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# REPLY

## THE NEED FOR REAL STRIKER REPLACEMENT REFORM

LEONARD BIERMAN\*  
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### INTRODUCTION

In a recent article in the *North Carolina Law Review*,<sup>1</sup> Louisiana State University Law Professor William R. Corbett proposes an innovative solution to the contentious issue of the right of employers to permanently replace economic strikers pursuant to the National Labor Relations Act ("NLRA" or "Act").<sup>2</sup> Professor Corbett's proposal is based on two arguments. First, he argues that the current legal distinction between "economic" and "unfair labor practice" strikes—whereby employers are prevented from permanently replacing employees striking over employer unfair labor practices but may permanently replace employees striking over economic issues<sup>3</sup>—is a useful one and should be maintained.<sup>4</sup> Second, Professor Corbett contends that the basic rule set forth in the United States Supreme Court's seminal 1938 decision in *NLRB v. Mackay Radio & Telegraph Co.*<sup>5</sup>—allowing an employer to hire permanent replacement workers for economic strikers—serves as a market check

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1. William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" Than the Workplace Fairness Act*, 72 N.C. L. REV. 813, 886-95 (1994).

2. 29 U.S.C. §§ 141-87 (1988).

3. See generally ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 339-41 (1976) (outlining the doctrinal development of this distinction).

4. Professor Corbett argues that this distinction deters employers' unfair labor practices. See Corbett, *supra* note 1, at 830, 866-71.

5. 304 U.S. 333 (1938).

on union bargaining demands and should, therefore, also be preserved.<sup>6</sup>

Using these two arguments Professor Corbett debunks the need for substantive changes to the *Mackay* rule of the kind recently considered by Congress in the Workplace Fairness Act.<sup>7</sup> He instead proposes the procedural reform of expediting National Labor Relations Board ("NLRB" or "Board") determinations regarding whether a given strike is an unfair labor practice or an economic strike.<sup>8</sup> By expediting this determination, Professor Corbett argues, both parties to a strike would know, as near to the beginning of the strike as possible, the technical legal character of the strike.<sup>9</sup> This, he asserts, would enable them to make better decisions concerning the continuation or termination of the strike and whether to hire replacement workers for the striking employees.<sup>10</sup>

Professor Corbett argues that the effect of this proposal would be to minimize abuses concerning the use of strikes and the hiring of permanent replacements by both unions and employers.<sup>11</sup> By maintaining the *Mackay* rule, employers would be protected against union abuses of their right to strike. By expediting the NLRB's determination concerning the character of the strike, that is, whether it is an economic or an unfair labor practice strike, employers would be able to determine with reasonable certainty whether the hiring of permanent replacements is permitted. In addition, unions would be protected in their right to strike insofar as the strike is over an unfair labor practice, and by expediting the NLRB's decision on this issue, unions would be able to decide whether to go on strike or to continue a strike with more complete information.<sup>12</sup>

Professor Corbett's proposal is highly innovative in its use of procedural mechanisms to deal with issues regarding the substantive rights of strikers, employers, and replacement workers. His proposal, however, raises numerous concerns, particularly in light of policy

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6. See Corbett, *supra* note 1, at 871-76.

7. See H.R. 5, 103d Cong., 1st Sess. (1993). This proposed legislation prohibited employers from hiring or threatening to hire permanent replacement workers during economic strikes. For a recent overview and discussion of this and related legislative proposals, see Samuel Estreicher, *Collective Bargaining or "Collective Begging"? Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577 (1994).

8. Corbett, *supra* note 1, at 886-95.

9. *Id.* at 900-02.

10. *Id.*

11. *Id.* at 867-76.

12. *Id.* at 900-02.

developments in the striker replacement area that have occurred since the publication of his piece. While the recent major league baseball strike focused public attention on the general issue of employer hirings of replacement workers,<sup>13</sup> of greater importance from a policy perspective was President Clinton's March 8, 1995 Executive Order overturning the application of the *Mackay* doctrine to federal contractors.<sup>14</sup> Under this Presidential Executive Order, all significant federal contractors, including thousands of industrial companies, are at risk of losing federal government contracts if they hire permanent striker replacements.<sup>15</sup>

In light of these recent developments, this Article responds to Professor Corbett's proposals by addressing them in today's new legal context. First, we examine Professor Corbett's proposal from the perspective of "internal" and "external" labor markets.<sup>16</sup> We argue that his proposal is flawed in two important respects. First, we assert that Professor Corbett's procedural proposals do not in any way meaningfully address potential problems caused by the *Mackay* doctrine with respect to the operation of internal and external labor markets. Second, even putting the above-referenced market concerns aside, Professor Corbett's proposed solution is not workable from a logistical perspective. Under Professor Corbett's proposal, the NLRB, acting on an expedited basis, would make an initial determination regarding the "character" of a strike in about forty-five to forty-six days.<sup>17</sup> The problem, however, is that strikes in the United States

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13. See generally Robert L. Rose, *Work Week*, WALL ST. J., Feb. 28, 1995, at A1 (discussing the schism among baseball fans regarding the use of replacement workers).

14. See Exec. Order No. 12954, 29 C.F.R. § 270.2 (1995); see also Robert L. Rose, *Gore Says Clinton to Sign Order to Bar Contracts to Firms That Replace Strikers*, WALL ST. J., Feb. 21, 1995, at B5 (discussing Vice President Gore's outlining of the proposed Executive Order to union leaders). A federal appeals court, however, has recently struck down the President's general authority to promulgate this Executive Order, *Chamber of Commerce v. Reich*, No. 95-5242, 1996 WL 39538, at \*17 (D.C. Cir. Feb. 2, 1990). President Clinton, though, has stated that he believes the Executive Order is "economically sound, fair and legal" and instructed the U.S. Justice Department to take "all appropriate steps" to have the appeals court "decision overturned." See Peter T. Killborn, *Clinton Order Discouraging Replacement of Strikers Is Overturned*, N.Y. TIMES, Feb. 3, 1996, at 7.

15. The Executive Order applies to companies that have federal contracts of over \$100,000. See Exec. Order No. 12954, 29 C.F.R. § 270.2(c) (1995); Exec. Order No. 12954, 29 C.F.R. § 270.2 (1995); see also David Rogers, *Clinton Holds 42 Senate Votes to Shield Order on Striker-Replacement Workers*, WALL ST. J., Mar. 10, 1995, at A4 (discussing the Clinton Administration's ability to sustain a threatened filibuster of a Republican proposal to withhold funds for the enforcement of its striker replacement executive order).

16. See *infra* part I.

17. See Corbett, *supra* note 1, at 892 n.414.

are, on average, of a much shorter duration.<sup>18</sup> Indeed, most strikes will be *over* before the NLRB gets around to making an "expedited" decision under Professor Corbett's proposal. Moreover, it seems highly unlikely that even under the most auspicious of circumstances the NLRB could make a determination of the kind Professor Corbett proposes in much less time than the forty-five days or so that Professor Corbett suggests. Thus, from both a practical perspective and a theoretical economic perspective, Professor Corbett's recent proposals regarding striker replacement reform are unworkable.<sup>19</sup>

Following this analysis, we review President Clinton's March 8, 1995 Executive Order from the same perspective.<sup>20</sup> We assert that in contrast to Professor Corbett's proposal, the Executive Order does substantively address the striker replacement problem. Nevertheless, as with our concerns over Professor Corbett's proposal, the Presidential Executive Order does not effectively address the problem of potential "opportunistic" behavior by the parties. Finally, we briefly outline an alternative proposal which we feel represents a more positive reform in this area.<sup>21</sup>

## I. PROFESSOR CORBETT'S PROPOSAL

### A. Overview

Professor Corbett argues that although employers should not be prohibited from hiring permanent replacements, the *Mackay* doctrine should be procedurally restricted.<sup>22</sup> Professor Corbett would restrict the *Mackay* doctrine by temporarily limiting employers' ability to hire permanent replacement workers until an appropriate tribunal has defined the character of the strike as economic or unfair labor practice.<sup>23</sup> If a strike is characterized as an unfair labor practice strike, the interim ban will be extended, since even under the *Mackay* doctrine permanent replacement workers cannot be lawfully hired in this context.<sup>24</sup> If the strike is not so characterized, the ban will be

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18. See *infra* notes 62-63 and accompanying text.

19. See *infra* parts II and III.

20. See *infra* part IV.

21. See *infra* part V.

22. See Corbett, *supra* note 1, at 886-93.

23. See *id.*

24. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); see also JAMES B. ATELSON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 31 (1983) (stating that if a strike is deemed an unfair labor practice strike, all replacement workers are considered temporary).

lifted, and the employer will be free to hire permanent replacements for the striking workers.<sup>25</sup>

Such temporary bans on the use of permanent replacements and expedited determinations of the characteristics of a strike do nothing, however, to prevent "opportunistic behavior" on the part of unions and employers. Providing employers with the blanket right to hire permanent replacements makes it very difficult to differentiate between those situations in which the employer *really needs* to hire permanent replacements in order to continue operations, and those cases in which the employer is arguably taking opportunistic advantage of the situation and hiring permanent replacements as a way of getting rid of the representative union.<sup>26</sup> One solution would be to overturn the *Mackay* doctrine and give unions total protection from the hiring of permanent strike replacements, as the Clinton Administration's Executive Order accomplishes with respect to large federal contractors,<sup>27</sup> but this might subject employers themselves to opportunistic behavior on the part of unions. This major drawback seems to exist under current striker replacement law, and Professor Corbett's proposal fails to address it at all.

### B. Internal and External Labor Markets

In order to effectively deal with this previously unaddressed issue, a distinction should be made between the levels of *skill* possessed by the workers involved in the strike. To understand how distinguishing the level of worker skills sheds some light on the striker replacements policy debate, we need first to develop the concept of external and internal labor markets.

The "external market" is where workers seek new jobs, searching among different firms for the best conditions.<sup>28</sup> External labor

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25. See Corbett, *supra* note 1, at 886-93.

26. See *infra* part II. See generally Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 674-78 (1993) (applying internal/external labor market theory to the need to reform the *Mackay* doctrine).

27. See Exec. Order No. 12954, 29 C.F.R. § 270.2 (1995).

28. See Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1353 (1988) [hereinafter Wachter & Cohen, *Collective Bargaining*]; 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 109, 109-25 (Bruno Stein ed., 1990) [hereinafter Cohen & Wachter, *Replacing Striking Workers*].

markets are generally deemed to be "efficient," and any government intervention in this market is likely to "decrease" efficiency.<sup>29</sup>

Efficiency in the external labor market arguably breaks down, however, when there is a need for *firm-specific training*, that is, the learning of skills clearly specific to a given firm.<sup>30</sup> In such situations, "internal labor markets" provide an alternative to exclusive reliance on external labor market analysis.<sup>31</sup> By "internalizing" parts of the employment relationship, firms can potentially encourage workers to make long-term investments with them, which in turn produces technological and cost efficiencies for those firms.<sup>32</sup> However, internal labor markets can themselves be inefficient<sup>33</sup> because of the highly "specific" nature of the investments that workers and employers may be making in each other.<sup>34</sup> More precisely, firms frequently invest heavily in the training of workers, while workers invest heavily in learning skills that may be applicable only to the given firm.<sup>35</sup> This creates a situation of "sunk investments" on both sides, investments that may be lost if workers switch jobs or firms discharge workers.<sup>36</sup> To protect these "sunk investments," employers and workers generally enter into implicit or explicit contracts regarding them.<sup>37</sup> For example, university professors may seek to "protect" their firm-specific service on various idiosyncratic university

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29. See Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1353.

30. Firm-specific skills are skills that are idiosyncratic to the particular firm and thus not easily transferable to other firms. General skills, on the other hand, are skills that are easily transferable among firms in the same industry. *Id.* at 1355-64. See also GARY BECKER, *HUMAN CAPITAL* 8-29 (2d ed. 1975) (developing the differences between general and firm-specific worker training); Augustine A. Lado & Mary C. Wilson, *Human Resource Systems and Sustained Competitive Advantage: A Competency-Based Perspective*, 19 ACAD. MGMT. REV. 699, 704-05 (1994) (discussing the creation of internal labor markets and investments in firm-specific human capital).

31. See Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1355-57.

32. *Id.* at 1356.

33. See Cohen & Wachter, *Replacing Striking Workers*, *supra* note 28, at 114; see also Michael L. Wachter & Randall D. Wright, *The Economics of Internal Labor Markets*, in *THE ECONOMICS OF HUMAN RESOURCE MANAGEMENT* 86-108 (Daniel J.B. Mitchell & Mahmood A. Zaidi eds., 1990) (discussing the efficiency aspects of internal labor markets in terms of the trade-off made by employees and employers).

34. See Cohen & Wachter, *Replacing Striking Workers*, *supra* note 28, at 114-15.

35. *Id.* at 114.

36. Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1360 n.43 ("Sunk investments are investments that have already occurred and cannot be recalled."); see also Stewart J. Schwab, *Life Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH L. REV. 8, 13 (1993) (discussing how internal labor market investments create a "lock in" effect for both employees and employers).

37. Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1360-61.

committees by obtaining tenure or other forms of explicit or implicit job security at the university.<sup>38</sup>

Opportunistic behavior appears when either party attempts to breach these implicit or explicit contracts.<sup>39</sup> In such situations, one party can be seen as trying to "expropriate" the returns or "rents" that the other party expects out of her investments.<sup>40</sup> Workers generally make firm-specific investments early in their careers and then recoup such investments as they age.<sup>41</sup> The employee invests by perhaps agreeing to a below-market wage early in her career, with the expectation that later on she will receive above-market compensation.<sup>42</sup> For example, an employee may, early in her career, engage in learning a skill that is specific to a particular employer. While doing this, she will likely agree to receive a below-market wage with the expectation that later on she will be permitted to stay in the firm and recover her investment in the form of above-market compensation. However, if the employer terminates the employment relationship after the employee has learned the skill and the employer has recovered its investment, but before the employee is able to recover her investment, the employee's investment will be lost.<sup>43</sup>

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38. See generally RICHARD P. CHAIT & ANDREW T. FORD, *BEYOND TRADITIONAL TENURE* (1982) (analyzing both traditional tenure programs and modified or alternative programs in the university setting); BARDWELL L. SMITH, *THE TENURE DEBATE* (1973) (discussing theories supporting and criticizing the institution of academic tenure systems); see also *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972) (discussing tenure as a "property" right); *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) (stating that a junior college teacher with long service may have some sort of "property" interest in his job, even absent a formal "tenure" system at the college).

39. See Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1360-64.

40. *Id.*

41. *Id.* In particular, Wachter & Cohen argue that "[w]orkers make sunk investments in their jobs by agreeing to long-term implicit contracts that provide for deferred compensation, that is, below-market wages at early stages of employment and above-market wages at later stages." *Id.* at 1360.

42. *Id.* at 1360-64.

43. *Id.* While the economics of major league baseball are rather unique, the model developed above does, to some extent, seem to apply to that industry. Players can be seen as making industry-specific investments before reaching the major league during college and minor league baseball, or during the very early stages of their major league careers. See generally Stephen J. Spurr & William Barber, *The Effect of Performance on a Worker's Career: Evidence from Minor League Baseball*, 47 INDUS. & LAB. REL. REV. 692, 693-94 (1994) (outlining how minor league clubs currently serve *solely* as training grounds for major league clubs). In return for these investments, the players ultimately receive wages above their "productivity." See *id.* app. at 706-07 (describing the compensation of minor league players during the years of the study, 1975-1988). Employer permanent replacement of players at this stage could be viewed as "opportunistic" since it would deprive players of the "rents" from their investments. *Id.*



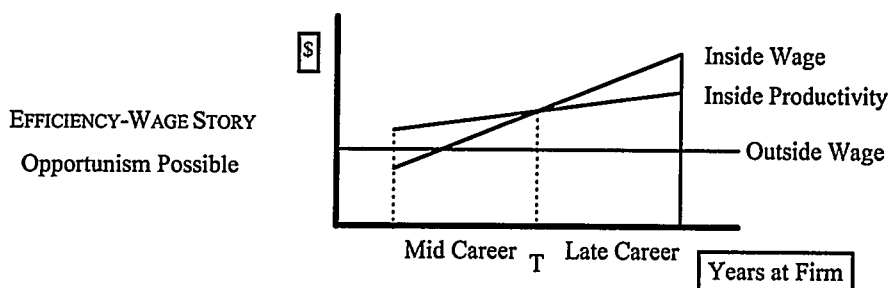
Similarly, an employer may invest in an employee's career by paying her more than her marginal productivity at a very early and/or later stage of her career, with the expectation that the employer will recover its investment during the employee's mid-career years.<sup>44</sup> During this middle period, the employee could behave opportunistically and make it difficult for her employer to recover its investment.<sup>45</sup>

## II. PROCEDURAL SOLUTIONS: NO MATCH AGAINST "OPPORTUNISTIC" BEHAVIOR

We believe that the underlying conflict involved in the striker replacement decision can be properly characterized by the problem of opportunistic or "strategic" behavior. Unions and employers are likely to engage in internal labor market types of arrangements, and skill specificity and investment make it possible under alternative legal standards for both the union and the employer to behave opportunistically or strategically. The motivation for either party to behave strategically is grounded on the investment made by the other party. Once the investment is made, the opposing party can extract the rents that are due to the investing party. Investment occurs only in situations where employees are required to learn skills specific to the firm. When learning firm-specific skills, employees must pay for their training in part by accepting a below-market wage during the training period. Having invested in the firm-specific skills, employees are then

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In a recent essay, Cornell University Law Professor Stewart Schwab graphically captures this phenomenon to some extent. Schwab, *supra* note 36, at 18. Players would be vulnerable to "opportunistic" behavior in the region to the right of point "T" in Professor Schwab's graph set forth below. *Id.*



*Id.* (adapted from original).

44. See Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1361.

45. See *id.*

quite vulnerable to the employer because the employees' investment in the firm-specific skills has given the employer the opportunity to behave strategically.<sup>46</sup>

Thus, the *Mackay* rule ultimately leaves unprotected those workers who are most vulnerable to opportunistic or strategic employer behavior, that is, employees who have invested in firm-specific training. Under *Mackay*, these employees can be permanently replaced (essentially, fired) by their employer during an "economic strike" even though they have not yet economically recouped the firm-specific investments they have made in the employer.<sup>47</sup>

On the other hand, if employees have not invested in firm-specific skills, but instead have acquired mainly general training, they are less vulnerable to the employer's strategic behavior.<sup>48</sup> Employees who are mainly required to perform tasks that require skills which are easily transferable in the external labor market do not have to invest in below-market wages early in their careers.<sup>49</sup> Thus, even if their employment is terminated, as in the case of being permanently replaced while on strike, employees have not suffered a significant loss on their investment.<sup>50</sup> As compared to the case of firm-specific investments, the employer is not in a strategic position to expropriate the employees' rents.

The skill specificity distinction also affects the union's ability to behave opportunistically.<sup>51</sup> The union will be in a position to impose serious damage on employers in situations where the skills required to perform work tasks are specific to the firm and require a substantial training period. In contrast, if the skills required to perform work tasks are mainly of a general nature, the employer will be able to continue operating by hiring essentially untrained temporary help.<sup>52</sup> Thus, we assert that a key distinction that should be made in the law of striker replacements is one based on the type of skills possessed by the workers involved in the strike. By focusing on that feature, the law could prevent the use of the strike and the hiring of permanent replacements as an opportunistic weapon designed to expropriate either party's rents. Professor Corbett's procedural proposals, as innovative as they are, do not address this problem.

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46. See generally *id.* at 1358-64 (discussing workers' investments in firm-specific skills).

47. See 304 U.S. 333, 344-51 (1937).

48. Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1358-64.

49. *Id.*

50. *Id.*

51. See Cohen & Wachter, *Replacing Striking Workers*, *supra* note 28, at 113-19.

52. *Id.*

### III. PROCEDURAL REFORMS: NOT A WORKABLE SOLUTION

Professor Corbett defends his proposal on the grounds that it at least protects strikers ("stays" the application of *Mackay*) until the determination of the nature of the strike is decided, while at the same time protecting employers against potential abuses by unions that might result from an outright overruling of the *Mackay* doctrine.<sup>53</sup> However, the "protection" that his proposal supposedly provides employees and unions is illusory, since it does not prevent opportunistic behavior by employers who permanently replace workers who have made firm-specific investments.

In this section we argue that the protection that Professor Corbett's proposal supposedly provides *employers* is equally illusory, as dramatically illustrated by the high-profile 1993 Thanksgiving holiday five-day flight attendant's strike at American Airlines.<sup>54</sup> Totally prohibiting employers from hiring permanent replacements may, according to Professor Corbett's analysis, as well as our own analysis of internal labor markets, allow unions to behave opportunistically.<sup>55</sup> Thus, Professor Corbett suggests that any ban on the hiring of permanent striker replacements should only be temporary pending an expedited decision regarding the legal status of the strike.<sup>56</sup> He appears to be opposed to the Clinton Administration's outright ban on the hiring of permanent replacements by many employers, and has noted that "there probably is not a meaningful distinction between a long interim ban and an absolute prohibition on hiring permanent replacements."<sup>57</sup> Thus, Professor Corbett suggests that employers be allowed to find out the nature of a strike as quickly as possible, and with reasonable certainty, in order to make their own decision of whether to hire permanent replacements.<sup>58</sup> In the case of economic strikes, Professor Corbett's proposal, in contrast to the Clinton Administration's approach, prevents employers from hiring permanent striker replacements only for a relatively short period of time.

The problem with the protection that Professor Corbett's proposal gives employers, though, is that unions can behave quite

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53. See Corbett, *supra* note 1, at 886-95.

54. See *infra* notes 75-77 and accompanying text.

55. See Corbett, *supra* note 1, at 886-95.

56. Professor Corbett directly acknowledges, though, that even this temporary ban can cause employers considerable trouble. See *id.* at 898-99.

57. *Id.* at 890.

58. See *id.* at 900-01.

opportunistically even over relatively short periods of time.<sup>59</sup> That is, even if the strike determination process is “expedited,” unions might still engage in opportunistic behavior against employers, since it is probably impossible to “expedite” procedures enough to avoid such a situation. For example, under Professor Corbett’s proposal the initial interim ban on all hiring of permanent replacement workers would last until a determination is made by the Regional Director of the NLRB whether to issue a formal complaint.<sup>60</sup> Professor Corbett indicates that it has recently taken about forty-five days to reach this determination.<sup>61</sup>

However, strikes in the United States tend to be of a much *shorter* duration. Historically, the average strike has lasted less than thirty-two days;<sup>62</sup> moreover, many strikes are of a shorter duration. For example, the fall 1993 strike at American Airlines lasted only five days, and was *planned* by the union to last no more than eleven days, in part to inflict maximum damage on the employer during the busy Thanksgiving holiday flying season.<sup>63</sup> Thus, expedited reviews within *forty-five to forty-six days* of the kind proposed by Professor Corbett will obviously be of little benefit to many employers.<sup>64</sup>

#### IV. PRESIDENT CLINTON’S EXECUTIVE ORDER: A WRONG STEP IN THE RIGHT DIRECTION

We assert above that Professor Corbett’s procedural proposal is not logistically workable, and that it does not address the “core” issue in the striker replacement debate: the motivation that exists for both parties to behave opportunistically. Under *Mackay*, employers can behave opportunistically by replacing striking workers who have made significant, not yet recouped, firm-specific investments with permanent

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59. Professor Corbett, while acknowledging the devastating impact his proposal might have on some employers, asserts that employers have a variety of “options” for operating during a temporary ban on hiring permanent replacements. *Id.* at 898-99. But, as noted above, such “options” may not be all that viable where the employer needs to train employees for firm-specific functions. See *supra* text accompanying notes 48-50.

60. *Id.* at 890-91.

61. *Id.* at 892 n.414.

62. See INTERNATIONAL AND COMPARATIVE INDUSTRIAL RELATIONS: A STUDY OF INDUSTRIALIZED MARKET ECONOMIES 317 (Greg J. Bamber & Russell D. Lansbury eds., 1993); Peter Feuille & Hoyt N. Wheeler, *Will the Real Industrial Conflict Please Stand Up?*, in U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT 255, 260-61 (Jack Stieber et al. eds., 1981).

63. See *infra* notes 75-77 and accompanying text.

64. Furthermore, such employers may be deprived of a critical opportunity to permanently replace their workforce.

replacements.<sup>65</sup> President Clinton's Executive Order directly addresses the concern of employer opportunistic behavior by prohibiting large federal contractors from hiring permanent striker replacements. As noted above, however, unions can also behave quite opportunistically in some circumstances.<sup>66</sup> President Clinton's Executive Order, which some observers have posited as a political "sell-out" to the AFL-CIO,<sup>67</sup> simply does not address the issue of possible union expropriation of employer investments.

The new Executive Order states that the Executive Branch, in order "to ensure the economical and efficient administration and completion of Federal Government contracts," will not permit federal agencies "to contract with employers that permanently replace lawfully striking employees."<sup>68</sup> The Executive Order mandates that the Secretary of Labor investigate whether any "organizational unit of a federal contractor"<sup>69</sup> has hired permanent replacements, and if so found, to "debar the contractor, thereby making the contractor ineligible to receive [federal] government contracts."<sup>70</sup>

While raising a myriad of other interesting legal and policy issues,<sup>71</sup> the Executive Order is of particular interest to our analysis because it appears to recognize, at least in part, the economic relationship underlying the striker replacement situation. The Order states:

An important aspect of a stable collective bargaining relationship is the balance between allowing businesses to operate during a strike and preserving worker rights. This balance is disrupted when permanent replacement employees are hired. It has been found that strikes involving per-

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65. See Exec. Order No. 12954, 29 C.F.R. § 270.2 (1995).

66. See *supra* notes 59-64 and accompanying text.

67. See William F. Buckley, Jr., *President Clinton: Short of Troops*, NAT'L REV., Apr. 3, 1995, at 74-75; Glen Burkins, *Clinton to Seek to Reinstate His Order Penalizing Employers of Strike-Breakers*, WALL ST. J., Feb. 5, 1996, at A16; see also Catherine Yang, *Look Who's Feeding the Litigation Fire*, BUS. WK., Sept. 18, 1995, at 150 (discussing the view of U.S. Chamber of Commerce leadership that the Executive Order "was a cheap shot from the President").

68. See Exec. Order No. 12954, 29 C.F.R. § 270.2(a) (1995).

69. *Id.* § 270.11.

70. *Id.* § 270.15.

71. See *Labor Policy Association Memo On Legality Of Executive Order Sanctioning Federal Contractors That Hire Permanent Strike Replacements*, Daily Lab. Rep. (BNA) E-2 (Mar. 8, 1995) (raising various constitutional problems concerning the validity of the Executive Order on Striker Replacements); *Striker Replacements: Executive Order Denounced by Business, Defended by Labor*, Daily Lab. Rep. (BNA) AA-3 (Mar. 9, 1995) (discussing concerns about the labor policy-making role of the President).

manent replacement workers are longer in duration than other strikes. In addition, the use of permanent replacements can change a limited dispute into a broader, more contentious struggle, thereby exacerbating the problems that initially led to the strike. *By permanently replacing its workers, an employer loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees.*<sup>72</sup>

Thus, the Executive Order recognizes the importance to the striker replacement debate of the investments that workers and employers make in firm-specific skills.<sup>73</sup> Although the Order does not specifically address opportunistic behavior by employers, the Administration's obvious awareness of the development of firm-specific skills played a role in its decision to prohibit federal contractors from hiring permanent striker replacements.

The Executive Order gives no indication, though, that labor unions can also engage in opportunistic behavior. The Clinton Administration's outright reversal of the *Mackay* doctrine as applied to federal contractors thus potentially harms employers that have made investments in firm-specific human capital and not yet recouped their investments.<sup>74</sup> Consequently, while affording employees of federal contractors and their unions considerable protection, President Clinton's Executive Order provides no protection to federal contractors themselves and permits unions and employees at various points in time to extract the "rents" that are due to given contractor employers.

A good example of this occurred during the aforementioned fall 1993 flight attendants' strike at American Airlines.<sup>75</sup> The union's timing of that strike was "opportunistic" not only because the strike was scheduled during the Thanksgiving holiday, but also because it

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72. Exec. Order No. 12954, 29 C.F.R. § 270.2 (1995) (emphasis added).

73. See Burkins, *supra* note 67, at A16 (quoting U.S. Secretary of Labor Robert Reich's reaction to the appeals court's overturning of the Executive Order, and Reich's statement that "rookie replacement workers" are brought in to replace better-trained workers who make better quality goods).

74. See generally Lado & Wilson, *supra* note 30, at 705 (discussing employer investments in firm-specific capital).

75. See Terry Maxon, *Strike Hinders American Passenger Flights, Many Jets Carry Only Cargo, Mail*, DALLAS MORNING NEWS, Nov. 19, 1993, at 1A, 24A. While it might seem that President Clinton intervened because of union "pressure," there have been allegations that the airline itself paid a very substantial sum to a Washington, D.C. lobbyist to get President Clinton directly involved in the dispute. See James M. Perry, *An Old Friend of the Clintons' Stays Loyal, Spends Spare Time Doing Damage Control For President*, WALL ST. J., Jan. 18, 1994, at A18.

was scheduled to last only eleven days: The union knew that the airline was faced with a Federal Aviation Administration requirement that airlines must train flight attendants at least *ten* days. Thus, responding to threats by American Airlines Chairman Robert Crandall to permanently replace virtually all of the striking flight attendants, union president Denise Hedges simply responded, "I have called an eleven day strike and the training takes ten days. I don't see how they can replace ninety percent of our workers in eleven days."<sup>76</sup> Under these circumstances, the airline ultimately acceded to union demands for arbitration of the dispute, ending the strike after only five days.<sup>77</sup> Even so, the airline attributed the vast majority of a 1993 fourth quarter loss of \$253 million to the strike.<sup>78</sup> In short, because of firm-specific investments required by the company, which limited its ability to immediately hire permanent replacement workers, the union was afforded the chance to behave opportunistically. President Clinton's Executive Order in no way curtails such opportunistic behavior by unions.

We argue that the proper solution to the striker replacement debate is to make it more difficult for *both* parties to behave opportunistically. We believe that a solution based on *negotiations* provides the necessary monitoring and enforcing devices.

## V. AN ALTERNATIVE APPROACH

### A. Background

Among the goals of the NLRA is the promotion and encouragement of collective bargaining.<sup>79</sup> The sponsors of the NLRA viewed collective bargaining as the means to promote a new labor policy without having to regulate the terms of the employment relationship directly.<sup>80</sup> In enacting the NLRA, Congress rejected a

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76. See Maxon, *supra* note 75, at 24A. In contrast to the American Airlines situation, if the skills required to perform work tasks are mainly of a general nature, the employer will be able to continue operating by hiring untrained temporary help. In such a situation, the union is not able to expropriate any rents. See Cohen & Wachter, *Replacing Striking Workers*, *supra* note 28, at 118-19.

77. See Bruce Ingersoll & Bridget O'Brian, *Clinton's Intervention Halts the Costly Strike at American Airlines*, WALL ST. J., Nov. 23, 1993, at A1.

78. See Bridget O'Brian, *AMR Posts Widened Fourth-Period Loss Largely on Effects of Attendant's Strike*, WALL ST. J., Jan. 20, 1994, at A2.

79. See 29 U.S.C. § 151 (1988).

80. See ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 363 (1991); see generally Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803 (1993) (comparing the "old" and "new"

more interventionist approach<sup>81</sup> and opted instead for a system that emphasized the distinct roles of labor and management, in which outcomes were to be determined by the ability of the parties to impose economic pressure on each other through the negotiation process.<sup>82</sup>

It is somewhat paradoxical that, among the several alternatives that have been advanced and more recently adopted to deal with the striker replacement issue, Professor Corbett's proposal and President Clinton's Executive Order included, there has been no direct attempt to use the collective bargaining process as a possible solution.<sup>83</sup> We argue that by incorporating the striker replacement decision into the bargaining process and letting the parties themselves debate over the use of permanent replacements for economic strikers, opportunistic behavior by both parties can be minimized while at the same time advancing the NLRA's objectives of industrial peace and collective bargaining.

### *B. The Advantages of Negotiation*

The proposal we advance is based on the assumption that through the negotiation process the parties themselves will be best able to resolve disputes concerning the hiring of striker replacements. They will accomplish this by making the necessary trade-offs and establishing rules that commit them to mutually enforce the contract. We submit that under the current general approach to striker replacements, the *Mackay* rule, the decision to hire striker replacements is not amenable to resolution through the collective bargaining process. For example, under *Mackay* employers can hire permanent replacements without consulting unions.<sup>84</sup> This arguably allows employers to get rid of unions by negotiating to points of impasse and then hiring permanent replacements.<sup>85</sup> Facing this outcome, employers currently have no real incentive to negotiate over the striker replacement issue since any negotiation will by definition make them worse off.

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industrial relation systems).

81. See COX ET AL., *supra* note 80, at 362.

82. *Id.* at 362-63.

83. See, e.g., Exec. Order No. 12954, 29 C.F.R. § 270.2 (1995); CHARLES CRAVER, CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT (1993); Corbett, *supra* note 1, at 885-902; Matthew T. Golden, *On Replacing the Replacement Worker Doctrine*, 25 COLUM. J.L. & SOC. PROBS. 51, 85-89 (1991).

84. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 346-47 (1938).

85. See Cohen & Wachter, *Replacing Striking Workers*, *supra* note 28, at 117-24.



Moreover, even if a given union places a high value on protecting at least those employees who are subject to opportunistic behavior, and even if the union is willing to compromise on the protection of other (less-skilled) employees or on any other issue, no bargaining is likely ever to take place under the *Mackay* rule. In this sense, the *Mackay* doctrine makes it less likely that bargaining will take place, and to that extent it is inefficient.<sup>86</sup> It is necessary, therefore, that any reform proposal start by changing the initial allocation of rights, which in this case means granting unions protection against the hiring of permanent striker replacements.

On the other hand, giving unions protection against the hiring of permanent replacements, without anything more, will also result in the likelihood of opportunistic behavior by the unions.<sup>87</sup> If unions are allowed to strike knowing that their members cannot be permanently replaced, as President Clinton's Executive Order permits them to do in the case of federal contractors, they will be free to engage in strikes in ways that expropriate rents that are due to employers.<sup>88</sup>

The solution we propose involves first providing striking workers with protection against permanent replacement by changing the initial legal right, and second, amending current law with respect to the "bargaining status" of the striker replacement issue. Under current judicial interpretations, the striker replacement issue has been deemed to be a "permissive" subject of bargaining under the NLRA, that is, a topic which parties are not required to bargain over and which cannot be forced to a point of impasse at the bargaining table.<sup>89</sup> We propose that the law be amended to make this a clearly "mandatory" subject of bargaining, *requiring* the parties to bargain with respect to it up to a point of impasse.<sup>90</sup>

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86. In the presence of transaction costs, an important consideration will be to define rights in a way that minimizes these transaction costs and permits efficient contractual exchanges. See David D. Friedman, *The World According to Coase*, 38 LAW SCH. REC. 4, 9 (1992), for a brief but excellent description of some of the implications of the Coase theorem.

87. See *supra* notes 69-74 and accompanying text.

88. See Peter G. Nash & Jonathan R. Mook, *Strike Replacement Legislation: If It Ain't Broke, Don't Fix It*, 16 EMPLOYEE REL. L.J. 317, 319-20 (1990-91).

89. Bargaining subjects have been classified by the Supreme Court as mandatory, permissive, or illegal. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Permissive issues are those dealing with legal subjects other than wages, hours, and working conditions. See GORMAN, *supra* note 3, at 498.

90. For an extensive discussion of this proposal, see Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 384-96 (1995). Professor Corbett has just published a reply to our proposal. See William R. Corbett, *Taking the Employer's Gun and Bargaining About Returning It: A*

Under this formulation we will make it more costly for employers to behave opportunistically by forcing a strike in the hope of getting rid of the union. Employers will be able to engage in this type of behavior only by paying a fairly high price: closing operations.<sup>91</sup> By making the striker replacement issue a mandatory subject of bargaining, we minimize transaction costs by giving unions, the parties which probably value this right the most,<sup>92</sup> the opportunity to

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*Reply to "A Law, Economics, and Negotiation Approach" to Striker Replacement Law*, 56 OHIO ST. L.J. 1511 (1995). We are currently formulating a response to his analysis. Mandatory subjects are generally defined as those concerning wages, hours, and other terms and conditions of employment. 29 U.S.C. § 158(d) (1988). Parties are required to bargain over mandatory subjects to a point of impasse. See Gorman, *supra* note 3, at 496-98. All topics falling outside the mandatory rubric that are not illegal to bargain over are deemed to be permissive subjects. See *Wooster Div. of Borg-Warner Corp.*, 356 U.S. at 349. Parties are free to bargain and agree to contractual provisions regarding permissive subjects, but they are not required to do so. See GORMAN, *supra* note 3, at 498.

Although a strong argument could be made that the issue of hiring striker replacements should be a mandatory bargaining subject, to the extent that lower federal courts have ruled on the issue, the consensus appears to be that it falls into the permissive bargaining category. See *NLRB v. Columbus Printing Pressmen's Union No. 252*, 543 F.2d 1161, 1166 (5th Cir. 1976) (holding that a union bargained in bad faith when it insisted to impasse on a provision requiring the parties to submit to arbitration disputes over the negotiation of terms of contracts in subsequent agreements). Similarly, the D.C. Circuit, in its *Land Air Delivery, Inc. v. NLRB*, 862 F.2d 354 (D.C. Cir. 1988) decision, found that the hiring of permanent strike replacements does not fall into the same bargaining category. *Id.* at 358 (holding that an employer's decision to permanently subcontract work during a strike is a mandatory subject of bargaining). The appeals court noted that it perceived a distinction "between replacing strikers with permanent employees and replacing them with permanent subcontractors." *Id.* at 357. See generally COX ET AL., *supra* note 80, at 498 (raising rhetorically whether the striker replacements issue is a mandatory or permissive bargaining subject but providing no elaboration).

91. As Wachter & Cohen point out, this sunk cost should deter illegal behavior. See Wachter & Cohen, *Collective Bargaining*, *supra* note 28, at 1378-85.

92. The rationale for arguing that unions, rather than employers, will be more likely to bargain over the striker replacement issue if given the initial legal entitlement, is based on the realities of the industrial relations process. First, the protection against striker replacement does not make the strike a risk-free venture for the union. As one congressional report states: "The hardship of doing without a paycheck and health insurance puts enormous pressure on the strikers to settle a dispute as soon as possible. Most American workers have no cushion, no money socked away to make house payments and car payments, to buy food or to pay doctors' bills." H. R. REP. NO. 103-116, 103d Cong., 1st Sess., pt. 1, at 33 (1993), *microfilm on SUP. DOC. NO. Y 1.18:103-116/PT.1*, at 33 (U.S. Gov't Printing Office).

Second, unreasonable pressures or unwillingness to bargain over this issue could represent a matter of survival for the union. For example, the House of Representatives Report on the Cesar Chavez Workplace Fairness Act states: "Workers have no incentive to make demands that will throw their employers into bankruptcy or otherwise cause permanent economic harm to their employers. The worker, after all, is dependent on the employer's long-term economic health. Workers realize this, and this realization significantly moderates worker demands." *Id.*

exchange the protection against permanent replacements for other bargaining demands they might value more highly. In this sense, the proposal facilitates bargaining by making more explicit the types of exchanges the union has to make.<sup>93</sup>

Our proposal also addresses what we see as the major flaw in Professor Corbett's proposal. By overruling the *Mackay* rule, our proposal effectively deters opportunistic behavior by the employer. The hiring of permanent replacements would only occur within a *negotiated* solution.

In addition, we submit that our proposal is superior to the Clinton Administration's Executive Order in that it provides a more balanced approach by requiring that the striker replacement issue be negotiated during the course of the bargaining process. By making the issue of the hiring of replacements for economic strikers a mandatory bargaining topic, opportunistic behavior by unions should be equally minimized, since union failure to negotiate in good faith could result in statutory unfair labor practice charges being brought against the union.<sup>94</sup>

### CONCLUSION

In his recent article in the *North Carolina Law Review* Professor William Corbett proposes an innovative procedural reforms to the National Labor Relations Act with respect to the highly controversial issue of employer rights to permanently replace workers during economic strikes. We assert, however, that despite the creative nature of these proposals, they are flawed. They are flawed because they do not meaningfully address the issue of skill specificity and firm-specific investments by both employers and employees in the context of the

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93. Provisions similar to what our proposal envisions have in fact been negotiated on a more limited scale. See 2 *Collective Bargaining Negot. & Cont.* (BNA) No. 1281, at 77:376 (July 7, 1994). For example, the collective bargaining agreement between Olin Corporation and The International Brotherhood of Electrical Workers states: "[T]he Employees as well as the Union shall cross all picket lines for the performance of work which is essential to the maintenance of the Company's plant and equipment for standby operations." *Id.* The collective bargaining agreement between Harbison-Walker Refractors and the Steelworkers states:

No strike or lockout shall occur at the establishment covered by this Agreement during the life of this Agreement, and continuous kilns shall be maintained at all times at a temperature which will result in no loss of ware or damage to the kilns, and periodic kilns under fire shall be burned off. Pumping operations shall also be continued during any strike or work stoppage that may occur as stated above.

*Id.* at 77:377.

94. 29 U.S.C. § 158 (b)(3) (1988).

striker replacement debate. Under the procedural reforms proposed by Professor Corbett it appears that both parties will continue, in economic strike situations, to be able to behave opportunistically with respect to each other.

However, we also believe that simply overturning *Mackay*, as exemplified in the federal contractor context by President Clinton's recent Executive Order, represents an equally flawed approach. Taken alone, the Clinton Administration approach still permits unions to engage opportunistically in strikes which breach implicit agreements parties have made under the internal labor market model.

To address this problem more meaningfully, we have briefly set forth a possible alternative approach to reform. Our approach involves a statutory overturning of the *Mackay* doctrine *coupled* with a statutory amendment making the striker replacement issue a mandatory subject of bargaining under the NLRA. The focus of our proposal is on negotiation, on letting the parties themselves, without outside intervention, resolve this important and complex issue.

