-65 (describing a shift from manufacturing to service, shift of manufacturing to Sunbelt where unions are less popular, growth of white collar jobs, reports of violent and corrupt union activities, increased global competition, deregulation, enactment of federal employment laws since 1960, erosion of state law employment-at-will doctrine,

tors. But the hoary doctrine has become a primary target of efforts to resuscitate the strike and organized labor.²⁸⁶ The escalating attack on *Mackay* is probably due in large part to the perception that it is a cause of decline that can be extirpated by legislation.

In summary, employers may threaten to hire, and perhaps even actually hire, permanent replacements more often today than they did before the 1980s. Even if that is not true, it seems that labor leaders, and perhaps employees, perceive it as so. The *Mackay* doctrine is thus believed to be a cause of the declining effectiveness of strikes and declining union density. Accordingly, many leaders and supporters of organized labor have attempted to rejuvenate the strike and the labor movement by campaigning to overturn *Mackay*.

IV. SIGNIFICANT FUNCTIONS OF THE DISTINCTION BETWEEN ECONOMIC STRIKES AND UNFAIR LABOR PRACTICE STRIKES: REASONS EMPLOYERS SHOULD NOT BE CATEGORICALLY PROHIBITED FROM HIRING PERMANENT REPLACEMENTS

This Article has discussed the risks that the current state of the law under *Mackay* imposes on the parties to labor disputes. Further, it has considered the argument that employers have exacerbated those risks and undermined the right to strike by increasingly threatening to hire, and hiring, permanent replacements. The problems sound a clarion call for modification of the current striker replacement law. Correction of these problems does not require, however, that employers be prohibited from hiring permanent replacements under all circumstances, thus abrogating the principal distinction between economic and ULP strikes. The distinction between the two types of strikes performs important functions in regulating the behavior of the parties to a labor dispute. First, the distinction between the types of

and employers' voluntary improvements in the workplace). After studying a number of factors contributing to union decline, Goldfield selected the following as most significant: "growing offensive of U.S. capitalists" against new union organizing efforts; changes in public policy that increasingly favor employers; and unions' inability and unwillingness to fight the losses in union density and union influence. GOLDFIELD, *supra* note 283, at 231.

286. This Article does not suggest that organized labor has failed to address other causes of declining union density. Some labor leaders, for example, have called for abandonment of the philosophy of spending almost all of the dues collected on servicing existing members and urged unions to embark on aggressive new organizing efforts. See *SEIU Organizing Director Calls for New Strategies for Labor Movement*, Daily Lab. Rep. (BNA) No. 112, at A-1 (June 14, 1993) (discussing speech delivered by Service Employees International Union's organizing director). Moreover, some labor leaders have sought to bolster the waning power of the strike with corporate campaigns, see *supra* note 222, and in-plant strategies, such as work-to-rule tactics, see Marc J. Bloch & Scott A. Moorman, *Working to Rule and Other Alternate Job Actions*, 9 LAB. LAW. 169 *passim* (1993). The resounding success of some corporate campaigns, such as that of the United Steelworkers against Ravenswood Aluminum, see *supra* notes 216-26 and accompanying text, suggests that such actions may do much to revitalize organized labor.

strikes is the most effective deterrent of ULPs by employers. Second, the right to hire permanent replacements during an *economic* strike provides a market check on the bargaining demands of the parties. These functions are worth preserving. A proposal more narrowly tailored than an absolute ban on the hiring of permanent replacements can both alleviate the problems created by the *Mackay* doctrine and preserve the significant functions it performs.

A. *The Distinction Between Economic and Unfair Labor Practice Strikes—The Most Effective Deterrent Against Employers' Unfair Labor Practices*

The current law regarding replacement of strikers permits employers to hire permanent replacements only if a strike is characterized as an economic strike.²⁸⁷ Evidently employers do value the option of hiring permanent replacements; one need look no further than the bitter struggle over the Workplace Fairness Act and its predecessors to know this is true. Many employers never exercise that option nor even threaten to exercise it, but even these employers recognize that retention of the option gives them leverage at the bargaining table.²⁸⁸

To retain the option of hiring permanent replacements, employers must avoid committing ULPs that may result in the Board's characterization of a strike as a ULP strike either from its inception or by conversion. Determination of the type of strike is a minefield for an employer that has engaged in any behavior which might be considered a ULP. The topography of this minefield is briefly described in this and the next two paragraphs.²⁸⁹ The test applied by the Board and the courts for determining whether a strike is a ULP strike is whether a ULP constituted a contributing cause of the strike.²⁹⁰ The test is nebulous and labor-friendly, in that the strike is a ULP strike, even if economic objectives predominate, as long as there is a causal connection between the employer's ULPs and the strike.²⁹¹

287. See *supra* notes 101-10 and accompanying text.

288. Ray, *supra* note 74, at 365.

289. For an extensive treatment of the Board's and courts' standards for determining whether a strike is a ULP or economic strike, see RAY & BARTLE, *supra* note 12, §§ 5.01-.06.

290. E.g., *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989) ("A strike that is caused in whole or in part by an employer's unfair labor practices is an unfair labor practice strike."); see also *General Indus. Employees Union, Local 42, v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991) (stating that a strike is a ULP strike if employer's violations are "contributing cause"); *R & H Coal Co., 309 N.L.R.B. 28, 28* (1992) (finding that employer's commission of ULPs was "contributing cause") (citing *C-Line Express*, 292 N.L.R.B. 638 (1989)). For a discussion of the types of conduct that constitute a ULP, see *supra* note 6.

291. *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990), *cert. denied sub nom. Reichhold Chems., Inc. v. Teamsters Local Union No. 515*, 498 U.S. 1053 (1991); *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1187 (7th Cir. 1990); *NLRB v.*

Even if an employer can avoid the first "mine" by establishing that the strike began as an economic strike, the employer still must be circumspect in its behavior toward the union and employees and avoid committing ULPs during the strike. Otherwise an employer still may lose the right to hire permanent replacements, if the economic strike is converted into a ULP strike. The test applied by the Board and courts to determine whether an economic strike is converted into a ULP strike is no less ambiguous or labor-friendly than the test for determining the initial characterization. A strike is converted if a ULP is a factor—again, not necessarily the principal or sole factor—in prolonging the strike.²⁹² Although it is possible for an employer to take actions that result in the Board's finding that a strike was converted from a ULP strike into an economic strike, the standard applied to such a conversion is even more ambiguous than the foregoing two standards, and the Board and courts have not often found such conversions.²⁹³ That standard inquires whether the employer has "cured"²⁹⁴ the ULP or otherwise removed it as a cause of prolonging the strike.²⁹⁵

Moore Business Forms, Inc., 574 F.2d 835, 840 (5th Cir. 1978). In *Northern Wire*, the employer argued that the strike should be classified as an economic strike because the employer had established that the strike would have been called even in the absence of the ULPs. *Northern Wire*, 887 F.2d at 1319. The court responded that the test is "whether the employees, in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have struck for some other reason." *Id.* at 1319-20.

292. *C-Line Express*, 292 N.L.R.B. 638, 638 (1989). Although the Board usually states the conversion standard as whether a ULP "prolongs" a strike, courts of appeals often state the standard as whether a ULP "aggravates or prolongs" a strike. *E.g.*, *NLRB v. Champ Corp.*, 933 F.2d 688, 694 (9th Cir.), *cert. denied*, 112 S. Ct. 416 (1991); *NLRB v. Jarm Enters.*, 785 F.2d 195, 204 (7th Cir. 1986); *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 275 (8th Cir. 1983). In *Champ Corp.*, the Ninth Circuit, amending its earlier opinion, 913 F.2d 639 (9th Cir. 1990), explained that, although it had in the past stated the standard as whether a strike "'is expanded to include a protest over unfair labor practices,'" the circuit follows the "aggravate or prolong" standard. *Champ Corp.*, 933 F.2d at 694 (citing *NLRB v. Top Mfg. Co.*, 594 F.2d 223, 225 (9th Cir. 1979)). The variations in statement of the conversion standard do not seem to produce divergent results because most courts apparently focus on prolongation.

293. *General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1311-12 (D.C. Cir. 1991) (noting that there are fewer cases finding conversions from ULP to economic strikes than cases finding economic to ULP), *enforcing Mohawk Liqueur Co.*, 300 N.L.R.B. 1075 (1990).

294. To cure its unlawful conduct and thus relieve itself of liability for ULPs, an employer must repudiate the conduct, and the repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," "free from other . . . illegal conduct," and adequately published to the employees. Additionally, the employer must accompany the repudiation with assurances that it will not interfere with the exercise of employees' § 7 rights and thereafter refrain from committing ULPs. *Passavant Mem. Area Hosp.*, 237 N.L.R.B. 138, 138-39 (1978) (quoting *Douglas Division, The Scott & Fetzer Co.*, 228 N.L.R.B. 1016, 1024 (1977)).

295. *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1289 (1993); *Chicago Beef Co.*, 298 N.L.R.B. 1039, 1040 (1990), *enf'd mem.*, 944 F.2d 905 (6th Cir. 1991). The two foregoing cases are examples of cases in which employers unsuccessfully argued that the strikes had been converted from ULP strikes into economic strikes. For cases in which employers prevailed on that argument, see *General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1313 (D.C.

In determining whether a ULP is a contributing cause of a strike or prolongation of a strike, the Board looks to both subjective evidence (how the striking employees characterize their motivation) and objective evidence (the probable impact that the type of ULP would have on reasonable strikers).²⁹⁶ However, the Board does not even examine the subjective evidence for some ULPs, but simply concludes that these ULPs, by their nature, interrupt or burden the bargaining process.²⁹⁷ The Board and some courts have found that an employer's ULPs were a contributing cause of a strike when the employees themselves knew little about the ULPs, but simply ratified the recommendation of their union to call a strike.²⁹⁸ Generally, the Board is more likely to conclude that a strike is a ULP strike if it is called soon after commission of the ULP.²⁹⁹ An employer cannot rest assured, however, that the Board or courts will determine that a strike called long after the employer committed a ULP is not a ULP strike.³⁰⁰ Some commentators believe that the Board uses the initial characterization of the strike and the conversion doctrine to protect the reinstatement rights of employees who have been permanently replaced: "There is some feeling that

Cir. 1991); Trident Seafoods Corp., 244 N.L.R.B. 566, 569-70 (1979), *enforced*, 642 F.2d 1148 (9th Cir. 1981).

296. *E.g.*, Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1080 (1st Cir. 1981); C-Line Express, 292 N.L.R.B. 638, 638 (1989).

297. *E.g.*, C-Line Express, 292 N.L.R.B. at 638. The Board has stated that the "most notable" of these ULPs, which ipso facto result in characterization of a strike as a ULP strike, is unlawful withdrawal of recognition of the employees' bargaining representative. *Id.* For early criticism of the Board's expansion of per se rules regarding conversion, see Frank H. Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice: II*, 49 VA. L. REV. 1297 *passim* (1963).

298. Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 725-26 (D.C. Cir. 1990) (holding that evidence was sufficient to show that strike was a ULP strike when the union president who recommended strike considered employer's insistence on a term in contract unreasonable, and employees, most of whom did not know the specifics of the employer's bargaining position, were ratifying motive for strike of union president by voting to strike), *cert. denied sub nom.* Reichhold Chems., Inc. v. Teamsters Local Union No. 515, 498 U.S. 1053 (1991); R & H Coal Co., 309 N.L.R.B. 28, 28 n.5 (1992) ("[E]vidence shows that . . . employees had little or no role in the decision to strike . . . that the [union] controlled the decision whether and when to strike, and that the [employer's] commission of unfair labor practices was a contributing reason in reaching that decision.").

299. *E.g.*, Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 990 (recognizing the importance of timing by suggesting that a strike which occurs shortly after a ULP is implemented is probably a ULP strike, while a strike that occurs long after is probably an economic strike); see also Burns Motor Freight, Inc., 250 N.L.R.B. 276, 277 (1980) (stating that timing is significant, but not dispositive).

300. Lapham-Hickey Steel Corp. v. NLRB, 904 F.2d 1180, 1187 (7th Cir. 1990) (holding that strike was ULP strike when employees went out seven-and-one-half months after employer declared impasse and implemented final offer); R & H Coal Co., 309 N.L.R.B. 28, 28 (1992) (holding that strike was ULP strike when called 13 months after employer unilaterally changed terms and conditions of employment and explaining delay as strategic decision by union).

when replacements occur, the NLRB may be prone to find some employer violation, a warping of the act stemming directly from *Mackay*.³⁰¹

Amidst the foregoing body of law, employers attempt to preserve the option of hiring permanent replacements. To retain this option, employers must work hard to bargain in good faith with the unions.³⁰² Moreover, the bargaining obligation continues during the strike,³⁰³ so that an employer must closely monitor its bargaining conduct during a strike to avoid converting an economic strike into a ULP strike.³⁰⁴ Because the causal relationship is nebulous, if an employer commits any ULP, it may find in a future Board decision that the strike was a ULP strike.³⁰⁵ If an employer is pristine in its conduct toward a union and its employees, or believes it is clairvoyant, it may predict that the Board will determine, at some time in the future, that a strike by its employees began as an economic strike and remained so for its duration. On the basis of that prediction, the employer may hire permanent replacements and deny the strikers reinstatement when they submit unconditional offers to return to work. If the employer is wrong, it will be liable for back pay and other make-whole relief, and that liability may be quite large.³⁰⁶

This potential liability serves as a disincentive to committing ULPs, particularly during a strike. Yet, the remedies the Board can order for

301. ATLESON, *supra* note 103, at 31-32; see also Stewart, *supra* note 297, at 1323 ("The Board is using the conversion sanction to give the unions an additional advantage in their economic battle with employers; it was meant to remedy unfair labor practices that prolong a strike.").

302. Ray, *supra* note 74, at 372-73. Professor Ray discusses the many types of conduct that may result in the Board's concluding that an employer violated § 8(a)(5) of the Act by failing to bargain in good faith. *Id.* at 376-80; see also RAY & BARTLE, *supra* note 12, § 3.03 (discussing cases distinguishing between lawful "hard bargaining" and unlawful "retaliatory bargaining"); YAGER, *supra* note 11, at 86-87 (discussing the fine distinction between unlawful "surface bargaining" and lawful "hard bargaining").

303. *E.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 490-92 (1959); NLRB v. Remington Rand, Inc., 94 F.2d 862, 870 (2d Cir.), *cert. denied*, 304 U.S. 576, and *cert. denied*, 304 U.S. 585, *reh'g denied*, 304 U.S. 590 (1938). The obligation continues until a union is decertified or the employer withdraws recognition and can establish either that the union no longer has majority status or that the employer has a good faith doubt regarding majority status. For discussion of the difficulty of satisfying the good faith doubt standard, see *supra* notes 165-69 and accompanying text.

304. *E.g.*, YAGER, *supra* note 11, at 88-89.

305. Baird, *supra* note 11, at 12 ("[B]ecause of the Russian roulette nature of NLRB findings, [employers] are very careful to avoid any appearance of unfair labor practices."); Golden, *supra* note 86, at 73-76 (explaining that employers face dual risks in Board's determination—either that strike commenced as ULP strike or that economic strike was converted into ULP strike).

306. See *supra* notes 183-93 and accompanying text. Professor Ray observes that, in light of potentially large liability, it is difficult for an employer to refuse to reinstate strikers and retain replacements unless it is sure that nothing it has done could have been a contributing cause of a ULP strike. Ray, *supra* note 74, at 375.

ULPs, other than back pay, are far from intimidating to employers.³⁰⁷ For an employer's refusal to uphold its statutory duty to bargain in good faith, the most onerous remedy that the Board can impose is ordering the employer to cease and desist from refusing to bargain.³⁰⁸ Thus, the distinction between employers' rights to hire replacements depending on the characterization of the strike is the most effective deterrent against employers' committing ULPs.³⁰⁹ If the distinction were removed by the overruling of *Mackay*, employers would have far less incentive to bargain in good faith with unions and otherwise avoid committing ULPs.³¹⁰ Consequently, labor law without *Mackay* might witness a more severe weakening of organized labor than labor law with *Mackay* ever has.³¹¹

B. The Option to Hire Permanent Replacements During Economic Strikes—A Market Check on the Parties' Estimations of the Value of the Labor Force

Some commentators argue that that employer's option to hire perma-

307. See, e.g., Ray, *supra* note 74, at 380 (asserting that Board's remedies for an employer's failure to bargain in good faith are weak).

308. 29 U.S.C. § 160(c) (1988); Ray, *supra* note 74, at 372.

309. See Ray, *supra* note 74, at 365.

310. See *id.* at 381.; Baird, *supra* note 11, at 12. One response to this is that the NLRA should be amended to provide for more effective remedies, such as punitive monetary awards. Given the ongoing battle over striker replacement legislation, it is reasonable to predict that an amendment providing for more onerous remedies under the Act is unlikely to be enacted. Indeed, this prediction is supported by the failure of the Labor Reform Act of 1977. S. 2467, 95th Cong., 2d Sess. (1978); H.R. 8410, 95th Cong., 1st Sess. (1977). Section 8 of that proposed legislation would have provided for several harsher remedies: a ban, up to a maximum of three years, on government contracts for employers that willfully violated a Board order or court decree enforcing a Board order; double back pay for employees unlawfully discharged during union organizing campaigns or during the period from recognition of the union until a first collective bargaining agreement is reached; and compensation for employees whose employer violates its bargaining duty regarding a first contract. Section 9 would have made preliminary injunctions under § 10(l) of the NLRA, 29 U.S.C. § 160(l) (1988), applicable to discharges during organizing campaigns or during the period from recognition of a union until the parties enter into a first collective bargaining agreement. The House passed the bill on October 6, 1977. 123 CONG. REC. 32,613 (1977). The Senate bill died on the Senate floor due to filibuster. 124 CONG. REC. 18,398, 18,400 (1978).

311. One commentator speculates that a possible unintended consequence of overturning *Mackay* is that employers may consider locking out employees more often, rather than waiting for a strike, when the parties cannot achieve a collective bargaining agreement. Peter G. Nash, *Getting Prepared for the Coming Labor and Employment Law Changes in the 1990s*, in THE SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL INSTITUTE ON LABOR LAW DEVELOPMENTS §§ 4.05[2]-[4] (1992). One advantage of a lockout over a strike, from an employer's perspective, is that the employer chooses the timing of a lockout. *Id.* § 4.05[3]. On the other hand, a disadvantage of lockouts is that employers are permitted to hire only temporary replacements. Harter Equip., Inc., 280 N.L.R.B. 597, 600 (1986), *review denied*, Local 825, Int'l Union of Operating Eng'rs v. NLRB, 829 F.2d 458 (3d Cir. 1987). If employers were absolutely prohibited from hiring permanent replacements during all strikes, a relative disadvantage of the lockout would be removed, and more employers might choose to lock out employees. Nash, *supra*, § 4.05[3].

nent replacements during economic strikes produces efficient results by subjecting the bargaining demands of the parties to the market.³¹² This market check should be available when a strike is called solely to pressure an employer to accede to the union's (and employees') economic demands.³¹³ The question presented to the market is whether the employer or labor is more accurate in its estimation of the value of the labor force.³¹⁴ An employer can seek alternative sources of labor willing to work for the wages it is willing to pay, and the employees can seek alternative sources of employment willing to pay the wages for which they are willing to work.³¹⁵ The offer that an employer can safely make to replacements is the compensation package that the striking employees had or the one offered to the union in bargaining. An employer that offers replacements better terms than those offered the striking employees, or those offered to the union and bargained to impasse, risks committing a ULP.³¹⁶ Thus, if the employer can attract *permanent* replacements sufficient in both quantity and quality,

312. Nash & Mook, *supra* note 86, at 319; *see also* Dolan, *supra* note 86, at 316 (stating that relationship mirrors the marketplace); Westfall, *supra* note 12, at 146 (explaining that *Mackay* doctrine allows parties to test market); *cf.* Estreicher, *supra* note 11, at 287 (positing that employer's attempt to withstand strike imparts information to parties about their positions and their relative bargaining power).

313. One may object to the market check function of the *Mackay* doctrine based on the belief that a purpose of the NLRA was to remove wages of organized workers from market checks. This theory regarding the Act posits that the Act imposes a labor law regime that cartelizes labor markets. *See, e.g.,* Richard A. Posner, *Some Economics of Labor Law*, in *LABOR LAW AND THE EMPLOYMENT MARKET: FOUNDATIONS AND APPLICATIONS* 44, 55, 65-67 (Richard A. Epstein & Jeffrey Paul eds., 1985) (noting, however, that the Act has not been interpreted as fostering cartelization to the fullest extent). Many commentators contend, however, that insulating collective bargaining and union demands from the market was not a purpose of the Act. *See, e.g.,* Cohen & Wachter, *supra* note 86, at 125 (asserting that the NLRA does not seek to insulate unions from nonunion competition in external market); Estreicher, *supra* note 11, at 287 ("[W]hile the law permits a collectivization of the employees' bargaining position, it does not displace market mechanisms for the pricing of goods and services."); Note, *One Strike*, *supra* note 85, at 678 (stating that collective bargaining enables employees to demand market value for labor); William J. Ryan, Recent Development, *Labor Law: Rights of Striking Employees*—Trans World Airlines v. Indep. Fed'n of Flight Attendants, 12 HARV. J.L. & PUB. POL'Y 1098, 1106 (1989) (approving Court's decision for not interpreting NLRA and Railway Labor Act as insulating unions from economic risks of striking).

A second basis on which one may object to the market check is that, even if labor law does not remove wages of organized labor from market competition, it should do so. *See* LeRoy, *supra* note 84, at 304-06 (recognizing that the striker replacement paradigm since passage of the NLRA has been one of combination, but advocating movement to cartelization paradigm).

314. *See* Note, *One Strike*, *supra* note 85, at 680 ("Strikes occur when, because of informational deficiencies, labor and management differ in their estimations of what the labor force is actually worth. Strikes are the tools envisioned by the Act to test the market and decide which estimate is, in fact, correct.") (footnote omitted); *see also* Nash & Mook, *supra* note 86, at 319 (asserting that "free play of economic forces" determines results of strikes).

315. Westfall, *supra* note 12, at 146.

316. *See* RAY & BARTLE, *supra* note 12, § 3.09. Judge Posner observes that if an employer were allowed to offer replacements a high enough wage, above the level paid to the striking

the demands of the union are supracompetitive, and acceding to them probably would produce an inefficient result.³¹⁷ Prohibiting employers from hiring permanent replacements during economic strikes consequently would remove, or at least significantly reduce, the market check and substantially cartelize labor markets.

The banning of permanent replacements would not appear to affect the market check on labor's demands because the employer would retain the option of hiring temporary replacements. The substitute labor pool, however, could be affected; consequently, the market test could be skewed. Professor LeRoy describes the effect on the labor pool from which the employer could hire temporary replacements: "[I]n theory employers would be free to hire from the same pool of substitute labor as before, because the law would place no express limitation on that labor pool. In practice, however, the legal prohibition against hiring *permanent* striker replacements would sharply limit the substitute labor pool."³¹⁸ Professor LeRoy offers, as an example, the responses Caterpillar received to its advertisements for striker replacements. Many of those responding were willing to relocate in order to accept permanent positions, and, according to anecdotal accounts, many were employed in other jobs at the time they responded.³¹⁹ Professor LeRoy reasonably infers that many employed persons who would have accepted a permanent position, would not have quit their jobs to take a temporary position.³²⁰ Thus, he posits that, if an employer were limited to hiring temporary employees, its labor pool would be reduced to local unemployed people and strikers.³²¹ That may be an overstatement; even employed persons might accept temporary positions if the compensation far exceeded that of their current jobs.³²² Nonetheless, Professor LeRoy is correct that

employees, then it would not be necessary to offer "permanent" jobs to attract a sufficient number of replacements. Posner, *supra* note 313, at 53.

317. Nash & Mook, *supra* note 86, at 319; Note, *One Strike*, *supra* note 85, at 681; cf. Cohen & Wachter, *supra* note 86, at 119-20 (asserting that if union struck to obtain or preserve monopoly wage premium, employer would be able to attract sufficient replacements).

318. LeRoy, *supra* note 84, at 305; see also Schatzki, *supra* note 11, at 384 (recognizing that, without *Mackay*, employer would have less flexibility in hiring replacements because many would not leave jobs for positions they would lose at end of strike).

319. LeRoy, *supra* note 84, at 305.

320. *Id.*

321. *Id.* That substitute labor pool may be limited even further because some local unemployed persons may not be willing to cross picket lines and suffer, at a minimum, verbal abuse and sometimes even physical violence. LeRoy, *supra* note 276, at 849; Posner, *supra* note 313, at 54.

322. Cf. Posner, *supra* note 313, at 53 (stating that if employers could offer high enough wages to replacements, promises of permanent status would not be necessary to attract replacements).

struck employers would encounter a different substitute labor pool (than under current law) if they were limited to offering temporary positions.³²³

Professor LeRoy, who advocates the overruling of *MacKay* and the cartelization of labor, concludes that employers requiring skilled workers would be unable to operate during strikes if they were limited to hiring temporary replacements.³²⁴ This conclusion may exaggerate the effects of overturning *MacKay* on most employers. However, Professor LeRoy's argument regarding the diminution of substitute labor pools does demonstrate that, at a minimum, the market check on labor's demands would be substantially diluted.

Although an employer's ability to operate during a strike and the market test of the value of labor are related issues,³²⁵ they are not identical. An employer that offers temporary positions is offering substantially different jobs than those occupied by the striking employees. The employer, consequently, is not subjecting its estimation of the value of its labor force to the market test because a reduced labor pool is considering those offers. An

323. It is difficult to know how much limiting an employer to offering temporary positions (meaning, of course, positions limited to the duration of the strike) would actually alter the substitute labor pool available to the employer. Professor Weiler points out that the best offer that an employer can make to replacements is that it may be able to retain them beyond the duration of the strike. Weiler, *supra* note 3, at 392. The employer cannot promise longer employment because the Board may determine the strike was a ULP strike, or the employer may settle the strike with the union under an agreement requiring reinstatement of the strikers—with discharge of replacements if necessary. *Id.* Thus, Professor Weiler questions how much of a recruiting advantage an employer derives from being able to offer "permanent" status to replacements. *Id.*

This is a difficult question because the answer depends, at least in part, on what the employer says in its advertisement of the replacement positions and what the potential applicants understand from the employer's statements. Some employers will have replacements sign forms using the language from *Belknap, Inc. v. Hale*, 463 U.S. 491, 503 (1983), *see supra* note 206, to create conditional permanent status and to avoid civil liability if they discharge the replacements. For example, Ravenswood Aluminum had its permanent replacements sign such forms. *See supra* note 217. Such language, seemingly, would advise applicants of the precarious nature of the jobs and reduce the substitute pool to roughly the same group that would apply for temporary positions. As Professor Westfall suggests, however, potential replacements may make a material distinction between positions that are certain to end when a strike ends and those that have "the potential for permanency and will not automatically cease when the strike ends." Westfall, *supra* note 12, at 150. Moreover, all employers do not use the *Belknap* language, even when they apparently intend to do so. *See supra* text accompanying notes 210-15. Some employers do not even attempt to equivocate regarding permanent status. Caterpillar, for example, ran advertisements in newspapers for "'permanent employees to replace non-returning striking workers.'" Dine, *supra* note 54; Franklin, *supra* note 54. As discussed above, Caterpillar reported that it was inundated with calls regarding the jobs, and many, according to accounts, were persons employed in other jobs. *See supra* text accompanying notes 54-55. Thus, the variance between the substitute labor pool available when an employer advertises for temporary replacements and that available when it advertises for permanent replacements may depend, in part, on the extent to which the employer dilutes the "permanent" status with qualifiers.

324. LeRoy, *supra* note 84, at 305-06.

325. Note, *One Strike*, *supra* note 85, at 679-80.

employer may choose not to hire from this pool, deeming the applicants to be underqualified. Alternatively, an employer may choose to hire from this pool rather than cease operations during the strike. Notwithstanding its ability to hire temporary replacements from this underqualified pool, an employer may still find it necessary to accede to supracompetitive demands of the union, rather than maintain its bargaining position, because it is unwilling to operate with an inferior substitute labor force for an extended period of time. An employer's bargaining position may consist of terms that would have attracted qualified replacements, which would have enabled the employer to stand its ground on its bargaining position if it had been permitted to offer permanent status. To apply a market test accurately to the conflicting bargaining positions, an employer must be allowed to offer its estimation of labor's value, including jobs not limited to the duration of the strike.³²⁶

What would be the consequences of removing or diluting the market check on labor's demands by banning the hiring of permanent replacements? As Professor LeRoy predicts, striking employees would exercise substantial cartel power in relation to their employers.³²⁷ The extreme prediction is that employees would strike often and would do so no matter how exorbitant their demands.³²⁸ This argument goes too far.³²⁹ Even if the employees could not be permanently replaced for engaging in economic strikes, they would not strike routinely because they would suffer loss of their regular paychecks and benefits while striking.³³⁰

It is reasonable to predict, however, that without the possibility of permanent replacement, unions would, at least, be quicker to call strikes.³³¹ To avoid such strikes and the possibly more difficult (and in some cases impos-

326. See Nash & Mook, *supra* note 86, at 319 (arguing that, if employers are prohibited from hiring permanent replacements, market forces will not operate freely to determine outcome of disputes).

327. LeRoy, *supra* note 84, at 305.

328. Cf. Westfall, *supra* note 12, at 146 (noting that employees could do so without risk of losing their jobs).

329. This prediction of dire consequences from the pro-Mackay camp is similar in its hyperbole to the anti-Mackay camp's description of the effect of the current law—that employers will not bargain in good faith because they can oust unions by hiring permanent replacements. Of course, most employers do not ignore their duty to bargain in good faith because they would commit a ULP. See *supra* Part IV.A. As a consequence, they would have no right to hire permanent replacements and could be subject to substantial make-whole relief if they hired them anyway and refused to reinstate ULP strikers. See *supra* Part II.C.3.

330. E.g., Pollitt, *supra* note 11, at 310; see also WEILER, *supra* note 84, at 129 (describing strike as "two-edged sword" inflicting costs on both employers and employees).

331. Dolan, *supra* note 86, at 317. Employees generally are not "strike happy," and most realize that their economic welfare is interwoven with that of their employer. Kamiat, *supra* note 84, at 43; Pollitt, *supra* note 11, at 310. It does not necessarily follow, however, that such realization will always provide the needed check on excessive demands and accompanying strikes. Westfall, *supra* note 12, at 147.

sible) task of hiring temporary replacements, more employers might abandon their bargaining positions and agree to unions' demands, even if the demands are supracompetitive.³³² In the extreme, such results would cause some employers to curtail operations, relocate assets, or perhaps eventually go out of business³³³—harming employer and employees,³³⁴ the community, and consumers.³³⁵

V. PROPOSALS FOR MODIFYING THE *MACKAY* DOCTRINE—POSSIBILITIES AND PROBLEMS

There have been numerous proposals to modify the *Mackay* doctrine. Many of them were born or resurrected in response to Congress's several attempts to abrogate *Mackay*. This section discusses the different types of proposals and explains the reasons why each inadequately addresses the interests of the parties to a labor dispute.

A. *Proposals That Would Make It an Unfair Labor Practice for an Employer to Hire or Threaten to Hire Permanent Replacements Unless It Can Prove Business Necessity*

A few proposals of this variety appear in academic writings.³³⁶ One such proposal would apply a modified version of the test of *NLRB v. Great Dane Trailers, Inc.*³³⁷ to the hiring of replacements.³³⁸ Under this proposal, an employer would commit a ULP by hiring permanent replacements unless it could bear the burden of proving that it was motivated by business neces-

332. See Nash & Mook, *supra* note 86, at 319-20; Note, *One Strike*, *supra* note 85, at 681.

333. Nash & Mook, *supra* note 86, at 319-20; Note, *One Strike*, *supra* note 85, at 682.

334. Nash & Mook, *supra* note 86, at 319; Note, *One Strike*, *supra* note 85, at 682 (arguing that the burden of inefficiency ultimately is borne by employees).

335. Estreicher, *supra* note 11, at 288 ("[M]anagement usually represents consumer welfare [at the bargaining table].").

336. E.g., Gillespie, *supra* note 85, at 795-97; McDonald, *supra* note 16, at 991-94; Note, *One Strike*, *supra* note 85, at 682-83. Professor Weiler would require such a showing at a minimum. Weiler, *supra* note 3, at 391.

337. 388 U.S. 26 (1967). In *Great Dane Trailers*, the Court distinguished between an employer's discriminatory conduct that is "inherently destructive" of important employee rights, and that which has a "comparatively slight" effect on employee rights. *Id.* at 33-34 (quoting *NLRB v. Brown*, 380 U.S. 278, 287, 289 (1965)). In cases involving both types of conduct, the Court placed the burden of proving "that he was motivated by legitimate [business] objectives" on the employer. *Id.* at 34. In cases involving "inherently destructive conduct," the plaintiff is not required to prove antiunion animus, and the employer can be held liable for a ULP even if the employer proves a business justification. *Id.* In cases involving conduct having a "comparatively slight" impact, the plaintiff must prove antiunion motivation if the employer proves a "legitimate and substantial" business justification. *Id.*

338. Gillespie, *supra* note 85, at 795-97. Under this version of the *Great Dane Trailers* test, the hiring of temporary replacements would be categorized as having a "comparatively slight" adverse effect on employees' rights. *Id.* at 795. The hiring of permanent replacements would be categorized as having an "inherently destructive" effect. *Id.* at 796.

sity—essentially, that there were no alternative methods of continuing its operations and protecting its business.³³⁹ Another proposal would make it a ULP for an employer to hire permanent replacements unless it could satisfy the burden of proving that it could not hire a sufficient quantity and quality of temporary replacements.³⁴⁰ These proposals are similar, but the first type is more stringent from the employer's perspective; it defines "alternatives" more broadly than the second and thus narrows the circumstances under which an employer may hire permanent replacements.

One criticism of these proposals is that they add to the already vague and difficult inquiries used to determine the type of strike and corresponding reinstatement rights of the strikers.³⁴¹ Employers know only too well that Board doctrine changes—and perhaps more importantly, Board membership changes—over time.³⁴² Because of the time delay between the filing of a ULP charge and a final decision by the Board,³⁴³ an employer that made offers of permanent status to replacements, believing that it could satisfy the business necessity test as applied by the Board at that time, may find its chances diminished by the time the Board decides the case.³⁴⁴ If the employer's prediction is incorrect, it must pay potentially large sums of back pay and other make-whole relief.³⁴⁵

My principal objection to this type of proposal is that it relieves no uncertainty regarding the rights of the parties at the critical moment—when the employer either declares that it will hire permanent replacements or actually begins doing so. Indeed, as other commentators have suggested,³⁴⁶ this type of proposal adds one more uncertainty: employer, employees, union, and replacements must guess not only how the Board will characterize the strike, but also whether the Board will find that the employer has satisfied the business necessity test. What is needed in this area of the law is more certainty, not less.

339. *Id.* The proposal would not impose the full force of the *Great Dane Trailers* test on an employer hiring permanent replacements, in that the Board would not be free to impose liability even if the employer succeeded in proving business necessity. *Id.*

340. McDonald, *supra* note 16, at 992; Note, *One Strike*, *supra* note 85, at 682-83.

341. Westfall, *supra* note 12, at 147-48 (contending that a business necessity test would raise a "host of factual issues" and expose employers to potentially huge liability); Zifchak, *supra* note 86, at 65 (arguing that a business necessity test would impose another level of litigation). *But see* Note, *One Strike*, *supra* note 85, at 684-85 (arguing that Westfall overstates the complexity of the inquiry and ignores that a similar inquiry is currently required in the context of sympathy strikes). For discussion of the difficult inquiries under the current state of the law regarding classification of the type of strike, see *supra* text accompanying notes 289-301.

342. Westfall, *supra* note 12, at 148.

343. Zifchak, *supra* note 86, at 65-66; *see also supra* note 92.

344. Westfall, *supra* note 12, at 148.

345. *See supra* notes 183-93 and accompanying text.

346. *See supra* note 341.

B. *Proposals That Would Prohibit an Employer from Hiring Permanent Replacements if the Union Agrees to Submit the Parties' Bargaining Differences to Fact Finding*

Senator Packwood's substitute amendment to S. 55, which was introduced in 1992 after the bill banning the hiring of permanent replacements failed on a first cloture vote, prohibited an employer from hiring permanent replacements under specific circumstances.³⁴⁷ To activate the prohibition, a union, seven days before striking, would be required to notify both the Federal Mediation and Conciliation Service and the employer that it agrees to the formation of a three-member fact-finding panel.³⁴⁸ If the employer did not agree to formation of the panel, the union would be permitted to strike, and the employer would be prohibited from hiring permanent replacements. If the employer agreed to formation of the panel, the collective bargaining agreement would remain in force and the status quo (including no strike and no hiring of permanent replacements) would be maintained for forty-five days, while the panel met to conduct fact finding and recommend resolutions of disputes between the parties. If the union accepted the panel's recommendations and the employer rejected them, the union could strike and the employer would be prohibited from hiring permanent replacements. If neither party agreed or only the employer agreed to accept the panel's recommendations, then the employer would be allowed to hire permanent replacements.³⁴⁹

Labor leaders declared their support for the Packwood amendment before the second cloture vote in the Senate.³⁵⁰ Management representa-

347. 138 CONG. REC. S8056-89 (daily ed. June 11, 1992) (amendments 2047-94 submitted by Sen. Packwood); *Statements and Summaries of Amendment to S. 55 by Sen. Bob Packwood and AFL-CIO President Lane Kirkland*, Daily Lab. Rep. (BNA) No. 114, at E-1 (June 12, 1992); Ray, *supra* note 74, at 370-71. Although Senator Packwood labeled the amendment a compromise on the striker replacement bill, John Irving and other members of a panel assembled by the Alliance to Keep Americans Working stated that the label was a misnomer, since no one in the business community was consulted. *Business Representatives Oppose Packwood Amendment to Striker Bill*, Daily Lab. Rep. (BNA) No. 116, at A-12 (June 16, 1992).

348. The panel would consist of one member chosen by the union, one chosen by the employer, and one jointly chosen. 138 CONG. REC. S8057 (daily ed. June 11, 1992) (amendment 2047 submitted by Sen. Packwood); *Statements and Summaries of Amendment to S. 55 by Sen. Bob Packwood and AFL-CIO President Lane Kirkland*, *supra* note 347, at E-1.

349. 138 CONG. REC. S8056-89 (daily ed. June 11, 1992) (amendments 2047-94 submitted by Sen. Packwood); *Statements and Summaries of Amendment to S. 55 by Sen. Bob Packwood and AFL-CIO President Lane Kirkland*, *supra* note 347; Ray, *supra* note 74, at 370-71.

350. *Statements and Summaries of Amendment to S. 55 by Sen. Bob Packwood and AFL-CIO President Lane Kirkland*, *supra* note 347, at E-1. Although labor leaders supported the Packwood amendment in 1992, they may not be willing to support such compromise legislation in the future. Addressing the AFL-CIO Industrial Union Department's nineteenth constitutional convention, International Brotherhood of Teamsters President Ron Carey said his union would reject any such compromise. *Kirkland Lauds Clinton on Issues Vital to Labor, But Rejects NAFTA*, Daily Lab. Rep. (BNA) No. 56, at A-11 (Mar. 25, 1993). Carey described the Packwood amendment as

tives, in contrast, announced their opposition to the Packwood amendment for a couple of reasons.³⁵¹ First, the proposal would reduce the incentive for the parties to work hard at collective bargaining and to reach agreement, knowing that the panel eventually would resolve the dispute.³⁵² Second, the Packwood proposal would undermine the principle that labor-management disputes should be settled by the parties to the dispute.³⁵³

Management's first objection may be an accurate prediction of the effect of the proposed law. The concern is that the parties would become overdependent on the fact-finding process to resolve their disputes.³⁵⁴ Evidence concerning this "narcotic effect" of fact finding suggests that, over time, parties do rely more on the fact-finding process rather than settling their own disputes.³⁵⁵ An additional reason that fact finding might detract from constructive collective bargaining between the parties—resulting in overuse of the procedure—is described as the "chilling effect" of fact finding; parties may become wary of making their best offers in negotiations prior to third-party intervention because they believe that the third party will recommend a resolution between the stated positions of the parties.³⁵⁶

Regardless of whether the intervention of third-party fact finders would have the foregoing effects on collective bargaining, management's second rationale for opposing the Packwood proposal is stronger. Adjustment of the *Mackay* doctrine does not require infringement upon a basic

"tak[ing] the right to strike and put[ting] the faith of the members in the hands of government." *Id.* UAW Secretary-Treasurer Bill Casstevens echoed Carey's opposition days later while addressing the same convention, saying Democrats made "a mistake" supporting the amendment in 1992. *Unions See Striker Replacement Bill as Beginning of Wider Labor Law Reform*, Daily Lab. Rep. (BNA) No. 221, at A-2 (Nov. 16, 1992). Casstevens said the labor movement should make it clear that it will accept nothing less in the 103d Congress than an absolute ban on the hiring of permanent replacements. *Id.*

351. *Business Representatives Oppose Packwood Amendment to Striker Bill*, *supra* note 347.

352. *Id.*

353. *Id.*

354. A variation on the Packwood proposal seeks to give the parties incentive to reach an agreement themselves, rather than relying on third-party intervention. Roukis & Farid, *supra* note 85, at 89-90. That proposal would require the parties to submit their unresolved issues to advisory arbitration when a strike or lockout occurred. *Id.* at 89. The incentive to avoid resort to arbitration is that mild monetary sanctions would be levied against the parties at the commencement of the hearings—a portion of the employees' wages and the employer's profits or cash flow. *Id.* at 90. The funds would be placed in an interest-earning account and returned if the parties reached an agreement. *Id.* If the parties did not reach an agreement as a result of the hearings, they could resort to self help (strike and permanent replacement), but a portion of the trust fund would not be returned. *Id.*

355. THOMAS A. KOCHAN & HARRY C. KATZ, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 282 (2d ed. 1988).

356. *Id.* at 280.

tenet of collective bargaining.³⁵⁷ Although the Packwood amendment would not require the parties to accept the panel's recommendations, it would create strong incentives to accept them. Such a law would represent a movement toward writing the contract, or at least some of its terms, for the parties.³⁵⁸

C. *Proposals That Would Prohibit an Employer from Hiring or Threatening to Hire Permanent Replacements During a "Cooling-Off" Period for the First Eight to Ten Weeks of a Strike*

Proposals to prohibit an employer from hiring or threatening to hire permanent replacements during a cooling-off period have enjoyed some support in both legislative³⁵⁹ and academic³⁶⁰ forums. Proponents of this type of proposal argue that the cooling-off period provides the employees with job security, while the parties attempt to reach an agreement pursuant to their duty to bargain in good faith.³⁶¹ Such a proposal does not go far enough, however, to alleviate the risks to the parties, and indeed may not have any effect on many strike-and-replacement situations. In many strike situations, employers do not resort to permanent replacements until the strike has lasted for a few months. Consider, for example, the

357. Cf. YAGER, *supra* note 11, at 141-43 (arguing that third-party resolution of disputes is inconsistent with an underlying premise of collective bargaining). The bargaining obligation imposed on the parties by the NLRA is stated as follows:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*

29 U.S.C. § 158(d) (1988) (emphasis added).

358. The Supreme Court has held that the Board does not have the power to order that a party agree to a term in a collective bargaining agreement. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970). A proposal like the Packwood amendment would give a party outside the collective bargaining process considerable input in writing terms of the contract for the parties.

359. H.R. 4552, introduced by Representative Joseph Brennan in 1988, would have prohibited employers from hiring permanent replacements for the first ten weeks of a strike. H.R. 4552, 100th Cong., 2d Sess. (1988). In the 103d Congress, the ten-week prohibition was included in a proposal by Representative Tom Ridge as a substitute amendment to H.R. 5 in June 1993. 139 CONG. REC. H3560 (daily ed. June 15, 1993); *House Approves Bill That Would Ban Permanent Replacement of Economic Strikers*, *supra* note 79. The House defeated the proposed amendment. 139 CONG. REC. H3567-68 (daily ed. June 15, 1993). In the 102d Congress, an eight-week ban was included in a substitute amendment to H.R. 5 introduced by Representative Goodling. 137 CONG. REC. H5565 (daily ed. July 17, 1991).

360. Ray, *supra* note 74, at 399-400.

361. *Id.* at 400; *House Panel Considers Bill to Limit Right to Permanently Replace Strikers*, Daily Lab. Rep. (BNA) No. 136, at A-8 (July 15, 1988).

UAW-Caterpillar dispute, during which Caterpillar did not announce its decision to hire permanent replacements until the strike had lasted more than five months. The cooling-off period would not appear to have much effect on such situations. If an employer weathers the designated period, this proposal leaves it free to hire permanent replacements.³⁶²

The cooling-off period may have negative effects other than mere ineffectiveness. First, there is a substantial chance that either or both of the parties will abuse the cooling-off period. An employer may bargain during that period without attempting to reach an agreement because, in the end, it can still threaten, and perhaps implement, permanent replacement. Second, when agreements are not achieved during that period, unions may file a greater number of section 8(a)(5) ULP charges, alleging that the employer engaged in surface bargaining or otherwise failed to bargain in good faith. Thus, unions may use the cooling-off period as a shield to protect the reinstatement rights of employees³⁶³ and as a sword to gain bargaining leverage.³⁶⁴

The parties may reach an agreement during the cooling-off period, and they may not. If not, the employer still may declare that it will hire permanent replacements, and the union may respond by filing ULP charges and arguing that the strike is a ULP strike. Then the parties are back in the same position as they would be under current law, with no one—not the employer, the union, the striking employees, or potential replacements—knowing at that crucial time whether the law allows the employer to hire permanent replacements.

362. YAGER, *supra* note 11, at 140 (arguing that employers would simply begin hiring permanent replacements with the same consequences to strikers as now exist under *Mackay*). Yager also argues that the cooling-off period would seriously harm many businesses because temporary replacements cannot be hired in most situations. *Id.* at 139-41. Although there undoubtedly are businesses for which that is true (Yager gives as examples businesses that have particular times of the year during which they conduct a disproportionate percentage of their annual business, such as ski resorts and department stores), the problem is overstated. For further discussion of this issue, see *infra* Part VI.B.3.

363. Cf. ATLESON, *supra* note 103, at 28 n.29 ("Many 8(a)(5) refusal-to-bargain cases . . . are fought to protect the status of replaced strikers rather than for the often minimal vindicatory value of a cease-and-desist order.").

364. Similarly, it has been suggested that unions increasingly have used information requests as a basis for unfair labor practices charges and for establishing the characterization of strikes as ULP strikes. Clifford R. Oviatt, Jr., *Recent Developments at the National Labor Relations Board*, 22 STETSON L. REV. 115, 121 (1992).

As it has become more difficult for unions to mount a successful economic strike, unions have turned to other forms of gaining bargaining leverage. One of these is to make extensive information requests that, if not satisfied by the employer, result in the union's filing unfair labor practice charges. Thus, the information request is not only a means of understanding the other side's bargaining position and ferreting out all its nuances, but is increasingly becoming a tactical weapon

Id.

It is certainly possible that constructive bargaining and a significant number of agreements would result from the cooling-off period. But this type of proposal invites opportunistic behavior by the parties and does not provide a means for the parties to ascertain, in time, the one piece of information they need—the type of strike in which the employees are engaging and the corresponding reinstatement rights of the strikers and replacement rights of the employer.

D. Proposals for Expedited Hearings and Board Decisions When an Employer Hires Permanent Replacements or When There Is a Strike

One legislative proposal and at least one academic proposal call for expedited decisions when an employer hires permanent replacements or when there is a strike. Senator Durenberger introduced the Justice for Permanently Displaced Striking Workers Act of 1993³⁶⁵ ("Justice Act") in the Senate on March 17.³⁶⁶ Although the bill does not expressly purport to be a compromise on the permanent replacement issue, it offers some possibility for reaching a compromise. The bill proposes amending the NLRA to require expedited ULP proceedings when "a collective bargaining agreement has expired and a person alleges that a party to a collective bargaining agreement has failed to negotiate in good faith as required by the Act, and where permanent replacements have been hired."³⁶⁷ The Justice Act proposes expedited proceedings under the foregoing circumstances. First, an administrative law judge (ALJ) has sixty days from the issuance of a complaint within which to hold a hearing; the ALJ then has sixty days from the conclusion of the hearing within which to render a decision.³⁶⁸ At that point, the parties have thirty days to file exceptions and briefs with the Board, and the opposing parties have fifteen days to file responsive briefs.³⁶⁹ Finally, the Board has ninety days from the filing of briefs to render a decision and an additional thirty days if oral argument is granted.³⁷⁰ The parties may mutually agree to extensions of these time periods.³⁷¹

The Justice Act is important, regardless of the practicability of its mechanics or the sufficiency of its attempt to address the risks created by the permanent replacement of strikers. It recognizes and seeks to address

365. S. 598, 103d Cong., 1st Sess. (1993).

366. 139 CONG. REC. S3044-46 (daily ed. Mar. 17, 1993).

367. S. 598, 103d Cong., 1st Sess., § 3(a)(2), 139 CONG. REC. S3046 (1993).

368. *Id.* § 3(b)(1), 139 CONG. REC. at S3046.

369. *Id.* § 3(b)(2), 139 CONG. REC. at S3046.

370. *Id.* § 3(b)(3), 139 CONG. REC. at S3046.

371. *Id.* § 3(b)(4), 139 CONG. REC. at S3046.

the critical problem—that delay in the adjudication of ULP charges renders the current system ineffective.³⁷² Others have sounded the message that delay in enforcement of the NLRA results in ineffective remedies and encourages disregard for the law.³⁷³ The Justice Act purports, by speeding up the determination of the strike's characterization, to benefit both permanently replaced strikers and employers who have hired permanent replacements: striking employees get reinstatement and make-whole relief and the employer avoids further accrual of back pay liability if the strike is a ULP strike. This is a laudable objective, but the Justice Act does not fully address the problems raised by permanent replacement.

A principal defect of the proposal, from the perspective of adjusting the *Mackay* doctrine, is that it leaves the threat of permanent replacement in the hands of employers as a strike-breaking weapon. What effect would the Justice Act have had on the UAW-Caterpillar dispute? When Caterpillar issued its ultimatum that it would hire permanent replacements if the strikers did not return to work, would the act have enabled the UAW to maintain the strike? That seems unlikely. The UAW could have told its striking members that it considered the strike a ULP strike, and *if the Board agreed*, under the Justice Act, the employees would get their jobs back and receive back pay more quickly. Would the employees have been willing to stay on strike under those conditions? Probably not. Thus, the threat of permanent replacement would still serve as the trump card to break a strike because the employees risking their jobs would not know their reinstatement rights at the critical moment.

A second proposal that calls for expedited ULP proceedings involves amending section 10(l)³⁷⁴ to require priority investigation of charges alleging certain ULPs when either a strike is in progress or a union has given formal authorization for a strike.³⁷⁵ Under the proposed amendment, a field examiner would conduct an investigation when such a charge is filed, and if the Board found reasonable cause to believe that a "flagrant" ULP had occurred, it would petition a federal court for temporary injunctive relief, as currently mandated by section 10(l) for certain alleged union ULPs.³⁷⁶ If

372. 139 CONG. REC. S3045 (statement of Senator Durenberger asserting that NLRB takes too long to vindicate rights of ULP strikers).

373. E.g., Zifchak, *supra* note 86, at 69; Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 107 (1993) (asserting that delay renders the Board a "paper tiger" in the view of employers).

374. 29 U.S.C. § 160(l) (1988).

375. Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 1007-11.

376. *Id.* at 1009. Section 10(l) currently requires an officer or regional attorney to petition for "appropriate injunctive relief" pending final adjudication by the Board if, after the investigation, the agent has reasonable cause to believe that one of the following ULPs has been committed by a union: secondary activity violating § 8(b)(4), 29 U.S.C. § 158(b)(4) (1988); hot cargo agreements

an injunction against the employer's conduct were obtained, the employees still would strike at their own risk with none of the protections accorded to ULP strikers, since the Board would give priority to its final determination.³⁷⁷ If the Board did not find reasonable cause to believe a flagrant ULP had been committed, then, the proposal suggests, the employees "might be accorded the safeguards presently accruing to unfair labor practice strikers."³⁷⁸

The foregoing proposal is significant for its combination of expedited proceedings with resort to some type of prohibition of the employer's unlawful activities. Nonetheless, it poses several problems. The principal problem is the set of conditions triggering both the expedited proceedings and the Board's efforts to obtain an injunction. The trigger is a strike situation when a flagrant ULP has been alleged. Rather than tolerating the now-existing uncertainty regarding reinstatement rights, unions presumably would invoke this procedure any time they wished to strike and reasonably could claim that a "flagrant" ULP had occurred. Although the proponent of this proposal acknowledges that it could involve considerable cost,³⁷⁹ it is more accurate to predict that the cost would be prohibitive because unions would be well advised to make use of the expedited proceedings whenever they could do so. The second problem with this proposal is that unions would strongly oppose the subjection of employees to permanent replacement if they struck *after* the Board determined that there was probable cause to believe that the employer had committed a flagrant ULP. It would be naive to suggest that most ULP strikes are conducted for the sole purpose of protesting the employer's ULPs, and that a strike would not be needed under this proposal because the Board would expeditiously resolve the ULP charge. The overwhelming majority of strikes also have economic motivations,³⁸⁰ and the employees and union derive added bargaining leverage if the superior reinstatement rights of ULP strikers provide the strikers with some measure of job security. Yet another problem with this proposal is that employers would be equally dismayed with it because, if the Board concluded that there was no reasonable cause to believe that a flagrant ULP had been committed, the employees would be protected as ULP strikers if they chose to strike. Notwithstanding these problems, this proposal suggests a couple of features that should be included in an adjustment of *Mac-*

violating § 8(e), 29 U.S.C. § 158(e) (1988); or recognitional picketing violating § 8(b)(7), 29 U.S.C. § 158(b)(7) (1988).

377. Note, *The Unfair Labor Practice Strike*, *supra* note 85, at 1010.

378. *Id.*

379. *Id.*

380. *E.g.*, Stewart, *supra* note 1, at 1326 ("[A]ll strikes emerge from economic strife between union and employer, and every strike is designed to make the employer give what he would not otherwise concede.").

kay: expedited proceedings and a prohibition of permanent replacement until the characterization of the strike is determined.

Although he does not propose a legislative amendment limiting *MacKay*, one commentator offers another alternative involving expedited proceedings. He suggests that the Board, using its discretionary power to seek injunctions under section 10(j)³⁸¹ of the Act, could have employers enjoined from hiring permanent replacements after a complaint is issued when an employer has engaged in flagrant bad faith bargaining to provoke a strike.³⁸² This suggestion offers a way to curb abuse of the permanent replacement device without amending the NLRA. Although not referring to the prevention of the hiring of permanent replacements, another commentator recently encouraged the Board to expand its use of this "powerful instrument" to assure that delays in ULP proceedings do not frustrate the purposes of the Act.³⁸³

There are several problems, however, with relying on increased resort to section 10(j) injunctions to address the problems of permanent replacement. First, seeking injunctive relief under section 10(j) is discretionary. The regional director must obtain the Board's approval to petition for 10(j) injunctive relief.³⁸⁴ Thus, policies regarding use of 10(j) injunctions to prohibit hiring of permanent replacements might vary among the regions and over time, depending on the composition of the Board. Second, the federal courts apply various standards to petitions for 10(j) injunctions,³⁸⁵ so results may differ among the districts and circuits. Third, because hiring permanent replacements is not itself a ULP under current law, courts might not consistently enjoin such conduct. There should be consistent treatment of all labor disputes involving permanent replacement or the threat of permanent replacement. Reliance on section 10(j) injunctions would not provide that consistency.

381. 29 U.S.C. § 160(j) (1988). As discussed below, petitioning for a § 10(j) injunction is within the Board's discretion, whereas petitioning for a § 10(l) injunction is mandatory if there is good cause to believe a union has committed one of the ULPs enumerated in § 10(l). See *infra* note 384. Also, whereas § 10(l) injunctions are limited to certain ULPs by labor organizations, see *supra* note 376, § 10(j) injunctions can be sought to enjoin any type of ULP.

382. Zifchak, *supra* note 86, at 69-72. William Zifchak suggests that the increased use of § 10(j) should be directed not only against employers; he recommends that the Board should seek § 10(j) injunctive relief against a union engaging in flagrant bad faith bargaining involving "threat of a strike to extort concessions." *Id.* at 70.

383. Morris, *supra* note 373, at 115-23. In the article, Professor Morris develops procedural reforms discussed in his earlier work, Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987) [hereinafter Morris, *The NLRB in the Dog House*].

384. Compare 29 U.S.C. § 160(j) (1988) ("The Board shall have power . . . to petition any United States district court . . .") with *id.* § 160(l) ("[T]he officer or regional attorney . . . shall, on behalf of the Board, petition any United States district court . . .").

385. See 2 THE DEVELOPING LABOR LAW, *supra* note 44, at 1817-21.

VI. A NEW PROPOSAL FOR LIMITING *MACKAY*

The permanent replacement of strikers under *Mackay* should be restricted. Employers should not be prohibited, however, from hiring permanent replacements under all circumstances. The proposal described below attempts to confine *Mackay* in *practice* to its current *theoretical* parameters—economic strikes.

A. *The Proposal*

The principal tenets of this proposal are twofold. First, employers should not be permitted to hire permanent replacements until the characterization of the strike and the corresponding reinstatement rights of the strikers have been determined, thereby reducing the uncertainty under which employers, employees, unions, and potential replacements must act. Second, this determination should be made expeditiously so as to deprive the employer of the permanent replacement option for the shortest possible time, thus minimizing the risk of injury to its business and facilitating speedy resolution of the labor dispute. To implement these two principles, this proposal recommends both a temporary or interim ban on the hiring of permanent replacements until it is determined that the strike is an economic strike and expedited ULP proceedings. In addition, the NLRA should be amended to make it a ULP for an employer to hire permanent replacements before such a determination is made.³⁸⁶ As the following paragraphs demonstrate, there is a tension between the objectives of reducing uncertainty and determining the characterization of the strike expeditiously. To achieve absolute certainty regarding the strikers' reinstatement rights, the proposal would have to forsake any expeditious determination; conversely, the earlier the determination occurs in the sequence of proceedings, the less certain are the parties that the final decision will reach the same conclusion. This proposal chooses among alternative approaches, at several stages, which best accommodate these objectives.

1. Triggering the Interim Ban

Under this proposal, an employer would be required to notify the Board that it intends to hire permanent replacements. If the union contends

386. It is not necessary to amend the Act to make premature threats to hire permanent replacements a ULP. Threats by an employer to engage in unlawful conduct, such as discriminatory discharges and plant closings for the purpose of "chilling" organizing efforts, are considered violations of § 8(a)(1). See, e.g., 1 *THE DEVELOPING LABOR LAW*, *supra* note 44, at 108-15. The potential *in terrorem* effect of threats to hire permanent replacements could be reduced if the Board would promulgate a rule requiring all employers and labor organizations under the Board's jurisdiction to post notices with a general description of rights and obligations under the Act. See Morris, *supra* note 373, app., at 134 (letter from Professor Thomas C. Kohler).

that the strike is a ULP strike, the employer's notification would trigger the interim ban. If the union or the employees have filed ULP charges before the employer's notification and contend that the strike is a ULP strike, the ban would become effective upon the employer's notification to the Board. The union and employees would have a short period of time after the employer's notification to file ULP charges and notify the Board that they consider the strike a ULP strike.³⁸⁷ Requiring the employer to notify the Board and using that as the trigger for the ban eliminates the possibility of (lawful) unannounced hirings. Of course, employers might hire permanent replacements without notifying the Board in violation of the law. Such unlawful conduct could be addressed through the Board's use of section 10(j) petitions for injunctions. Because petitioning for an injunction under section 10(j) is discretionary, however, the better approach would be to amend section 10(l) to include the premature hiring of permanent replacements as a ULP that requires the regional office to petition for an injunction.³⁸⁸

An alternative approach would make the union's announcement of its intention to strike the trigger mechanism, but this approach is unsatisfactory for several reasons. First, it is more efficient and economical to place the trigger mechanism in the employer's hands because threats of strikes and actual strikes occur more often than threats of permanent replacement and actual hiring of permanent replacements. In most strikes, the employer will never threaten to hire replacements, so it would be overkill to invoke the interim ban and expedited proceedings each time a strike is called. Second, the employees are not in immediate danger of permanent replacement (if, as under this proposal, the employer is required to notify the Board of its intention to hire permanent replacements) at the beginning of a strike, and thus do not need to know their reinstatement rights at the inception of every strike. Finally, knowing that it will give up the valued option to hire permanent replacements and the concomitant bargaining leverage—at least during the interim ban and perhaps beyond—an employer will be reluctant to in-

387. Although allowing the filing of charges to trigger the interim ban on hiring permanent replacements after the employer's notification may encourage spurious charges, the alternative of not allowing a short time for post-notification filing presents a greater problem. If no post-notification filing could trigger the interim ban, the employer might file the notification early in the strike, before the union filed ULP charges, thus avoiding the ban and expedited proceedings.

Additionally, unions and employees should be precluded from relying on any pre-notification conduct of the employer as a cause of a ULP strike if they fail to file a charge regarding that conduct either before the employer's notification or during the period allowed for post-notification filing. Cf. Stewart, *supra* note 1, at 1330-31 (arguing that the Board should refuse to apply the conversion doctrine if an employer asks a union why it is striking and the union refuses to declare its reason). If the law were otherwise, the proposal would do little to reduce an employer's uncertainty regarding its right to hire permanent replacements.

388. For discussion of ULPs to which § 10(l) injunctions are applicable, see *supra* note 376.

voke these procedures if it can operate by other means during a strike. Thus, the interim ban on hiring permanent replacements and the expedited ULP proceedings should be triggered by an employer's notification to the Board that it intends to hire permanent replacements rather than by a union's announcement of a strike.

2. Lifting or Extending the Interim Ban

The interim ban should be accompanied by legislatively mandated expedited ULP proceedings.³⁸⁹ Furthermore, the ban should be lifted or extended depending on the determination of the type of strike. This aspect of the proposal raises a question: Which determination in the proceedings results in a lifting or extension of the ban? Before addressing that issue, a thumbnail sketch of the relevant ULP proceedings is necessary.³⁹⁰

When a ULP charge is filed with a regional office of the NLRB, a Board agent conducts an investigation to determine whether a charge has merit and a complaint should be issued.³⁹¹ If the investigation reveals that the charge is without merit, the regional director recommends that the charge be voluntarily withdrawn by the charging party.³⁹² If the charge is not withdrawn by the charging party, the regional director dismisses the charge.³⁹³ If, on the other hand, the investigation reveals that a charge has merit, the regional office generally attempts to give the parties an opportunity to submit evidence, arguments, and offers of settlement, in an effort to resolve the case without issuing a complaint.³⁹⁴ If a case is not settled, the

389. For discussion of the timetable for proceedings, see *infra* Part VI.A.3.

390. For a more extensive treatment of ULP proceedings, see JEFFREY A. NORRIS & MICHAEL J. SHERSHIN, JR., *HOW TO TAKE A CASE BEFORE THE NLRB* pt. 3 (6th ed. 1992).

391. NLRB Statements of Procedures, 29 C.F.R. § 101.4 (1993); NORRIS & SHERSHIN, *supra* note 390, § 12.10. A major component of an investigation is the Board agents' interviews with parties and witnesses. 1 NLRB, CASEHANDLING MANUAL: UNFAIR LABOR PRACTICE PROCEEDINGS ¶ 10056 (1989) [hereinafter NLRB, CASEHANDLING MANUAL]. For an insightful discussion of the investigation, see Matthew M. Franckiewicz, *How to Win NLRB Cases: Tips from a Former Insider*, 44 LAB. L.J. 40 *passim* (1993).

392. NLRB Statements of Procedures, 29 C.F.R. § 101.5 (1993); NORRIS & SHERSHIN, *supra* note 390, § 12.11.

393. NLRB Statements of Procedures, 29 C.F.R. § 101.6 (1993); NORRIS & SHERSHIN, *supra* note 390, § 12.12. The charging party may appeal this decision to the General Counsel. NLRB Statements of Procedures, 29 C.F.R. § 101.6 (1993).

394. NLRB Statements of Procedures, 29 C.F.R. § 101.7 (1993); NORRIS & SHERSHIN, *supra* note 390, ch. 14; 1 NLRB, CASEHANDLING MANUAL, *supra* note 391, ¶ 10126.2 (detailing steps that should be taken to reach settlement after determination is made to issue complaint and recognizing that experience has shown this is "critical and fruitful" stage for settlement). Although the ultimate decision on issuance of a complaint or dismissal of a charge rests with the regional director, the parties are first advised of the investigating agent's recommendation to the regional director. Franckiewicz, *supra* note 391, at 43. The agent's supervisor authorizes the agent to communicate to the parties the recommendation that will be made to the regional director. *Id.* If the agent is not successful in obtaining a withdrawal or settlement, the case is "agendae" and

regional director, on behalf of the General Counsel, issues a complaint and serves it on the parties.³⁹⁵ The respondent has fourteen days from service of the complaint to file an answer.³⁹⁶ An ALJ then conducts a hearing and renders a decision.³⁹⁷ If the ALJ renders a decision adverse to the party against whom the complaint was issued, that party may voluntarily comply with the decision.³⁹⁸ Parties may file exceptions (and cross-exceptions) to the decision of the ALJ and supporting briefs with the NLRB; parties may also file briefs in support of the ALJ's decision, as well as reply briefs.³⁹⁹ If exceptions are not filed within the time allowed, the decision of the ALJ becomes the decision of the Board.⁴⁰⁰

In cases in which exceptions are filed, the Board typically delegates decision-making authority to three-member panels as authorized by statute,⁴⁰¹ although the full five-member Board may review cases that establish or change policy.⁴⁰² The Board, in deciding a case, may adopt, reject, or modify the findings and conclusions in an ALJ's decision.⁴⁰³ Board orders are not self-enforcing; hence, the Board may petition to have its order enforced by an appropriate United States Court of Appeals.⁴⁰⁴ A party aggrieved by a Board order also may petition an appropriate court of appeals for review of the order.⁴⁰⁵ Finally, decisions of the courts of appeals either enforcing Board orders or denying enforcement are subject to review by the Supreme Court upon certification or the granting of a writ of certiorari.⁴⁰⁶

Considering the framework of ULP proceedings, at what stage of the proceedings should a decision be made to lift or extend the interim ban on the hiring of permanent replacements under this proposal? To eliminate wholly the parties' uncertainty regarding the characterization of the strike and the strikers' reinstatement rights, one would propose that the ban

reviewed by the regional committee. *Id.* The regional director may or may not attend the agenda; regardless, the case must be reviewed with the regional director before he issues a complaint or dismisses the case. *Id.*

395. NLRB Rules and Regulations, 29 C.F.R. § 102.15 (1993); NORRIS & SHERSHIN, *supra* note 390, at 379.

396. NLRB Rules and Regulations, 29 C.F.R. § 102.20 (1993); NORRIS & SHERSHIN, *supra* note 390, § 15.6.

397. NLRB Rules and Regulations, 29 C.F.R. §§ 102.34-.45 (1993); NORRIS & SHERSHIN, *supra* note 390, §§ 16.1-.21.

398. NORRIS & SHERSHIN, *supra* note 390, § 17.2.

399. NLRB Rules and Regulations, 29 C.F.R. § 102.46 (1993); NORRIS & SHERSHIN, *supra* note 390, §§ 17.4-.8.

400. NLRB Rules and Regulations, 29 C.F.R. § 102.48(a) (1993); NORRIS & SHERSHIN, *supra* note 390, § 17.2.

401. 29 U.S.C. § 153(b) (1988).

402. NORRIS & SHERSHIN, *supra* note 390, § 17.10.

403. *Id.* § 17.11.

404. 29 U.S.C. § 160(e) (1988).

405. *Id.* § 160(f).

406. *Id.* § 160(e).

should continue until the last tribunal to consider the case has rendered a decision. However, such a proposal would abandon the goal of a speedy determination for lifting or extending the ban. Furthermore, there probably is not a meaningful distinction between a long interim ban and an absolute prohibition on hiring permanent replacements. For some employers, such a long ban might damage the business severely. Furthermore, some employers might abandon reasonable bargaining positions rather than attempt to endure such a long ban. Consequently, this proposal strikes a balance between the competing objectives of speed and certainty. Under this proposal, the continuation of the ban would be determined at each of the following stages: the regional director's decision whether to issue a complaint; the ALJ's decision; and the Board's decision. Additionally, if the determination is made to lift the ban at any stage of the proceedings, the striking employees should be given a short period of time—no longer than a week—in which to make offers to return to work before the ban is lifted. The recommendation that the Board's decision be determinative of the ban is unremarkable; however, the recommendation that the two earlier stages also be treated as determinative merits discussion.

Initially, if the regional director does not issue a complaint alleging a ULP strike,⁴⁰⁷ the interim ban should be lifted; conversely, if the regional director does issue such a complaint, the ban should be extended. One might argue that the ban should not be lifted at this stage because a regional director's decision not to issue a complaint can be appealed to the General Counsel.⁴⁰⁸ Thus, if an appeal is filed, an alternative approach would be to extend the ban, notwithstanding the regional director's dismissal of the charge, until the General Counsel's office decides the appeal. That alternative should be rejected because it could result in extension of the interim ban for a couple of months or more.⁴⁰⁹ In the attempt to balance adequately the goals of certainty and expeditious determination, this issue should be resolved in favor of speed because little is lost in certainty. The General

407. In cases involving a strike and the filing of a ULP charge alleging a ULP strike, the General Counsel is to "plead [in the complaint] and litigate the nature of the strike in addition to the primary unfair labor practice issue." 1 NLRB, CASEHANDLING MANUAL, *supra* note 391, ¶ 10266.1. The General Counsel also must seek a Board order requiring reinstatement of strikers if the complaint alleges that the strike began as, or was converted to, a ULP strike. *Id.* The complaint must contain specific details regarding the acts causing the ULP strike. *Id.*

408. NLRB Statements of Procedures, 29 C.F.R. § 101.6 (1993).

409. The following time allowances under the appeal procedure indicate how long an appeal may remain pending: from service of notice of a regional director's decision not to issue a complaint, a charging party has 14 days to file an appeal, NLRB Rules and Regulations, 29 C.F.R. § 102.19(a) (1993); extensions may be granted for filing appeals, *id.*; oral argument may be granted, *id.* § 102.19(b); and a motion for reconsideration of the General Counsel's decision may be filed within 14 days of service of the decision, *id.* § 102.19(c). In addition to these time periods, there is the time from the filing of an appeal to the General Counsel's rendering of a decision.

Counsel reverses the regional directors' decisions not to issue complaints in only a small percentage of cases, so an appeal should not result in an extension of the ban.⁴¹⁰

If the regional director issues a complaint alleging a ULP strike and the interim ban is extended, few cases would advance to hearings before ALJs because most would settle.⁴¹¹ In those cases that did proceed, if the ALJ determines that the strike is an economic strike the ban should be lifted; conversely, if the ALJ determines that the strike is a ULP strike, the interim ban should be extended until the Board renders a decision. One might argue that the ban should not be lifted at this stage because the Board may reverse the ALJ's decision as to the characterization of the strike. An alternative approach would be to extend the ban at this stage, even when the ALJ finds the strike is economic, if the General Counsel files exceptions to the ALJ's decision. Again, this alternative should be rejected because it does not represent a proper balancing of the objectives of certainty and expeditious determination. First, the delay occasioned by extending the ban until the Board's decision would be substantial, effectively rendering the interim ban permanent.⁴¹² Even if the Board were required to comply with the timetable proposed in the Justice for Permanently Displaced Striking

410. In fiscal year 1991, the General Counsel's Office of Appeals decided 3,648 appeals and reversed only 3.5% of the cases. *NLRB General Counsel's Summary of Fiscal Year 1991 Operations*, Daily Lab. Rep. (BNA) No. 189, at D-1 (Sept. 29, 1992). The reversal rate in fiscal year 1990 was 2%. *Id.*

411. Statistics compiled by the General Counsel establish that the issuance of a complaint, which occurs in only a small percentage of meritorious cases, is a very reliable indicator that an employer will be found to have committed a ULP. Regional directors determined that formal proceedings were warranted for only 36.1% of the ULP cases in fiscal year 1991 and only 35.4% of the cases in fiscal year 1990. *NLRB General Counsel's Summary of Fiscal Year 1991 Operations*, *supra* note 410. This percentage, called the "merit factor," has been between 31% and 36% over the years. *Id.* Regional directors actually issue complaints in only a small percentage of cases in which they determine that the ULP charges are meritorious because most such cases settle. For example, in fiscal year 1991, 93.2% of the meritorious cases settled, and in fiscal year 1990, 91.5% settled. *Id.* It is likely that even a higher percentage of cases would settle if the ban on hiring permanent replacements were extended based on issuance of a complaint.

Arguably, employers should not have such pressure applied to them to settle cases before the formal hearings in front of ALJs. The General Counsel's success rate in cases before ALJs and the Board suggests, however, that employers are well advised to settle cases in which complaints are issued. The General Counsel won "in whole or in part" 84.8% of the Board and ALJ decisions in fiscal year 1991, and 83.4% in fiscal year 1990. *Id.*; see also Franckiewicz, *supra* note 391, at 41 ("[W]hether a party wins or loses at the NLRB is essentially determined by whether or not the regional director decides to issue a complaint."). Moreover, a high percentage of the Board's decisions are enforced by the federal courts. The Appellate Court Branch of the General Counsel won, "in whole or in part," 86.5% of the cases decided by the Courts of Appeals in fiscal year 1991 and 88.8% in fiscal year 1990. *Id.*

412. For discussion of the delay from the time of the ALJ's decision to the Board's decision, see *infra* text accompanying note 424.

Workers Act,⁴¹³ the interim ban could extend for a year or more from the filing of a ULP charge to the rendering of a decision by the Board.⁴¹⁴ Second, the certainty of the parties regarding the ultimate decision would not be substantially diminished by making the ALJ's decision determinative of the status of the interim ban. Decisions by ALJs are usually adopted by the Board or adopted with some modifications. Although an ALJ's findings and recommendations are not binding on the Board, and the Board bases its findings of fact upon a de novo review of the entire record, it is rare for the Board to overrule credibility determinations by an ALJ who listened to the testimony and observed the witnesses.⁴¹⁵

Notwithstanding the possibility of reversal if a ban is lifted at the first stage or the second stage under this proposal, the affected parties will be in a better position to make decisions than they are under current law. At the first stage, if a regional director dismisses a ULP charge, the case is over unless the General Counsel reverses the regional director's decision. The employer is permitted to hire permanent replacements, and the striking employees know that they must either return to work or risk not being reinstated immediately in their jobs. Alternatively, if the regional director issues a complaint, the employer continues to be prohibited from hiring permanent replacements, and the striking employees know that they do not risk losing their right to immediate reinstatement by continuing to strike.

At the second stage, if the ALJ determines that the strike is an economic strike, the employer is permitted to hire permanent replacements, and the strikers know that they must return to work or risk losing their jobs. The employer still faces the risk that, if it hires permanent replacements, the

413. S. 598, 103d Cong., 1st Sess. (1993). For discussion of the bill, see *supra* notes 365-73 and accompanying text.

414. The timetable in the Justice Act is not inclusive of all periods in the proceedings, but § 3(b) of the act does set forth the maximum periods for many of the stages. See *supra* notes 368-71 and accompanying text. The sum of those maximum allowances is 285 days. The median time for issuance of complaints, a matter not regulated by the bill, was 46 days in 1991 and 45 days in 1990. *NLRB General Counsel's Summary of Fiscal Year 1991 Operations*, *supra* note 410. Additionally, the Justice Act would not regulate the number of days for the hearing or the number of days the parties are allowed to submit post-hearing briefs to the ALJ. Thus, the time from the filing of a ULP charge to Board decision under the timetable in the Justice Act could be approximately one year.

415. *Standard Dry Wall Prods.*, 91 N.L.R.B. 544, 545 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951). Anyone who reads many decisions of the NLRB becomes accustomed to seeing the following footnote:

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

E.g., *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1286 n.2 (1993).

Board may reverse the ALJ and order the employer to reinstate the strikers and discharge replacements if necessary. For several reasons, however, that uncertainty should not seriously hinder an employer's ability to choose a course of action. First, the chance that the Board will reverse the ALJ's determination is small. Second, because the employer will not have hired permanent replacements prior to this stage and the Board's decision will be rendered according to a legislatively mandated expedited schedule, any make-whole relief ordered by the Board (if it reverses the ALJ) will be relatively small compared to such liabilities under current law. Third, the employer may not find it necessary to hire many, if any, permanent replacements, because many strikers will return to work rather than risk losing their right to immediate reinstatement. Alternatively, if the ALJ determines that the strike is a ULP strike, the employer continues to be prohibited from hiring permanent replacements, and the employees can remain on strike without the fear of losing their jobs to replacements.

Thus, determining the status of the interim ban when the regional director decides whether to issue a complaint, and, if the case proceeds, when the ALJ renders a decision, accomplishes the dual objectives of this proposal. The foregoing approach reduces uncertainty and determines the status of the ban expeditiously.

3. Expedited Unfair Labor Practice Proceedings

An interim ban on the hiring of permanent replacements creates an increasingly greater risk of harm to the employer's business the longer it lasts. This proposal therefore requires expedited ULP proceedings at all stages. The timetable for the ULP proceedings should be as fast as practicable without sacrificing the thoroughness and quality of the investigations, hearings, and decisions. In order to require such case handling, section 10 of the Act should be amended to provide that no type of ULP case takes priority over cases involving a strike and an employer's notification of its intent to hire permanent replacements.⁴¹⁶

Consideration of the time now required for a decision at each stage indicates the extent to which each should be expedited. At the first stage at which the interim ban could be lifted under this proposal, the regional of-

416. Under current law, ULP charges alleging union violations of §§ 8(b)(4)(A)-(C), 8(e), and 8(b)(7) are given priority over other types of charges. 29 U.S.C. § 160(l) (1988). Strike-and-replacement cases should be accorded the same priority. At a minimum, the Act should be amended to give strike-and-replacement cases second priority under § 10(m), 29 U.S.C. § 160(m) (1988). Section 10(m) currently gives § 8(a)(3) and § 8(b)(2) cases priority over other types of ULP cases, other than those listed in § 10(l). The proposed Justice for Permanently Displaced Striking Workers Act of 1993, S. 598, 103d Cong., 1st Sess. (1993), would amend § 10(m) by adding § 8(a)(5) and § 8(b)(3) ULP charges. See 139 CONG. REC. S3044 (daily ed. Mar. 17, 1993).

fices' recent record on handling charges, from filing of the charge through issuance of the complaint, does not seem to impose an onerous burden on employers. The median time for issuance of complaints in fiscal year 1991 was forty-six days.⁴¹⁷ Although this stage should be expedited if feasible, it is not the stage at which a substantial lapse of time occurs.⁴¹⁸

In contrast, the second stage at which the interim ban could be lifted, the rendering of the ALJ's decision, must be expedited. In fiscal year 1990, the median time from filing of a ULP charge to decision by an ALJ was 357 days, including a median of 154 days from the issuance of a complaint to the close of a hearing and a median of 155 days from the close of a hearing to the issuance of an ALJ's decision.⁴¹⁹ One could argue that substantial delay at this stage is not as significant as it would be at the first stage; only a small percentage of ULP cases proceed to an ALJ decision, and a substantial majority of those result in a finding that the employers committed ULPs.⁴²⁰ In short, because most ALJ decisions would not result in lifting of the interim ban, the long delay at the second stage is less important than the delay at the first stage. Those facts notwithstanding, some employers who would succeed in having the interim ban lifted as a result of an ALJ's decision could suffer severe harm to their businesses as a result of the ban lasting a year.

The timetable for adjudication proposed in section 3(b) of the Justice Act provides some guidance for establishing constraints on the second stage in expedited proceedings: a maximum of sixty days from issuance of complaint to hearing before an ALJ⁴²¹ and a maximum of sixty days from completion of hearing and submission of posthearing briefs to the ALJ's decision.⁴²² Although these proposed time constraints would help expedite proceedings for the period from issuance of the complaint to an ALJ's decision, even they should be tightened if practicable.⁴²³

417. *NLRB General Counsel's Summary of Fiscal Year 1991 Operations*, *supra* note 410. In fiscal year 1990, the median time from charge to complaint was 45 days. *Id.* The Board's time goal from the filing of a charge to implementation of the regional director's decision is 45 days. 1 NLRB, CASEHANDLING MANUAL, *supra* note 391, ¶ 10051.

418. *Cf.* Morris, *supra* note 373, at 127. In evaluating the NLRB's published statistics for fiscal year 1990, Professor Morris observed as follows: "[T]he median time for obtaining an ALJ's decision from the filing of the charges to the issuance of the decision is one year, or more specifically, 357 days. Almost all of that time—309 days—occurs following the issuance of the complaint." *Id.* (footnote omitted).

419. 55 NLRB ANN. REP., *supra* note 6, at 196 tbl. 23 (1992).

420. *See supra* note 411.

421. This allowance exceeds the NLRB's time target of 45 days. 1 NLRB CASEHANDLING MANUAL, *supra* note 391, ¶ 10051.

422. *See* S. 598, 103d Cong., 1st Sess., § 3(b), 139 CONG. REC. S598, S3045 (daily ed. Mar. 17, 1993) (statement by Sen. Durenberger).

423. Professor Morris has suggested a reorganization of the ALJs' operations that also could expedite this stage of the proceedings. His proposal consists of the following changes: (1) as-

The third stage at which the ban could be lifted, the Board's decision, also must be expedited. In fiscal year 1990, the median number of days between the issuance of an ALJ's decision and the issuance of the Board's decision was 314 days, making the median number of days from filing a charge to issuance of a Board decision 671 days.⁴²⁴ Again, the timetable in the Justice Act suggests time constraints at the Board stage of the proceedings: a maximum of thirty days for the filing of exceptions and briefs in opposition to the ALJ's decision; a maximum of fifteen days for the filing of reply briefs; and a maximum of ninety days from the filing of briefs to the Board's decision, with a maximum of thirty additional days if oral argument is scheduled.⁴²⁵ It may be difficult to impose tighter constraints on the Board than those provided in the Justice Act. Streamlining the procedures for handling cases involving an interim ban, however, offers some possibility for further expediting Board decisions.⁴²⁶

B. Potential Problems With the Proposal

1. Cost

The first objection may be that implementing this proposal will be costly. There certainly are expenses associated with establishing and utilizing the proposal described above. On this objection, for the time being, the response of a commentator who proposed a business necessity amendment will suffice:

Unquestionably, the administration of such a scheme would impose costs. However, it must be remembered that employers do not resort to hiring permanent replacement workers all that often, and thus the number of disputes is not likely to be great.

signing ALJs to cases immediately after complaints issue and having the assigned ALJ handle all motions and rulings for each case; (2) giving ALJs authority to act upon all motions, and encouraging prehearing conferences and motion practice (including discovery and summary judgment and partial summary judgment); and (3) further decentralizing the ALJs' home-base locations by assigning them to major metropolitan areas. Morris, *The NLRB in the Dog House*, *supra* note 383, at 46-47; Morris, *supra* note 373, at 127-29.

The Acting General Counsel recently outlined some administrative changes being considered to reduce delay, which could be implemented without statutory amendment. *NLRB General Counsel Outlines Possible Changes for Labor Board To Better Meet Statutory Goals*, Daily Lab. Rep. (BNA) No. 14, at A-13 (Jan. 24, 1994). Among those changes is a "fast-track" proceeding system for ULP cases in which there is a need for immediate relief. *Id.* This system would represent a departure from the current "first-in, first-out" approach. *Id.*

424. 55 NLRB ANN. REP., *supra* note 6, at 196 tbl. 23.

425. See 139 CONG. REC. S598, S3045 (daily ed. Mar. 17, 1993).

426. One of Professor Morris's recommendations for expediting § 10(j) injunction cases might also result in faster Board decisions in cases involving interim bans: maintaining a stand-by three-member Board panel, with one member assigned primary responsibility for this special docket. Morris, *The NLRB in the Dog House*, *supra* note 383, at 45-46; Morris, *supra* note 373, at 122.

Furthermore, both of the extreme rules have costs of their own [T]he prudent course is to avoid the risks of either extreme.⁴²⁷

As a final note on cost, it is reasonable to expect that resort to permanent replacements would be even less frequent under this proposal than under the current law.⁴²⁸

2. Conversion of the Strike

Another potential problem with this proposal is the changing nature of some strikes. A strike may start as an economic strike, then convert into a ULP strike (or vice versa), and then even be reconverted.⁴²⁹ How can this proposal capture a moment in time to determine the type of strike and the corresponding reinstatement rights of the strikers?

First, consider possible conversion after the interim ban is lifted. If it is determined that the strike is economic and that the employer is permitted to hire permanent replacements, that will, in many cases, end the strike, and there will be no subsequent conversion.⁴³⁰ If the strike continues after the interim ban is lifted, however, the employer's reliance on the characterization of the strike is unlikely to be frustrated by a subsequent conversion. If the employer hires a full complement of permanent replacements soon after the interim ban is lifted and the strike is converted thereafter, the striking employees would not have a right of immediate reinstatement because they were economic strikers when the replacements were hired.⁴³¹

Second, consider possible conversion during the period of the interim ban on the hiring of permanent replacements, which lasts from the employer's notification of its intention to hire permanent replacements to the lifting of the ban. It is certainly possible that, while the ULP proceedings are being conducted, a union may file new ULP charges, alleging that the employer has committed ULPs during this period. These ULPs could convert the strike even if the regional director, the ALJ, or the Board deter-

427. Note, *One Strike*, *supra* note 85, at 685.

428. A large majority of ULP cases settle before proceeding to a hearing before an ALJ. *See supra* note 411. Thus, one might reason that if employers could operate their businesses by other means, they would be reluctant to notify the Board of their intention to hire permanent replacements and thus initiate NLRB proceedings.

429. *See supra* notes 292-95 and accompanying text.

430. For examples of strikes that ended when employers threatened to hire permanent replacements, consider the UAW strike of Caterpillar, discussed in the Prologue *supra*, and the UAW strike of Peterbilt, discussed *supra* note 261. For general discussion of the effect of threatening to hire and of hiring permanent replacements on strikes, see *supra* Part III.

431. *E.g.*, *C-Line Express*, 292 N.L.R.B. 638, 639 (1989). If the union contends that the strike was converted by a ULP committed between the lifting of the interim ban and the hiring of permanent replacements, that filing should not trigger a new ban and expedited proceedings. Such a filing should be treated in the same manner as ULP charges filed during the interim ban.

mines that the strike was an economic strike immediately prior to the commencement of the investigation. This possibility raises the question of how these new charges affect the already-commenced expedited proceedings and the ban on the employer's hiring of permanent replacements. In short, charges filed during the interim ban would not trigger a new interim ban and a second set of expedited hearings. Such a situation would be completely unworkable; if that were allowed, unions could frustrate employers' efforts entirely by filing new ULP charges and alleging a conversion during each set of expedited proceedings. This would achieve, in effect, a permanent prohibition on hiring permanent replacements at considerable administrative cost.

To account for the possibility of meritorious ULP charges during the interim ban, however, an accommodation can be made at the first stage of the proceedings because that would be the most important stage for lifting or extending the ban. Under some circumstances, a regional director should be permitted to extend the interim ban once for a short period, not to exceed twenty days, to supplement an already-conducted investigation or to hold meetings with the parties regarding new ULP charges. This extension should only be granted, however, upon submission of substantial evidence supporting the contention that a strike has been converted; a mere filing of a ULP charge including an allegation of conversion should not be sufficient. Corresponding rules should apply to an employer's contention that a strike was converted from ULP into economic during the interim ban; new expedited proceedings would not be commenced to determine whether a conversion occurred.

Thus, ULP charges and allegations of conversion during the interim ban would not invoke a new ban and expedited proceedings. Consequently, a scenario is possible in which the parties are uncertain regarding the outcome of new charges and therefore do not conclusively know the reinstatement rights of the striking employees if the interim ban is lifted. This problem would have significance only if the ban were lifted. The union would contend that the new ULP charges converted the strike and the strikers now had rights to immediate reinstatement, although they would not have had such rights based on the ULP charges considered in the proceeding. This introduces some uncertainty into the scenario. Should the employer, with the interim ban being lifted, risk hiring permanent replacements? Should striking employees remain on strike notwithstanding the employer's freedom to hire permanent replacements, hoping that the Board will find that the strike was converted after commencement of the expedited proceedings?

Given the possible uncertainties even if expedited proceedings were held regarding all pre-proceeding ULP charges, does this proposal accom-

plish anything? Yes. It does not eliminate uncertainty, but it does substantially reduce it. Even in the scenario posed in the preceding paragraph, based on the decision of a regional director, an ALJ, or the Board, the parties would know the nature of the strike from its inception until *at least* the time the investigation was conducted. This is important information on which all parties can base their actions, and it is much better information regarding the employees' reinstatement rights and the employer's right to hire permanent replacements than the parties have under the current law. Would an employer be deterred from hiring permanent replacements when the interim ban is lifted by the possibility of conversion based on new ULP charges? The question would require an employer to evaluate its own conduct *during a short period of time*. Unless an employer knows or has good reason to think that it has committed ULPs after commencement of the expedited proceedings, it is not likely to be deterred. Would striking employees feel comfortable remaining on strike in the hope of a finding of conversion based on the new ULP charges? Unless an employer has committed egregious ULPs, most would not.

In sum, the possible conversion of a strike after an employer hires permanent replacements is not likely to reduce the value of the expedited proceedings in clarifying the reinstatement rights of the striking employees. Possible conversion during the interim ban may reduce the value of the expedited proceedings, but only marginally. Although uncertainty regarding the employees' reinstatement rights and the employer's right to hire replacements is not eliminated in that situation, it is substantially reduced, and the parties have much better information on which to base their courses of action than under the current law.

3. Devastating Effect of the Interim Ban on Some Employers

Some have argued that a temporary ban on the hiring of permanent replacements would severely harm and perhaps even destroy some businesses.⁴³² Such harm is particularly likely for businesses that have seasons in which they do a disproportionately high percentage of their annual business; if a strike begins during one of those periods of the year, these businesses could be crippled.⁴³³ This potential problem does not overcome, however, the benefits of an interim ban on the hiring of permanent replacements accompanied by expedited proceedings for several reasons. First, the strike-and-permanent-replacement situation is infrequent. Second, even for businesses with disproportionately profitable seasons, hiring of temporary replacements may be a viable option, depending upon several factors, in-

432. *E.g.*, YAGER, *supra* note 11, at 139-41; *see supra* note 362.

433. YAGER, *supra* note 11, at 141.

cluding the local market and the skill level of the striking employees. Third, many employers have other options for operating during a temporary ban on hiring permanent replacements, which they may use instead of, or in conjunction with, temporary replacements. These possible options include the following: operating with employees who do not strike and nonbargaining unit employees, such as managerial and supervisory personnel; subcontracting some bargaining-unit work on a temporary basis; relying on inventories built up in anticipation of a strike; and assigning work to other nonstruck facilities or transferring employees from such facilities to the struck facility.⁴³⁴ This is not to suggest that employers could easily operate during an interim ban by implementing one or more of the foregoing options. Such operations might require careful advance planning,⁴³⁵ which has not always been necessary for employers having the right to hire permanent replacements immediately. Additional reasons that this proposal will not be particularly harmful to seasonal employers involve the lifting or extension of the ban. The interim ban of this proposal may be lifted at several stages in the proceedings. If it is lifted by the regional director's decision not to issue a complaint, the duration may be shorter than the most frequently discussed temporary ban of ten weeks. Moreover, if the ban is not lifted at the complaint stage, it is highly likely that the employer will be found to have committed ULPs; thus, the interim ban spares the employer from future discharge of permanent replacements, reinstatement of strikers, and a potentially large back pay liability.

In sum, there probably are some employers and situations in which a temporary ban on the hiring of permanent replacements would be devastating to the employer's business. In view of the other options available for operating during the ban, however, there are not many such situations. Moreover, careful prestrike planning may ameliorate the difficulties of even the few employers that otherwise would be severely harmed by the interim ban.⁴³⁶

434. See, e.g., CHARLES R. PERRY ET AL., OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS 51-68 (1982); Finkin, *supra* note 80, at 562.

435. See, e.g., PERRY ET AL., *supra* note 434, at 51-68.

436. An alternative approach is to provide a procedure that would exempt from the interim ban employers who could demonstrate that the interim ban would inflict great harm on their businesses. This approach is, of course, a version of the business necessity test. Its use in conjunction with the interim ban is objectionable for the same reasons that the business necessity test in conjunction with a permanent ban is objectionable: it injects another difficult factual determination into the process, thereby slowing down the expedited proceedings. Moreover, employers might attempt to invoke the emergency exception in nonemergency cases on a regular basis. In the end, however, such an exception may be needed. For further discussion of business necessity tests, see *supra* Part V.A.

C. *Beneficial Effects on Both the Parties and the Adjudication of Unfair Labor Practice Charges*

All parties to a labor dispute would derive benefits from implementation of this proposal because the risks encountered by all parties would be reduced. Applying this proposal to the UAW-Caterpillar dispute on April 1, when Caterpillar issued its ultimatum, demonstrates those benefits. Additionally, implementation of this proposal would facilitate the adjudication of ULP charges.

Caterpillar's striking employees would have benefited from application of this proposal. Caterpillar would have been required to notify the Board of its intention to hire permanent replacements. Because the UAW filed ULP charges asserting that the strike was a ULP strike, Caterpillar would have been prohibited from hiring permanent replacements until the nature of the strike was determined. Accordingly, the employees, not fearing loss of their jobs, could have remained on strike. If it were determined that the strike was economic, then it would have been necessary for them to decide whether to risk their right to immediate reinstatement by continuing to strike, but they would have known their reinstatement rights and had an opportunity to offer to return to work before Caterpillar began hiring permanent replacements.⁴³⁷

The union also would have benefited. The UAW would not have feared that its members would lose their jobs to replacements before their reinstatement rights were determined. Therefore, the UAW could have advised its members to remain on strike pending a determination of whether the interim ban should be lifted or extended. Just as the strikers' rights to immediate reinstatement would not have been in immediate jeopardy, the UAW's status as the collective bargaining representative would not have been in jeopardy because of potential decertification by replacements.

Rather than announcing a decision to hire permanent replacements to its employees and thereby causing the strike to collapse, Caterpillar would have been required to notify the Board of its decision. Although employers may consider it a disadvantage to be prohibited from hiring permanent replacements until the nature of the strike is determined, the practice would confer some obvious and some not so obvious benefits on employers. It is apparent that employers are spared potentially large make-whole liability. If Caterpillar had followed through on its ultimatum, it could have been strapped with a very large back pay and make-whole liability for denying the strikers reinstatement if the strike were determined, a year or more

437. Although many opponents of *Mackay* object to the inability to conduct an economic strike free of risk, there are reasons for treating economic and ULP strikers differently. See *supra* Part II.B and Part IV.

thereafter, to be a ULP strike. Under this proposal, such liability is averted. Caterpillar also may have faced civil lawsuits if it had been required to discharge permanent replacements. Although the Supreme Court has suggested how employers might insulate themselves against such liability, it is not always effective;⁴³⁸ indeed, Caterpillar's newspaper advertisements seeking "permanent employees to replace non-returning striking workers"⁴³⁹ could have made such actions viable. This proposal would avoid such potential civil liability. Another benefit of this proposal to employers such as Caterpillar is that, even if they have committed ULPs that are contributing causes of a strike, it affords them an opportunity to take corrective action intended to convert a strike into an economic strike and to obtain a determination of whether their efforts have been successful. Thus, under this proposal, if Caterpillar had known that it would need to hire permanent replacements, before filing its notification with the Board, it could have attempted to cure its ULPs.⁴⁴⁰

Finally, replacements would benefit from implementation of this proposal. Even under this proposal, employers might still feel it necessary to condition the replacements' continued employment on a final decision (by the Board or court of appeals) or a strike settlement. Under this proposal, however, if Caterpillar had actually hired permanent replacements, it could have advised them that the strike had been characterized as an economic strike. The replacements would have possessed more definite information on their status and could then have decided whether it would be worthwhile to leave another job or move from another part of the country, or world, to take the replacement position.

Implementation of this proposal also would benefit the process of adjudicating ULP cases. Employers charged with committing ULPs and their attorneys have different approaches to the initial investigation by Board agents.⁴⁴¹ Some are not very cooperative. Under the procedures described in this Article, employers who notify the Board of their intention to hire

438. See *supra* notes 194-215 and accompanying text.

439. Dine, *supra* note 54, at 1A.

440. Because an expeditious determination of the character of a strike has been unavailable, employers have had little incentive to attempt to "cure" their ULPs. Even if they took action, they still would be uncertain of the type of strike until a Board decision, which might not be forthcoming for a year or two. Commentators have argued that the conversion doctrine has been too one-sided and that employers should have an opportunity to convert ULP strikes into economic strikes. Stewart, *supra* note 1, at 1330-33 (arguing that unions should be required to respond to an employer's inquiry regarding reasons for strike so that employer could attempt to remedy ULPs); see also James M. Rabbitt, Comment, *Reconversion of Unfair-Labor-Practice Strikes to Economic Strikes*, 64 GEO. L.J. 1143, 1151 (1976) (proposing a procedure whereby regional NLRB offices could certify that an employer had taken corrective measures that would relieve the employer of ULP strike liability).

441. NORRIS & SHERSHIN, *supra* note 390, at 332.

permanent replacements would have an incentive to cooperate in such investigations so that the interim ban could be lifted at the complaint stage.

D. Flexibility of the Proposal

The proposal outlined in this Article is malleable. As discussed, there are alternative approaches at several stages. The precise mechanics are open to debate. The basic principles undergirding this proposal are that employers should not be allowed to hire permanent replacements until the nature of the strike is determined, thus reducing the risks undertaken by all of the parties, and that the determination should be made as quickly as possible, so that an employer's business is not harmed. At that time, the parties, equipped with knowledge of their rights, can resolve their dispute quickly.

VII. CONCLUSION

Under the *Mackay* regime of striker replacement law, employers have been permitted to hire permanent replacements for strikers. Although the doctrine has been limited under the substantive law to economic strikes, in practice employers have threatened to replace permanently, and have replaced, both economic and ULP strikers. The limitation recognized by the substantive law has provided little comfort to parties to a labor dispute when employers have either announced that they would hire permanent replacements or begun hiring them. None of the parties—employer, striking employees, union, or replacements—know whether the strike is economic or ULP at that critical time when they must take action. Consequently, all of the parties encounter substantial risks, with the employees facing the greatest risk—potential loss of their right to immediate reinstatement to their jobs. In some cases, like UAW-Caterpillar, the striking employees and union abandon the strike rather than risking the loss.

Those calling for the abrogation of *Mackay* are correct that the law regarding permanent replacement of strikers should be changed. That does not, however, require categorically prohibiting employers from hiring permanent replacements. The primary distinctions between economic and ULP strikes are the different rights of employers to hire replacements and the corresponding rights of striking employees to reinstatement. The distinction between the two types of strikes serves the important purposes of deterring employers from committing ULPs and providing a market check on the parties' bargaining positions. Accordingly, the distinction is worth preserving.

There have been many proposals to reform striker replacement law over the years. In the last six years, a number of bills have been introduced in Congress, ranging from a ten-week ban on hiring permanent replace-

ments to an absolute prohibition. Although the *Mackay* doctrine has survived the onslaught so far, its margin of victory has dwindled, and some change now seems imminent.

This Article, after considering and critiquing prior proposals for reform of striker replacement law, fashions a new proposal. This proposal would reduce the risks imposed on the parties, while preserving the useful distinction between economic strikes and ULP strikes. The proposal accomplishes its objectives by imposing procedural constraints on the *Mackay* doctrine that substantially confine its applicability in practice to economic strikes. The fundamental principles of the proposal are that an employer should not be allowed to hire permanent replacements until the characterization of a strike is determined, but that employers should be prohibited from hiring permanent replacements for the shortest time possible.

The current law regarding replacement of strikers will be altered in the near future. It should be changed, but it is important that the reasons for the change be examined and the new law developed to accommodate those reasons. There are elements of the current law that should be preserved. The reform advocated in this Article reduces the risks and uncertainties encountered by the parties to a labor dispute and does so without unconditionally depriving employers of the option of hiring permanent replacements. This approach to reform of the law on permanent replacement of strikers is a far, far better thing than the Workplace Fairness Act.

