1994

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Recommended Citation

Samuel Estreicher, *Collective Bargaining or "Collective Begging"? Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577 (1994).

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ESSAY

COLLECTIVE BARGAINING OR “COLLECTIVE BEGGING”? : REFLECTIONS ON ANTISTRIKEBREAKER LEGISLATION

Samuel Estreicher*

I. OVERVIEW

Since at least the Supreme Court's 1938 opinion in *Mackay Radio*,¹ employers have had the right to hire permanent replacements for economic strikers as a means of maintaining operations during a strike. Despite continuous criticism in academic and organized labor circles,² this practice did not achieve widespread notoriety and result in calls for legislative change until the 1980s. The Reagan administration's 1981 firing of members of the Professional Air Traffic Controllers Organization (PATCO) for engaging in an illegal strike is often cited as lending encouragement to employers to win labor disputes — and break unions — by permanently replacing strikers.³ During that decade, long-established bargaining relationships — at Continental, Phelps Dodge, Boise Cascade, and Greyhound, to name a few — were severed in this manner. In April

* Professor of Law, New York University. B.A. 1970, Columbia; M.S. (Industrial Relations) 1974, Cornell; J.D. 1975, Columbia. — Ed. This is a revised text of remarks initially given at the annual meeting of the American Association of Law Schools' Section on Labor and Employment Law in Washington, D.C., on January 5, 1991, and will be part of a book-length work on U.S. labor law reform, tentatively entitled *A Labor Law for Competitive Markets*, forthcoming from Harvard University Press. For my earlier views on this subject, see Samuel Estreicher, *Strikers and Replacements*, 3 LAB. LAW. 897 (1987). I benefited from the opportunity to present this paper at the New York University Law School "Brown Bag" of February 26, 1993, and gratefully acknowledge the financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University.

1. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

2. For examples and analysis of this criticism, see *infra* Part II.

3. See, e.g., CHARLES B. CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* 33 (1993); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 42 (1993); PAUL C. WEILER, *GOVERNING THE WORKPLACE* 19-20 (1990). AFL-CIO secretary-treasurer Thomas Donahue argues that employers "interpreted [President Reagan's response to the PATCO strikers] 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, 57 (quoting Mr. Donahue). On the PATCO strike, see generally Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983), and Herbert R. Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984).

1992, only the threat of job loss through permanent replacement persuaded workers on strike at Caterpillar to return to work after five months on the picket line.⁴

The lesson the labor movement drew from the experience of the 1980s was that its institutional survival required repeal of *Mackay Radio*. On July 17, 1991, the House of Representatives passed a bill prohibiting employers from hiring or threatening to hire permanent replacements.⁵ In June 1992, a companion bill in the Senate failed by five votes to overcome Republican and business community opposition.⁶ With the election of a Democratic president in 1992 — a President who had pledged support for the so-called Workplace Fairness Act⁷ — the effort was renewed in the 103d Congress. On June 15, 1993, the renamed Cesar Chavez Workplace Fairness Act passed the House,⁸ but in July 1994 the bill again failed to attract

4. See *Caterpillar Says It Will Begin Recall of Strikers on April 20*, Daily Lab. Rep. (BNA) No. 75, at A-17, A-18 (Apr. 17, 1992); Jonathan P. Hicks, *Union Agrees To End Strike at Caterpillar: Company to Stop Trying to Hire Replacements*, N.Y. TIMES, Apr. 15, 1992, at A1, A20. Protesting Caterpillar's restrictions on pro-union solicitation activities, the United Auto Workers (UAW) called a nationwide unfair labor practice (ULP) strike against the company in June 1994, and there are 120 complaints currently pending before the NLRB. The complaints have been consolidated before Administrative Law Judge (ALJ) James Rose who, on November 23, 1994, sustained violations alleged in four of the complaints concerning discipline of employees for wearing t-shirts and other insignia that disparaged Caterpillar's management. See *Caterpillar, Inc.*, Nos. 33-CA-10158 to 10161, 1994 NLRB LEXIS 945 (ALJ Nov. 23, 1994), described in *NLRB Administrative Law Judge Supports UAW's ULP Claims Against Caterpillar Inc.*, Daily Lab. Rep. (BNA) No. 227, at D-12 (Nov. 29, 1994). On January 5, 1995, ALJ Rose found that the company violated the law in granting preferential treatment to employees crossing picket lines during the 1992 walkout. See *Caterpillar, Inc.*, Nos. 33-CA-10038 & 10014, 1995 NLRB LEXIS 10 (ALJ Jan. 5, 1995), reprinted in Daily Lab. Rep. (BNA) No. 6, at E-6 (Jan. 10, 1995). Both Caterpillar and the union signaled a willingness to resume talks, but the union has balked at the company's refusal to discuss the pending ULP charges. See *Talks Between Caterpillar, UAW Uncertain as Union Rejects Company's Ground Rules*, Daily Lab. Rep. (BNA) No. 7, at A-14 (Jan. 11, 1995). The events surrounding the Caterpillar strike as of 1992 are usefully recounted in 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, 819-26 (1994).

5. H.R. 5, 102d Cong., 1st Sess. (1991); see 137 CONG. REC. H5518-90 (daily ed. July 17, 1991) (debate and passage of bill).

6. S. 55, 102d Cong., 1st Sess. (1991); see 138 CONG. REC. S7919-20, S7922-66 (daily ed. June 11, 1992) (debate and failure of cloture motion); *Senate Fails to Invoke Cloture on Striker Replacement Bill*, Daily Lab. Rep. (BNA) No. 114, at A-10 (June 12, 1992). See *infra* note 107 for a discussion of the substitute bill offered by Senators Packwood and Metzenbaum.

7. H.R. 5, 102d Cong., 1st Sess. (1991); see 137 CONG. REC. H5518, H5588-90 (daily ed. July 17, 1991). Paul Tsongas's bid for the Democratic presidential nomination foundered in Michigan and Illinois in April 1992 in part because Tsongas, unlike Bill Clinton, would not take the pledge to support the striker-replacement legislation. "I don't care who it is, where it is," said Paul GIBLIN, Illinois legislative director for the United Auto Workers. "If you're against that, that's apple pie and motherhood." Robin Toner, *Clinton Hopes Groundwork of 1991 Will Keep Him Rolling in the North*, N.Y. TIMES, Mar. 13, 1992, at A-17.

8. See 139 CONG. REC. H3568-69 (daily ed. June 15, 1993) (passage of H.R. 5 by 239-190 vote).

sufficient support in the Senate to terminate a threatened filibuster.⁹

Despite the emergence of a Republican majority in both houses of Congress as a result of the 1994 election, the striker replacement issue is likely to continue to simmer in public policy debates over reform of federal labor law. Given the union movement's insistent claim that repeal of *Mackay Radio* is essential to redress a growing disparity in bargaining power between labor and management, and the controversy that continues to envelop labor disputes in which employers attempt to maintain operations by hiring permanent replacements, the question of what are the appropriate ground rules for economic conflict under the National Labor Relations Act of 1935 (NLRA)¹⁰ remains very much alive.

Ideally, reform of the rules governing strikes should not be viewed in isolation but as part of a comprehensive reexamination of federal labor law aimed at making the system work better in an era of competitive product markets. It makes a difference whether one considers the question assuming the continuation of the existing framework of adversarial labor relations, in which unions view themselves and are viewed by management as advancing an industry-wide wage and job control policy often conflicting with the interests of the particular firm. A different answer might be given in the context of an altered legal regime that promotes a better alignment of interest between the firm and the bargaining agency of its employees.¹¹ Congress, however, has considered and is likely to continue to take up the strikebreaker issue separately and apart from a broader overhaul of the statutory scheme.¹² The question

9. See 140 CONG. REC. S8844 (daily ed. July 13, 1994) (53-46 vote on motion to close debate on S. 55).

10. Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1988)). A separate statute governs labor organization and collective bargaining in the railroad and airline industries. See Railway Labor Act (RLA), 45 U.S.C. §§ 151-164, 181-188 (1988). Although the structure of collective bargaining differs significantly under the RLA, the rules governing the reinstatement rights of strikers and the rights of replacement workers are virtually identical to those applicable to industries covered by the NLRA. See *TWA, Inc. v. Independent Fedn. of Flight Attendants*, 489 U.S. 426, 432-42 (1989) (applying NLRA precedents to cases considering reinstatement rights of strikers under the RLA).

11. In a book manuscript in progress, the broad outlines of which are sketched in Samuel Estreicher, *Employee Voice in Competitive Markets*, AM. PROSPECT, Summer 1993, at 48, and Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993), I consider the case for broader reform of the legal framework.

12. Thus, for example, Secretary of Commerce Ronald Brown and Secretary of Labor Robert B. Reich's Commission on the Future of Worker-Management Relations, chaired by Harvard professor John T. Dunlop, was charged with the task of formulating recommendations for a broad range of issues concerning reform of the framework for labor-management relations and means of improving productivity, employee participation, and nonlitigatory methods of dispute resolution — save for the issue of the reinstatement rights of strikers. See

therefore is, on the assumption that the basic structure of the labor laws will remain in place, is there a case for modifying the *Mackay Radio* doctrine?

In my view, existing law should be modified, but not for the reasons typically given in the literature and by advocates of the Workplace Fairness bill. Those arguments ultimately cannot be reconciled with the central premises of the NLRA, and they require a reassessment of first principles that the bill's proponents claim is unnecessary and thus avoid. Any justification for an isolated change of the rights of strikers and replacement workers — that leaves undisturbed all of the other central features of the scheme — must be consistent with the existing statutory commitment to the mix of regulation and market forces that is captured by the phrase *free collective bargaining*. That is, workers have a right to insist on collective bargaining of terms and conditions of employment and to promote their interests by engaging in strikes and other concerted activities, but they have no right as such to pursue their economic goals free of competitive forces in both labor and product markets.

Continued adherence to the principle of free collective bargaining requires, I argue, rejection of any per se prohibition of the hiring of permanent replacements for economic strikers. If an employer cannot maintain operations by other means or withdraw its capital by relocating operations elsewhere, such a prohibition effectively insulates labor demands from market checks. The unionized firm will continue to face competition in product markets, but its ability to adjust its personnel practices to take account of the labor-cost advantages of competitors will turn on its ability to secure union consent to reductions in labor costs. Some unions may promote industry-wage policies irrespective of the impact on the particular firm. Also, while many unions will not intentionally pursue their dispute to the point of damaging the firm's competitive position, strikes may nevertheless cause such damage because they are often the result of bargaining failures — poor communication, mistrust, distortions in the incentives of union and management leadership, and the like.

A flat-out ban on permanent replacements even when they are truly necessary to continue operations would represent an unprecedented instance in which the law gives a particular stakeholder a right to continue its dispute with the firm indefinitely while simulta-

neously preventing the firm from breaking the relationship and turning to a different party for the same resource. Such a rule would strengthen labor's position in many disputes — although this might be achieved only by a substantial worsening of the competitive position of union-represented firms. In any event, legal intervention to systematically improve outcomes for labor would require a broad examination of the costs and benefits of wealth redistribution through regulation of this type and reconsideration of the existing regime for collective labor relations. The essentially proceduralist case that advocates of strikebreaker legislation have made thus far is inadequate.¹³

The question becomes whether under current conditions the statutory commitment to collective bargaining warrants any change in present law. In my view, with the sharp decline in union representation from a high point of 35.7% in 1953 to under 13% of non-agricultural workers in private firms today,¹⁴ unrestricted resort by employers to permanent replacements poses a serious threat to the institution of collective bargaining. Employers who can continue operations at prestrike levels with the use of management personnel or temporary help but who nevertheless hire — or threaten to hire — permanent replacements inflict a penalty on their striking employees without economic justification. Strategic use of permanent replacements as a tool for breaking collective organization has always been possible, but in an earlier period of high unionization rates, employers contemplating such a move faced a corresponding disincentive to replace strikers — the realistic prospect that its work force would ultimately re-unionize irrespective of the outcome of any strike. Under current conditions, the risk of re-unionization has atrophied, and the potential benefits to employers of

13. Advocates of repeal of *Mackay Radio* undoubtedly entertain a substantive agenda — hoping that greater protections for strikers will enhance the ability of unions to produce distributional gains for their members — but the case for reform is most often pitched in terms of perfecting the statutory right to strike. See, e.g., GOULD, *supra* note 3, at 192-93 (“I think the notion that employees lose their right to reinstatement because they engage in protected activity confounds the statutory scheme and the promotion of freedom of association and collective bargaining, which the preamble of the Act reminds us is still a basic purpose of the statute.”); WEILER, *supra* note 3, at 268-69 (“[W]orkers should not be forced to gamble their very jobs when they utilize the procedure prescribed by the national labor laws to break deadlocks in the process of free collective bargaining.”).

14. For data on trends in unionization rates, see LEO TROY & NEIL SHEFLIN, U.S. UNION SOURCEBOOK app. A at A-1 (1985). In 1992, 12.7% of nonagricultural employees in private firms were represented by labor unions in collective bargaining. See *Proportion of Union Members Declines to Low of 15.8 Percent*, Daily Lab. Rep. (BNA) No. 25, at B-5 (Feb. 9, 1993). In 1993, that figure fell slightly to 12.3%. See *Number of Union Members Rose in 1993 as Public Sector Grew*, Daily Lab. Rep. (BNA) No. 27, at B-3 (Feb. 10, 1994).

strategic use of the *Mackay Radio* doctrine appear increasingly attractive.

The objective of labor law reform in this area should be, then, to minimize strategic use of the *Mackay Radio* doctrine, while retaining the beneficial market check on unreasonable union demands that the employer's ability to operate with replacements provides. One approach commonly offered in the literature would be to require a showing by employers that operations could not be maintained by temporary help or other means as a prerequisite to the hiring of permanent replacements.¹⁵ I favor such a prior showing of business necessity, provided, however, that a mechanism is available for a prompt administrative determination early on in the strike and that the inquiry takes account of the employer's customary educational, skill, and motivational requirements for the positions in question.

For situations in which employers will be able to make a convincing showing that operations cannot be maintained with temporary workers, there is still a need for a moratorium period during which the process of collective bargaining can operate with some insulation from market forces. Here, I would follow the approach that until recently was the law in Ontario: allowing strikers to return to their jobs for a period of up to six months, even if replacements have been hired. Six months is a sufficiently long time to ensure that both sides feel the signaling and informational effects of a strike and to minimize any strategic use of *Mackay Radio*.

II. FALSE STARTS

Critics of the existing rule on striker replacements offer some variant of one or more of the following positions: (i) the language in the Supreme Court's *Mackay Radio* decision recognizing the employer's right to hire permanent replacements should be dismissed as aberrational dictum inconsistent with the fundamentals of the NLRA (the "aberrational dictum" thesis); (ii) the statutory right to strike in sections 7 and 13 of the NLRA¹⁶ is flatly inconsistent with

15. See, e.g., GOULD, *supra* note 3, at 193 ("My judgment is that Congress should overrule *Mackay* altogether. But at a minimum there ought to be a presumption that temporary replacements are sufficient to protect the employer's interest."); WEILER, *supra* note 3, at 267 ("At a minimum, then, the law should be changed to require an employer to prove that it actually needed to promise permanent tenure to replacements in order to maintain its operations before permitting such a serious inroad on the Section 7 rights of striking employees."); Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669 (1993).

16. 29 U.S.C. §§ 157, 163 (1988).

and should override the employer's ability to maintain operations by hiring permanent replacements (the "rights" thesis); (iii) the use of permanent replacements produces labor strife, prolongs labor disputes, and provokes attendant violence — hence, such use is inconsistent with the statutory goal of promoting industrial peace (the "industrial peace" thesis); and (iv) the use of permanent replacements tips the scales too much in management's favor and for that reason should be prohibited (the "balance of power" thesis). None of these views, I submit, can be squared with the existing statutory commitment to "free collective bargaining."

A. *The "Aberrational Dictum" Thesis*

In *Mackay Radio*, the Supreme Court sustained a National Labor Relations Board (NLRB) order requiring reinstatement of six strikers on the ground they had been discriminatorily denied reinstatement. The company had rehired scores of the strikers but barred reinstatement to the six complainants who led the strike. This was a clear case of discrimination, and nothing more need have been said. The Court nevertheless offered its understanding that the NLRA does not restrict the ability of an employer, otherwise free of unlawful conduct, to maintain operations with the aid of permanent replacements:

Nor was it an unfair labor practice to replace the striking employe[e]s with others in an effort to carry on the business. Although § 13 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 it 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. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.¹⁷

There is a tendency at least in the academic literature to dismiss this language as an aberration — as ill-considered dicta.¹⁸ But this was a case of dictum that simply recognized what all understood at the time to be the reach of the statute. Indeed, even the rather pro-

17. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) (footnote omitted).

18. See, e.g., JULIUS G. GETMAN & BERTRAM 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).

union Labor Board of that period, in its reply brief in the *Mackay Radio* litigation, acknowledged:

The Board has never contended, in this case or in any other, that an employer who has neither caused nor prolonged a strike through unfair labor practices, cannot take full advantage of economic forces working for his victory in a labor dispute. The Act clearly does not forbid him, in the absence of such unfair labor practices, to replace the striking employees with new employees or authorize an order directing that all strikers be reinstated and the new employees discharged. Admittedly the strikers are not "guaranteed" reinstatement by the Act. . . . Admittedly an employer is fully within his rights under the statute in refusing to reinstate striking employees when he has legally filled their positions The Board did not question that right in this case.¹⁹

The Board's concession²⁰ plainly reflected the legislative history of the NLRA. Senator Wagner's initial bill in 1934 would have excluded replacements from the statutory definition of *employee*.²¹ In a revised bill introduced in conjunction with Senator David I. Walsh of Massachusetts — a bill that became the basis for the NLRA as enacted — Wagner deleted the exclusion of striker replacements from the law's protection.²² A Senate committee document²³ ac-

19. Reply Brief for the NLRB at 15-18, *Mackay Radio* (No. 37-706).

20. Professor Christopher Tomlins, who writes about American labor history from a left-wing, critical legal studies perspective, acknowledges that *Mackay Radio's* position on the reinstatement of economic strikers "had been established Board policy for some time." CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 261 n.32 (1985). Referring to the precedents of the first NLRB established under Resolution No. 44, ch. 677, 48 Stat. 1183 (1934), Professor Irving Bernstein notes: "Where a strike was caused by the employer's violation of 7(a), [the] NLRB returned the workers to their jobs without prejudice. Where there was no such breach, strikers had no legal claim to restoration." IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 85 & n.7 (1950).

21. See S. 2926, 73d Cong., 2d Sess. § 3(3) (1934), reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 1, 2 (1985) [hereinafter LEGIS. HIST.] ("[T]he term 'employee' shall not include an individual who has replaced a striking employee.").

22. See S. 2926, 73d Cong., 2d Sess. (1934), reprinted in 1 LEGIS. HIST., *supra* note 21, at 1070 (amended version of S. 2926, which deletes the striker replacement exclusion and provides a new definition of *employee*); S. REP. NO. 1184, 73d Cong., 2d Sess. (1934), reprinted in 1 LEGIS. HIST., *supra* note 21, at 1070-71 (reporting the second print of S. 2926, which includes the deletion of the striker replacement exclusion); see also 78 CONG. REC. 9607 (1934).

23. SENATE COMM. ON EDUC. AND LABOR, 74TH CONG., 1ST SESS., MEMORANDUM COMPARING S. 1958, SEVENTY-FOURTH CONGRESS, FIRST SESSION, A BILL INTRODUCED BY SENATOR WAGNER ON FEBRUARY 21, 1935, TO CREATE A NATIONAL LABOR RELATIONS BOARD, AND FOR OTHER PURPOSES, WITH THE BILL REPORTED BY SENATOR WALSH ON MAY 26, 1934, AS A SUBSTITUTE FOR S. 2926, SEVENTY-THIRD CONGRESS, ALSO INTRODUCED BY SENATOR WAGNER (Comm. Print 1935), reprinted in 1 LEGIS. HIST., *supra* note 21, at 1319 [hereinafter MEMORANDUM COMPARING S. 1958 TO REVISED VERSION OF S. 2926]. According to New Deal labor historian Irving Bernstein, this committee report, drafted by NLRB general counsel Calvert Magruder and his assistant Philip Levy at the request of Senator Walsh, is "the best guide to the meaning of the Wagner Act." BERNSTEIN, *supra* note 20, at 90-91 n.27.

companying the version of the bill introduced in the next Congress explained the revised definition of *employee*:

The broader definition of "employee" in S. 1958 does not lead to the conclusion that no strike may be lost or that all strikers must be restored to their jobs, or that an employer may not hire new workers, temporary or permanent, at will. All that is protected here is the right of those in a current labor dispute or strike to participate in elections, to be free from discrimination in reinstatement after they have agreed to return on the employer's terms, to collective bargaining, to freedom from interference, restraint, or coercion, etc.²⁴

As Irving Bernstein observes in his study of New Deal collective bargaining policy: "Under S. 1958 . . . the employer remained free to refuse to rehire strikers or to take on replacements during a stoppage so long as his purpose was not discriminatory."²⁵

Even if there were any doubt about the congressional understanding in 1935, the dictum of *Mackay Radio* was essentially codified in later amendments to the NLRA. Congress in the Taft-Hartley amendments of 1947²⁶ further entrenched the principle by disenfranchising permanently replaced workers. Section 9(c)(3)²⁷ provided that employees who were permanently replaced during economic strikes lost entirely their right to vote in NLRB elections²⁸ — the opposite of the position Wagner had initially taken. This was one of the provisions that prompted President Truman's unsuccessful veto.²⁹ In 1959, a limited re-enfranchisement occurred:³⁰ replaced strikers eligible for reinstatement could vote for

24. MEMORANDUM COMPARING S. 1958 TO REVISED VERSION OF S. 2926, *supra* note 23, at 21, reprinted in 1 LEGIS. HIST., *supra* note 21, at 1346. The language quoted in the text appears to be from an analysis prepared by William M. Leiserson, who worked closely with Senator Wagner when Leiserson was executive secretary of the National Labor Board, which the Senator chaired during the National Industrial Recovery Act period. BERNSTEIN, *supra* note 20, at 58; see MEMORANDUM COMPARING S. 1958 TO REVISED VERSION OF S. 2926, *supra* note 23, at 6, 15-25, reprinted in 1 LEGIS. HIST., *supra* note 21, at 1327, 1338-46.

25. BERNSTEIN, *supra* note 20, at 92.

26. Labor Management Relations Act (LMRA), Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1988)).

27. LMRA, Pub. L. No. 80-101, sec. 101, § 9(c)(3), 61 Stat. 136, 144 (1947) (current version at 29 U.S.C. § 159(c)(3) (1988)).

28. Tomlins suggests that § 9(c)(3) merely codified NLRB practice:

Wage and hour strikers had lost the right to vote in Board elections well prior to passage of the Taft-Hartley Act, however, and in fact the Board continued to follow the same policy of only allowing such strikers to vote in cases where it was unclear whether or not they had been validly replaced.

TOMLINS, *supra* note 20, at 293-94 (footnote omitted).

29. See 93 CONG. REC. 7485-86 (1947) (reporting President Truman's veto message, which refers disapprovingly to the denial of a vote to strikers).

30. As enacted in 1947, § 9(c)(3) provided: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." LMRA, Pub. L. No. 80-101, Sec. 101, § 9(c)(3), 61 Stat. 136, 144 (1947) (current version at 29 U.S.C. § 159(c)(3) (1988)). As a result of the Landrum-Griffin amendments of 1959, § 9(c)(3) now provides in relevant part: "Employees

up to one year from the commencement of a lawful economic strike.³¹

Finally, if the language from *Mackay Radio* is dictum, it also enjoys the unique status of having been the foundation for at least five other major Supreme Court opinions spelling out its implications.³²

B. The "Rights" Thesis

Critics of *Mackay Radio* also insist that the "right to strike," enshrined in sections 7 and 13 of the NLRA,³³ is rendered meaningless if lawful economic strikers can lose their jobs for exercising that right. This view holds that it is to draw a distinction intelligible only to lawyers — indeed, only to labor lawyers — to say that workers have a statutory *right* to strike and yet may lose their jobs if they exercise that right. If we are to have a conceptually coherent right to strike, the argument goes, *Mackay Radio* must be repealed.³⁴

There is undoubtedly a good deal of rhetorical force to the point. Nevertheless, workers do have a meaningful — if arguably

engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike." Pub. L. No. 86-257, § 702, 73 Stat. 519, 542 (codified at 29 U.S.C. § 159(c)(3) (1988)). The Conference Committee rejected the House bill, H.R. 8342, 86th Cong., 1st Sess. § 703 (1959), see H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. 37-38, reprinted in 1959 U.S.C.A.N. 2509-10 (omitting broader language of H.R. 8342), which would have provided for a flexible case-by-case approach to the voting rights of replaced strikers. See H.R. REP. No. 741, 86th Cong., 1st Sess. 25 (1959), reprinted in 1959 U.S.C.A.N. 2448. The NLRB subsequently rejected the argument that because replaced strikers have contingent rights to reinstatement under *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), they are "entitled" to reinstatement and hence eligible to vote even beyond the 12-month period. See *Levitz Furniture Co.*, 248 N.L.R.B. 15 (1980); *Wahl Clipper Corp.*, 195 N.L.R.B. 634 (1972).

31. See Pub. L. No. 86-257, § 702, 73 Stat. 519, 542 (1959) (codified at 29 U.S.C. § 159(c)(3) (1988)).

32. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *TWA, Inc. v. Independent Fedn. of Flight Attendants*, 489 U.S. 426 (1989); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

It is a mistake, however, to infer from this history that the strikers' exposure to permanent replacement is a reflection of management's property rights or an abstractly conceived absolute right to maintain operations. The prohibition of superseniority offers to lure replacements, the rule against hiring permanent replacements during an offensive bargaining lockout, the Board's rule against offering replacements better terms than the last offer to the union, and the antidiscrimination principle adverted to in the quote from the NLRA legislative history, see *supra* text accompanying note 24, all are examples of limits on the weapons management can employ to further the objective of staying open for business. See generally *Estreicher, supra* note *, at 901-03.

33. 29 U.S.C. §§ 157, 163 (1988).

34. For a particularly forceful expression of this view, see *GOULD, supra* note 3, at 192-93.

incomplete — right to strike in that (i) they cannot be fired for the act of striking; (ii) they can return to work at any point until permanent replacements have assumed their positions; and (iii) in the event that such replacements have been hired and the union does not secure a return-to-work agreement, they have the right to preferential reinstatement — with full seniority and benefits — for jobs that open up in the poststrike period.³⁵

Whatever may be the merits of adding additional protections to this list, we should be skeptical of rights-based arguments for doing so. Consider, first, the other rights-holders: management is thought to have a right to maintain operations.³⁶ Moreover, as David Westfall has written, employees wishing to return to work also have a right to abandon the strike, and new hires have a similar right to work on the terms offered the striking union.³⁷ It is not clear by what method we are to reconcile competing rights. Ultimately, each of these rights is derived from a particular statutory scheme, and each takes its full measure of support from that scheme.

Second, there is nothing inherent in the concept of the “right to strike,” as such, that requires any particular rule on strike replacements. Certainly, as Quebec³⁸ — and, more recently, Ontario³⁹ — has legislated, the right to strike could mean that the employer may not seek to maintain operations with the use of nonmanagerial labor of any kind, even temporary help, except in certain exceptional

35. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). An open issue is whether an employer can recall laid-off replacements before recalling more senior unreinstated strikers. Compare *Giddings & Lewis, Inc.*, 255 N.L.R.B. 742, 745 (1981) (finding a violation where the employer gives general recall preference to laid-off replacements over unreinstated strikers), *enforcement denied*, 675 F.2d 926, 931 (7th Cir. 1982) with *Aqua-Chem, Inc.*, 288 N.L.R.B. 1108, 1110 (1988) (allowing priority to be given to laid-off replacements unless, based on “objective factors,” they had “no reasonable expectancy of recall”), *enforced*, 910 F.2d 1487 (7th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991). *Aqua-Chem* is soundly criticized in Matthew W. Finkin, *Labor Policy and the Evisceration of the Economic Strike*, 1990 U. ILL. L. REV. 547, 561-62, and Douglas E. Ray, *Some Overlooked Aspects of the Strike Replacement Issue*, 41 KAN. L. REV. 363, 393-98 (1992).

36. See, e.g., DANIEL V. YAGER, *LOADING THE SCALES: IS THE BALANCE BETWEEN THE RIGHT TO STRIKE AND THE RIGHT TO OPERATE IN NEED OF REFORM?* (1993); John S. Irving, *Permanent Striker Replacements Should Not Be Banned*, GOVT. UNION REV., Spring 1993, at 1, 3.

37. See David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 LAB. LAW. 137, 156-58 (1991).

38. See An Act to amend the Labour Code and the Labour and Manpower Department Act, ch. 41, 1977 S.Q. 635-36, *amended by* ch. 52, 1978 S.Q. 687-88; ch. 37, 1982 S.Q. 801-02; ch. 22, 1983 S.Q. 199-200; ch. 12, 1985 S.Q. 289-90; ch. 95, 1986 S.Q. 1074-75; ch. 85, 1987 S.Q. 1510; and ch. 61, 1992 S.Q. 1054.

39. See Labour Relations Act, R.S.O., ch. L.2, §§ 73.1-2 (Jan. 1993).

circumstances. At the other extreme, as was the case under British law, it could simply mean a legal immunity — a freedom from “back to work” injunctions and tort law liability for interference with the conduct of a business.⁴⁰ There are also many positions that lie between these two poles.

Some commentators have attempted to bolster the “rights” thesis by arguing that the United States stands alone among civilized developed nations in refusing to protect the jobs of economic strikers.⁴¹ The claim is significantly overstated, as our law on strikers and replacements is not materially different from — and in some

40. The Industrial Relations Act of 1971, ch. 72, modified the common law position by providing limited protection against selective dismissal or selective rehiring that discriminated against union activists:

[T]he Act was not permitted to undermine the ultimate power of the employer in a labour dispute, with sections 25 and 26 expressly providing special rules for the dismissal of those taking part in a lock-out or a strike. In either case a dismissal would not be regarded as unfair unless it could be shown, first, that an employer had been selective in his dismissal or re-engagement of those taking part in the strike or lock-out; and, secondly, that those dismissed or not re-engaged had been selected because of their union membership or activities. The bottom line then was that a dismissal in the course of a strike was not unfair save for the victimization of union activists.

K.D. EWING, *THE RIGHT TO STRIKE* 41 (1991); see Xavier Blanc-Jouvan, *The Effect of Industrial Action on the Status of the Individual Employee*, in *INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY* 176, 202-04 (Benjamin Aaron & K.W. Wedderburn eds., 1972). The British Labour government repealed the 1971 legislation but in the Employment Protection (Consolidation) Act of 1978, ch. 44, only slightly expanded the protection against selective dismissal:

It was only if the employer selectively dismissed or selectively re-engaged (for any reason — not just union membership or activities as before) any of those who had participated in the action that a complaint of unfair dismissal could be made. But even in such a case the dismissal would not necessarily be unfair for the complaint would have to be determined on established principles. And even if this were to lead to a holding of unfair dismissal, it is almost inconceivable that an employee would be successfully reinstated into his employment by a tribunal.

EWING, *supra*, at 42. With the return of the Conservative Party to power, the Employment Act of 1982, ch. 46 (Eng.), substantially diluted the prohibition of selective dismissal by allowing employers selectively to reengage striking workers after a period of three months had elapsed from the dismissal of the work force, and by allowing employers to dismiss only those who were on strike on the date of their dismissal, without dismissing those who had returned to work during the strike. See Ewing, *supra*, at 44-45.

The Employment Act of 1990, ch. 38, further narrowed the protection against selective rehiring when the workers strike without the authorization of their union. See SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* 194 (1992). Professor — now NLRB Chair — William Gould believes that British law forbids permanent replacement of workers engaged in an authorized strike but does not cite authority for his reading. See GOULD, *supra* note 3, at 200-01.

41. See, e.g., GOULD, *supra* note 3, at 198-201; Finkin, *supra* note 35, at 569-71; cf. Katherine Van Wezel Stone, *Legal Regulation of Economic Weapons: A Comparative Perspective*, in *PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR* § 5.7, at 79 (Bruno Stein ed., 1990) [hereinafter *CONFERENCE PROCEEDINGS*] (stating that in France, Germany, and parts of Canada, legal rules provide employees with “greater ability to exercise their market power on a collective basis”).

respects is more protective of strikers⁴² than — that of Great Britain.⁴³

In any event, reliance on the experience of other countries is invariably a hazardous enterprise. Too often comparative-law arguments involve isolating a piece of the foreign scheme that is thought worthy of emulation without transplanting the entire framework — including institutional arrangements and legal culture — that makes the scheme work in the other country.⁴⁴ Thus, for example, we cannot derive a great deal of guidance from a country like Germany, which recognizes the right to strike but relies on a two-tier system of (i) multienterprise regional or national collective bargaining to establish minimum terms of employment acceptable to marginal firms within employer federations, and (ii) supplementation of collective agreements through essentially collaborative dealings with enterprise-based works councils that are prohibited by law from striking.⁴⁵

Among decentralized bargaining systems somewhat similar to our own, there is considerable variation in the rules governing strikes. Great Britain's law, as previously mentioned, is more protective than our own with respect to the reinstatement of economic strikers.⁴⁶ Japanese law apparently bars permanent replacements,⁴⁷ but the labor relations system is based on enterprise unionism and other collaborative features that place strikes by Japanese workers, in terms of their incidence and average duration, at the low end

42. Our law does not, for example, allow wholesale dismissal of strikers but rather outlaws dismissal as such and provides for contingent reinstatement rights for replaced strikers. See *supra* text accompanying note 35. Individual British workers also face damages liability for engaging in unauthorized strikes or strikes in violation of a collective bargaining agreement, see Stone, *supra* note 41, § 5.4.1, which would be barred here, see *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981).

43. See *supra* notes 40 & 42.

44. The best writing on this subject remains Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974). See also Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985) (discussing the proper role of comparative law in the specific field of unjust dismissal statutes). For the argument of a management advocate along these lines, see YAGER, *supra* note 36, at 161-77.

45. See Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, *supra* note 11, at 15-17.

46. See *supra* notes 42-43 and accompanying text.

47. This appears to be the implication of KAZUO SUGENO, JAPANESE LABOR LAW 542 (Leo Kanowitz trans., 1992) ("An employer's discharge, discipline or other disadvantageous treatment of workers because of their participation, as leaders or supporters, in proper dispute acts is null and void.").

internationally⁴⁸ — and certainly in comparison to the United States.⁴⁹

Sharing a common law system, a common border, and, increasingly, a common market with the United States, Canada provides a more instructive comparative-law experience. Several provinces⁵⁰ and the Federal Labour Code (as interpreted)⁵¹ bar the use of permanent replacements; both Ontario⁵² and Quebec⁵³ also generally prohibit use of temporary help and management brought in from other sites to perform struck work. The Canadian experience — discussed below⁵⁴ — is certainly relevant to the policy debate here, but it hardly makes American law on strikers and replacements an anomaly among civilized nations. The case for change has to be made on other terms.

C. The "Industrial Peace" Thesis

There is a suggestion in the literature on strikebreaker legislation that repeal of *Mackay Radio* might serve to reduce industrial strife.⁵⁵ The NLRA's statement of purposes indeed cites industrial peace as an overriding objective of the legislation.⁵⁶ The statute has

48. See, e.g., Tadashi Hanami, *Conflict Resolution in Industrial Relations*, in *INDUSTRIAL CONFLICT RESOLUTION IN MARKET ECONOMIES* 203, 210-11 & tbl. 3 (T. Hanami & R. Blanpain eds., 2d ed. 1989); Taishiro Shirai, *A Theory of Enterprise Unionism*, in *CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN* 117, 136-37 & tbl. 5.5 (Taishiro Shirai ed., 1983). Official strike statistics do not reflect, however, the use by Japanese unions of short, largely symbolic work stoppages of a day or two of duration, and work-to-rule forms of protest. See Hanami, *supra*, at 210-11 & tbl. 4.

49. See, e.g., MASANORI HASHIMOTO, *THE JAPANESE LABOR MARKET IN A COMPARATIVE PERSPECTIVE WITH THE UNITED STATES* 54-57 & figs. 3.7-3.8 (1990).

50. See H.R. 4552 and the *Issue of Strike Replacements: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 41-45, 50-65 (1988) (statements of Brian Langille, Professor, University of Toronto Law School) (summarizing provincial laws).

51. See Labour Act, R.S.P.E.I., ch. L-1, § 8 (1974), amended by ch. 39, 1987 S.P.E.I. 121; Canadian Air Line Pilots' Assn., 5 C.L.R.B. Rep. 368, 407-10 (1983).

52. See Labour Relations Act, R.S.O., ch. L.2, §§ 73.1-2 (Jan. 1993).

53. See An Act to amend the Labour Code and the Labour and Manpower Department Act, ch. 41, 1977 S.Q. 635-36, amended by ch. 52, 1978 S.Q. 687-88; ch. 37, 1982 S.Q. 801-02; ch. 22, 1983 S.Q. 199-200; ch. 12, 1985 S.Q. 289-90; ch. 95, 1986 S.Q. 1074-75; ch. 85, 1987 S.Q. 1510; and ch. 61, 1992 S.Q. 1054.

54. See *infra* text accompanying note 61.

55. See DAVID CARD & CRAIG A. OLSON, *BARGAINING POWER, STRIKE DURATION, AND WAGE OUTCOMES: AN ANALYSIS OF STRIKES IN THE 1880s*, at 27, tbl. 7 (Princeton Univ. Indus. Relations Section Working Paper No. 294, 1992); John F. Schnell & Cynthia L. Gramm, *The Empirical Relations Between Employers' Striker Replacement Strategies and Strike Duration*, 47 *INDUS. & LAB. REL. REV.* 189, 203 (1994); Craig A. Olson, *The Use of Strike Replacements in Labor Disputes: Evidence from the 1880s to the 1980s*, at 17 & tbl. 2 (Mar. 1991) (unpublished manuscript, on file with author).

56. NLRA § 1, 29 U.S.C. § 151 (1988).

succeeded in replacing an administrative procedure for strikes over recognitional disputes, and in encouraging the use of arbitration to resolve disagreements over the interpretation of collective bargaining agreements. It is less clear, however, that the statute is designed to eliminate economic conflict as such. Disagreements resulting in occasional strikes and lockouts are thought to be an unavoidable part of the process of collective bargaining.⁵⁷

Even if we assume, for the moment, that the NLRA also generally seeks to reduce economic conflict, it is questionable whether enhancing a union's ability to maintain a strike indefinitely will reduce the incidence or duration of strikes. The "joint costs" theory of strikes in the economic literature argues that strikes will be used less by the parties when the joint costs to both parties is high relative to the cost of other mechanisms for resolving their differences.⁵⁸ This theory offers no firm prediction as to the likely effects of strikebreaker legislation. Such a law makes strikes more costly to firms — by increasing output losses — and less costly to workers. It may improve labor's bargaining power and may affect relative wages.⁵⁹ But in theory, strike incidence and duration should not be affected by a policy change that leaves undisturbed the joint costs to both parties of a strike.⁶⁰

In practice, the effects of such laws may be quite different. The Canadian experience here may be instructive. A recent empirical study conducted by Professors Morley Gunderson, Angelo Melino, and Frank Reid of the University of Toronto finds that the impact

57. See generally *NLRB v. Insurance Agents' Intl. Union*, 361 U.S. 477 (1960) (stating that the NLRB generally lacks authority to regulate weapons of economic conflict because the NLRA views conflict as part of the process of collective bargaining).

58. On the joint-costs model of strikes, see John Kennan, *Pareto Optimality and the Economics of Strike Duration*, 1 J. LAB. RES. 77 (1980), and Melvin W. Reder & George R. Neumann, *Conflict and Contract: The Case of Strikes*, 88 J. POL. ECON. 867 (1980).

59. To the contrary, reviewing the Canadian experience, Professor John Budd of the University of Minnesota finds that "there is no evidence to support the contention that the presence of legislation affecting the use of strike replacements significantly alters relative bargaining power and the wage determination process or significantly impacts strike activity." JOHN W. BUDD, *CANADIAN STRIKE REPLACEMENT LEGISLATION AND COLLECTIVE BARGAINING: LESSONS FOR THE UNITED STATES* 21-22 (University of Minn. Indus. Relations Ctr. Working Paper No. 93-08, 1993).

60.

In essence, a policy should reduce the expected duration of a strike if it reduced uncertainty by making information public or if it increased the joint cost to both parties of using the strike as opposed to other mechanisms. The policy may also have a differential impact on bargaining power, but as long as that is recognized by both parties, it would have implications for wages but not for strike durations.

Morley Gunderson & Angelo Melino, *The Effects of Public Policy on Strike Duration*, 8 J. LAB. ECON. 295, 297-98 (1990).

of anti-"scab" legislation in Canada has been to *increase*, rather than decrease, both the incidence and duration of strikes:

Certainly the most controversial policy variable is the *anti-scab* legislation, which prohibits the use of replacement workers during a strike. Such legislation exists only for 13 percent of our contracts, essentially in Quebec since 1977. Somewhat surprisingly, our results indicate that the legislation is associated with statistically significant and quantitatively large *increases* in *both* strike incidence and duration and hence overall strike activity. This is surprising because the legislation was introduced in part to curb the picket line violence and animosity that otherwise could convert a peaceful, short-duration strike into a violent, long-duration one as picketers were confronted with replacement workers. As well, prohibitions on replacement workers should increase the cost of the strike to employers by removing their option of carrying on production by using replacement workers (albeit this may also reduce the cost to striking workers as they are under less threat of being permanently replaced, and it may reduce costly picket line violence).⁶¹

These results are not necessarily inconsistent with empirical work in the United States finding that strikes in which permanent replacements have been hired tend to last longer than strikes in which firms attempt to maintain operations by other means.⁶² We cannot tell from these studies whether the use of replacements prolongs strikes, or whether firms use or threaten to use replacements when they anticipate a long, intractable dispute. Because these investigations do not control for all the relevant characteristics of the parties contributing to the nature of the dispute between them, the correlations found between strike duration and use of replacements may simply reflect, as the authors of one recent study acknowledge,

61. Morley Gunderson et al., *The Effects of Canadian Labour Relations Legislation on Strike Incidence and Duration*, 41 LAB. L.J. 512, 517 (1990). A fuller account of this study can be found in their paper of the same title presented to the spring meeting of the Industrial Relations Research Association, Buffalo, New York, May 3, 1990 (on file with author). See also Gunderson & Melino, *supra* note 60. But see BUDD, *supra* note 59, at 21-22 (asserting that there is no evidence that Canadian strikebreaker legislation has had a significant impact on strike activity). Professors John Kennan and Robert Wilson argue that the Gunderson-Melino findings are due to the fact that

removing the firm's option to hire replacement workers increases the union's uncertainty about the firm's reservation value. In the case of screening and signaling models, this greater uncertainty generates strikes that will be longer on average, although also wage settlements will be higher. In the case of an attrition model, the effect of a "no scab" law is to enlarge the pie, which directly reduces the quit rate of both parties and thus leads to longer strikes and higher wage settlements on average. In all these models, therefore, one expects strikes to end more quickly, and wage settlements to be lower on average, if replacement workers are not precluded by a "no scab" law.

JOHN KENNAN & ROBERT WILSON, STRATEGIC BARGAINING MODELS AND INTERPRETATION OF STRIKE DATA 35 (Stanford Ctr. on Conflict and Negotiation Working Paper No. 5, 1988) (footnote omitted).

62. See *supra* note 55 (citing studies).

"a tendency on the part of employers expecting or actually experiencing long strikes to announce the intent to hire, or actually hire, permanent replacements."⁶³

In some instances, as in the disputes at Greyhound⁶⁴ and at International Paper in Jay, Maine,⁶⁵ the use of replacements may have prolonged the strike because it complicated the union's ability to call a halt to a conflict that spelled job loss for many of its members — and possible loss of bargaining authority for the union. There are also examples like the Caterpillar-UAW dispute and others in which the firm's declared intention to hire permanent replacements effectively ended the strike.⁶⁶ Even if we put aside other consequences of strikebreaker legislation, and even if we thought that reducing strike duration was a sufficient justification for a policy change, the case remains to be made that restricting the hiring of permanent replacements will have the desired effect.

D. *The "Balance of Power" Thesis*

Ultimately, *Mackay Radio's* critics are worried about too few strikes occurring rather than too many. The incidence of strikes declined by fifty percent during the 1980s relative to the previous decade.⁶⁷ In Professor Matthew W. Finkin's terms, there has been

63. Schnell & Gramm, *supra* note 55, at 203. At a 1991 conference sponsored by the Economic Policy Institute, Professor Gramm stated:

There are a couple of possible explanations for the observed relationship between the use of permanent replacements and strike duration. One is that the use of replacement workers (and particularly the use of permanent replacements) causes longer strike durations. The other possibility is that firms are more likely to hire replacement workers when they expect very long strikes. My gut feeling is that the first hypothesis accounts for much of the difference we observe, but we don't yet have studies that can separate out the magnitude of the two competing effects.

Cynthia Gramm, *Employers' Decisions to Operate During Strikes: Consequences and Policy Implications*, in SEMINAR: EMPLOYEE RIGHTS IN A CHANGING ECONOMY — THE ISSUE OF REPLACEMENT WORKERS 33, 36 (Economic Policy Inst. ed., 1991) [hereinafter SEMINAR].

64. Professor Peter Cappelli of the University of Pennsylvania's Wharton School observed that Greyhound's decision to hire permanent replacements in response to the strike of its drivers signalled "the collapse of traditional labor relations" "Hiring permanent replacements means a labor strike is now a fight to the death, rather than a periodic test of wills." Thomas C. Hayes, *Future of Labor Is Seen in Bus Strike*, N.Y. TIMES, Mar. 7, 1990, at A18 (quoting Prof. Cappelli).

65. See Julius Getman, *The Strike at Jay*, in SEMINAR, *supra* note 63, at 51, 54; Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803 (1993).

66. One study notes that in the few cases in which firms hired permanent replacements, the "more typical[]" union response was "to soften its position and seek a quick settlement, as was the case in the clear majority of the cases." CHARLES R. PERRY ET AL., OPERATING DURING STRIKES 66 (1982).

67. See U.S. GEN. ACCOUNTING OFFICE, GAO/HRD 91-2, LABOR-MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970s AND 1980s, at 12 (1991) (stating that strikes reported to the Federal Mediation and Conciliation

an "enervation of the economic strike": "the strike may no longer be a credible tool of agreement-making for those employees for whom the labor market presents little or no obstacle to their replacement."⁶⁸ In other words, *Mackay Radio* should be repealed in order to right the balance of power between labor and management, even if this leads to more strikes.

It is difficult to say why the number of strikes has declined in the United States during this period. The level of strike activity is less a product of legal rules than of larger forces, such as aggregate demand conditions, unemployment rates, and product market conditions.⁶⁹ Indeed, Canada — which had experienced the highest rate of strikes from 1966 to 1975 among any nation except for Italy⁷⁰ — also reports a substantial decline in the incidence of strikes during the 1980s,⁷¹ despite legislative developments strengthening the position of unions and protecting strikers from job loss.

In any event, although — as developed below⁷² — we should be concerned about the apparently greater willingness of firms during the 1980s to resort to permanent replacements,⁷³ the NLRA confers no mandate on the Labor Board or the courts to devise rules that seek to achieve some abstract balance of power between labor and management. Although the NLRA's framers expressed the hope that collective bargaining would increase the purchasing power of workers as a means of drawing the nation out of the Great Depression,⁷⁴ the statute they wrote only commits the parties to a

Service (FMCS) dropped from about 2660 a year during the 1970s to 1250 a year during the 1980s, with the greatest decline occurring between 1979 and 1983).

68. Finkin, *supra* note 35, at 547, 549.

69. The economic literature on this issue is usefully explored in Sheena McConnell, *Cyclical Fluctuations in Strike Activity*, 44 INDUS. & LAB. REL. REV. 130, 141 (1990) (finding that "the probability of a strike varies pro-cyclically with the inverse of the unemployment rate" and that "strikes are most likely in industries suffering low demand in regions with low unemployment").

70. See S.M. JAMIESON, INDUSTRIAL CONFLICT IN CANADA 1966-1975, at 1-2 (Centre for the Study of Inflation and Productivity, Economic Council of Canada, Discussion Paper No. 142, 1979), cited in ALTON W.J. CRAIG, THE SYSTEM OF INDUSTRIAL RELATIONS IN CANADA 289 (3d ed. 1990).

71. See CRAIG, *supra* note 70, at 288 tbl. 11.18.

72. See *infra* text accompanying notes 98-101.

73. There are, as yet, no definitive data to support this impression. A 1991 study by the General Accounting Office found that employers announced they would hire permanent replacements in about 31% of strikes in 1985 that were reported to the FMCS and about 35% of strikes in 1989, and actually hired permanent strike replacements in about 17% of strikes in each year. U.S. GEN. ACCOUNTING OFFICE, *supra* note 67, at 13-18. Its poll of employer and union representatives also revealed a widely held belief among those surveyed that replacements were hired less often in the late 1970s than in the late 1980s. *Id.* at 18-19.

74. Section 1 of the NLRA states in relevant part:

process of collective bargaining rather than to particular substantive outcomes.

The proceduralist thrust of the NLRA was quite deliberate. Both labor and management would have strongly opposed any government role in the setting of the terms and conditions of employment.⁷⁵ Senator Wagner initially omitted a good-faith bargaining requirement from his bill, fearing it would be vulnerable to the charge that he was seeking a form of compulsory arbitration of labor disputes.⁷⁶ The bill as it emerged from the Senate labor committee — and as it was enacted into law — contained such a requirement, but the committee report took pains

to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.⁷⁷

The climate in the postwar period was no more conducive to a government role in setting terms for labor and management. Government labor policy during World War II enhanced the institutional position of unions but also dampened wages. Pent-up wage demands led to a wave of strikes in 1946 and 1947 that fueled inflationary pressures and public sentiment in favor of curbing the power of unions.⁷⁸ The Case Bill of 1946,⁷⁹ a forerunner of Taft-Hartley that would have prohibited secondary boycotts and extor-

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

NLRA § 1, 29 U.S.C. § 151 (1988). The economic theory underlying this statement is questioned in Daniel J.B. Mitchell, *Inflation, Unemployment, and the Wagner Act: A Critical Reappraisal*, 38 STAN. L. REV. 1065, 1073-76 (1986).

75. The American Federation of Labor consistently opposed "compulsory arbitration, compulsory investigation of industrial disputes, industrial courts, and similar devices which involve limitations upon the right to strike and regulation of relations between employers and employees by law." LEWIS L. LORWIN, *THE AMERICAN FEDERATION OF LABOR* 401-02 (1933).

76. See JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* 137 (1974).

77. S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), reprinted in 2 LEGIS. HIST., *supra* note 21, at 2312.

78. See TOMLINS, *supra* note 20, at 253-56.

79. H.R. 4908, 79th Cong., 2d Sess. (1946).

tion,⁸⁰ would have become law but for President Truman's veto.⁸¹ In 1947, the bill that passed the House would have banned industry-wide collective bargaining because of its wage-pushing inflationary effects.⁸² As enacted into law, the Taft-Hartley amendments to the NLRA outlawed secondary boycotts and several other restraints on union weapons and removed any ambiguity in the original Wagner Act suggesting that the NLRB had authority to infer from the absence of agreement or substantive rigidity of bargaining positions that a party had not bargained in good faith.⁸³ Thus, the Supreme Court later observed: "[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."⁸⁴

Removing a countermeasure from the employer's arsenal is, of course, not the same thing as writing a contract for the parties. But, as Justice Brennan's landmark decision in *NLRB v. Insurance Agents' International Union*⁸⁵ makes clear, government regulation of bargaining tactics in the service of promoting a balance of power between labor and management cuts against the grain of this statute and is difficult to square with the statutory commitment to free collective bargaining.⁸⁶

80. H.R. 4908, 79th Cong., 2d Sess. sec. 7, §§ 1-6, sec. 11 (1946).

81. See JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947*, at 252 (1981).

82. See *id.* at 254-55; Mitchell, *supra* note 74, at 1071.

83. The Taft-Hartley amendments added § 8(d), which provides in relevant part: "[S]uch obligation [to bargain collectively in good faith] does not compel either party to agree to a proposal or require the making of a concession . . ." 29 U.S.C. § 153(d) (1988); see *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (holding that § 8(d) also operates as a constraint on the NLRB's remedial authority); *NLRB v. Insurance Agents' Intl. Union*, 361 U.S. 477, 487 (1960) (stating that "§ 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements").

84. *H.K. Porter*, 397 U.S. at 108.

85. 361 U.S. 477 (1960).

86.

And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. Nor does it contain a charter for the NLRB to act at large in equalizing disparities of bargaining power between employer and union.

361 U.S. at 490 (citation omitted).

III. A COLLECTIVE PROCESS-BASED THEORY FOR REFORM OF *MACKAY RADIO*

As I suggested in a 1987 article,⁸⁷ we need a theory of the role of the strike and strike replacements in the process of collective bargaining that accords with the central premises of the NLRA.

A. *Central Premises of the NLRA*

I take the premises of the NLRA to be the following:

First, workers have a right to opt for collective representation in setting the terms and conditions of employment.

Second, the law protects the freedom of workers meaningfully to decide whether to be represented on a collective basis, but it is otherwise indifferent to the extent of unionization or the extent of coverage of union contracts. Absent from our law is the provision of German law permitting extension by administrative fiat of collective bargaining agreements to nonunion firms. The NLRA, including the 1947 Taft-Hartley amendments,⁸⁸ and in particular section 7's recognition of the employee's "right to refrain" from union activities,⁸⁹ reflects a public policy that does not seek to promote the spread of unions where it is not otherwise sought by the affected employees.

Third, the NLRA assumes there is a problem of inequality of bargaining power when individual workers negotiate terms of employment with firms. Congress, in the language of section 1, sought to redress "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers."⁹⁰ The import of this latter assumption is that for workers who have opted for collective representation, the statute seeks to promote a process by which the workers acting as a group negotiate terms with their employer, even if the employer would prefer to deal with its employees on some other basis.

Fourth, again within the domain of the statutory scheme as it presently stands, the problem of inequality of bargaining power is thought to be corrected by the ability of workers to invoke the collective representation option and the statutory protection of their declared preference for collective bargaining. Unlike the Fair La-

87. See Estreicher, *supra* note *.

88. LMRA, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1988)).

89. NLRA § 7, 29 U.S.C. § 157 (1988).

90. NLRA § 1, 29 U.S.C. § 151 (1988); see *supra* note 74. I leave for another occasion whether this is a sound diagnosis of some or all labor markets.

bor Standards Act of 1938⁹¹ or the laws common in European countries, the NLRA does not stipulate the minimum terms under which workers may be employed. Nor, as we have seen, is it a law requiring the parties to reach any particular outcome or any agreement at all.

Rather, the NLRA is an essentially *proceduralist* statute that facilitates collective bargaining without nullifying the influence of market forces. The parties at the table are not insulated from the forces of competition, whether between firms in the product market or between union and nonunion workers in the labor market.

Some may argue that the purpose of the NLRA is to eliminate competition in the labor market — “to take wages out of competition.” That is certainly an objective of unions, and where such competition is eliminated, unions are at their strongest point.⁹² It is also true that, as a general matter, unions enjoy an immunity from the antitrust laws in pursuing that objective.⁹³ The NLRA, however, aids that objective only in the very limited sense of providing a collective representation option and insisting on good-faith collective bargaining once that option has been exercised. The NLRA does not itself eliminate or seek to eliminate labor-market competition.

B. *Unraveling the Paradox of Mackay Radio*

From these premises, I believe we can derive a theory of the role of the strike and strike replacements as well as a basis for evaluating current arrangements. Certainly, other theories flowing from different premises are possible. Professors George Cohen and Michael Wachter, for example, have offered a defense of *Mackay Radio* based on efficiency considerations in internal labor markets.⁹⁴ Writers wishing to bolster union bargaining power would

91. 29 U.S.C. §§ 201-219 (1988).

92. The premise of my recent Piper Lecture in Labor Law, see Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, *supra* note 11, and my upcoming book is that a new labor relations system, and a new role for unions, is needed in a world in which competitive product markets make it increasingly difficult to take wages and other terms and conditions of employment out of competition.

93. See *United States v. Hutcheson*, 312 U.S. 219 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

94. See George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, in CONFERENCE PROCEEDINGS, *supra* note 41, at 109; Michael L. Wachter, Does the NLRA Protect Union or Firm Rent-Seeking? 24-27 (Feb. 1993) (unpublished manuscript, on file with author). As a positive theory of the NLRA, Cohen and Wachter overstate the statutory commitment to efficiency. Under the statute, workers are permitted, for example, to forge alliances seeking to eliminate entirely labor-market competition in their industry. For other criticism, see *infra* note 97.

offer a very different, wealth-redistributive view.⁹⁵ Such theories, however, require independent justification from first principles. Moreover, they would require a reassessment of the entire statutory scheme, rather than an isolated change in the rules governing the reinstatement rights of strikers and leaving all other aspects of the NLRA essentially intact.

Consistent with the premises outlined above, the only justification, in my view, for allowing employers to hire permanent replacements in the course of a strike is that the statute does not eliminate the role of labor-market competition — of competition among workers — in the setting of the terms and conditions of employment. Hence, the risk of permanent replacement serves as a market-based check on unreasonable union demands at the bargaining table.

There are, of course, other checks on union demands, notably the limited ability of many workers, even when aided by union strike funds and state laws extending unemployment benefits, to pay for the necessities of life without working. The NLRA does not, however, insulate workers from labor-market competition even if their union were willing to invest its entire strike treasury on a particular dispute, or if all strikers were able to secure temporary employment elsewhere, to facilitate a strike of indefinite duration.

But that is only half of the story. It is also a central premise of the statute that when workers have opted for collective representation, the terms of the labor contract are to be determined by what workers organized *collectively* will accept, not by what individual workers are willing to accept. Collective bargaining is not quite the same thing as “collective begging,” a term of derision used by advocates of *Mackay Radio’s* repeal.⁹⁶ Thus, we also have to ask whether there is a corresponding collective-labor check on unreasonable management demands. Given the congressional judgment, it is not a sufficient answer to say that such a check comes from the willingness of *individual* replacement workers to brave the picket line and work on the terms of management’s final offer to the union. The very inequality of individual worker bargaining power that led Congress to enact a collective representation option cannot help but influence the reservation wage of individual replacement

95. See, e.g., Michael H. Gottesman, *Whither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767 (1991).

96. See, e.g., Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 420 (1992); Pollitt, *supra* note 18, at 297; William D. Turner, *Restoring Balance to Collective Bargaining: Prohibiting Discrimination Against Economic Strikers*, 96 W. VA. L. REV. 685, 690 (1994).

workers and hence the content of management's final offer to the union.⁹⁷

Mackay Radio seems, on one level, to permit this paradoxical result. On another level, if we consider the union density levels of the 1940s and 1950s, it is possible to argue that firms could often expect that at the end of a strike, replacement workers would either support the preexisting union or enlist the services of another labor organization. It is this prospect of continuing union organization at strike's end that, in my view, provides the necessary moderating influence of a *collective* employee check on management demands at the bargaining table. That check acts to ensure that management, too, faces the right incentives from the standpoint of the statute.⁹⁸

There are many explanations for the decline in union density. The fall in the unionization rate may reflect changes in worker preferences and product market conditions that the law itself cannot alter but that call for a different role for unions and for facilitating legal change.⁹⁹ Some of the explanation may also lie, as Professor

97. By contrast, Cohen and Wachter argue:

The line drawn by *Mackay Radio* is consistent with the efficiency model . . . because the rule helps deter opportunistic behavior by both sides in the [internal labor market (ILM)]. Recall that in the ILM, sunk, firm-specific investments by both parties create the potential for opportunistic behavior. Suppose that a strike occurs because a firm with monopsony power in the ILM has demanded that the workers agree to lower future wage rates, that is, a lower expected return on their sunk investments. If the firm's product market conditions have not changed, then such a demand by the firm is an opportunistic threat rather than an efficient adjustment as long as the prevailing wage rates represent a competitive return on workers' investments. In this case, striking workers would have little to fear from replacement workers, because these replacements would not accept jobs that offer a stream of future wages below competitive levels. Alternatively, any replacement workers who accepted jobs would be reluctant to make sunk investments in a firm that had developed a reputation for opportunistic behavior. Cohen & Wachter, *supra* note 94, at 118.

This view is problematic on a number of grounds. First, Cohen and Wachter have no explanation for the role of unions and collective bargaining in firms not characterized by ILMs. Second, even for ILM-type firms, they substantially overstate the role of reputation costs, particularly for firms that have changed location or operations and perhaps have less need for firm-specific worker investments in the future. Third, they fail to take into account the possibility that what may look like cheating on relational contracts for the strikers may be a good deal for a different group of workers — replacements and crossovers — because when the latter group obtains employment during a strike, changes in product markets, in labor market supply, or in the skills needed for these jobs may have altered that group's marginal productivity calculus. Finally, and most importantly, the Cohen-Wachter analysis — though purporting to provide a positive theory of the NLRA — does not give due recognition to the congressional intent to provide a *collective* employee check on management demands at the bargaining table.

98. The suggestion here is that the framers of the NLRA envisioned significant union density levels in fashioning the model of economic conflict authorized by the statute. They did not, however, make any affirmative provision for ensuring the maintenance of any particular level of unionization.

99. This is essentially the view I take in Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, *supra* note 11.

Paul Weiler has suggested,¹⁰⁰ in the remedial deficiencies of the statute.

Whatever the causes of the decline in union density, under present conditions *Mackay Radio* threatens to unravel the statutory scheme. This is particularly true given the existing rules that allow representational issues to be decided during the course of a strike. Those rules empower employers to treat a strike, not simply as a dispute resolution mechanism consistent with a continuation of the bargaining relationship at strike's end, but as an occasion for eliminating that relationship.¹⁰¹

C. *The Proposal*

This state of affairs requires legislative action. How should the law be changed?

1. *The Case Against a Per Se Ban on Permanent Replacements*

One option is the current legislative initiative to overturn *Mac-kay Radio*. A per se prohibition on the hiring of permanent replacements would, in my view, substantially diminish the influence of labor-market competition in the setting of terms and conditions of employment in the union sector. If an employer cannot maintain operations by other means or withdraw its capital by relocating operations elsewhere, such a prohibition effectively insulates labor demands from market checks.¹⁰² Collective bargaining

100. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

101. The Supreme Court's decision in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), mitigates the potential to use permanent replacements as a means of ousting unions by requiring employers to prove some basis for believing that replacement workers do not support the striking union before withdrawing recognition from the union. Given the union's objective at strike's end to obtain the return of strikers to their jobs, however, there will often be a conflict of interest between returning strikers and replacements that should not be difficult to prove. Proposals in the literature include adoption by the NLRB of an "economic strike bar" to considering representational questions during an active strike, see Joan Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 TEMP. L. REV. 691 (1988), and barring employers from unilaterally 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 (1991). For my views, see *infra* text accompanying note 120.

102. Bargaining outcomes under such a regime would be largely determined from the firm's standpoint by the extent of prestrike stockpiling, the durability of relationships with suppliers and customers, and the firm's ability to mechanize operations sufficiently so that managers can perform unit work during strikes. From the union's standpoint, bargaining outcomes would be determined by the size of strike funds, the availability of unemployment compensation under state law, and alliances with other unions such as truckers. I do not believe that — under these conditions — the parties would face the right incentives to resolve disputes in a manner that promotes the long-term competitive health of firms in the union sector.

should not be an endurance contest. If the employer has met its bargaining obligations and is fully prepared to continue to deal collectively with its employees at strike's end, and if sufficient time has passed for the informational and signaling benefits of the conflict to manifest themselves, there has to be a mechanism for testing the reasonableness of the union's demands in the marketplace. The ability to hire replacements willing to work on the basis of the firm's final offer to the union provides that check.¹⁰³

It is true that even without *Mackay Radio* firms will continue to face product-market competition, and many unions will be as concerned as management with reducing the firm's competitive disadvantage, even if this means adjusting wages, work rules, and the like. These are situations for which *Mackay Radio* is largely irrelevant: the parties will ordinarily be able to adjust their differences without strikes, or, if occasional strikes occur to keep management convinced of the union's effectiveness or to lower union members' expectations,¹⁰⁴ the strikes will be relatively short in duration.

Some bargaining relationships, however, are marred by distrust on both sides, and a long strike will typically be necessary to communicate employees' resolve to management or to convince employees of economic constraints operating on the firm. In yet other situations, the interests of the union and the firm may not be entirely congruent because the union may be concerned about the implications of an agreement that adversely affects its bargaining position in other units — as is arguably the case in the Caterpillar-UAW dispute¹⁰⁵ — or because the union is catering to the preferences of long-service workers who benefit, say, from restrictive

103. As discussed below, see *infra* text accompanying note 110, the struck firm's ability to attract temporary workers will not necessarily provide this check if adequate numbers of qualified workers would be available for permanent, but not temporary, employment. See *Prohibiting Permanent Replacement of Striking Workers: Hearing on H.R. 5 Before the Subcomm. on Aviation of the House Comm. on Pub. Works and Transp.*, 102d Cong., 1st Sess. 193-94 (1991) (statement of Prof. David Westfall); Corbett, *supra* note 4, at 875; Michael H. LeRoy, *Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert, and Cartelization*, 34 B.C. L. REV. 257, 305-06 (1993).

104. See Orley Ashenfelter & George E. Johnson, *Bargaining Theory, Trade Unions, and Industrial Strike Activity*, 59 AM. ECON. REV. 35, 37 (1969).

105. In a number of highly publicized strikes, unions have allowed constituencies other than the immediately affected workers to determine the outcome of strike and contract ratification votes. See, e.g., Henry J. Holcomb, *Port workers reject pact, face job loss*, PHILA. INQUIRER, Sept. 29, 1993, at A-1 (reporting that Wilmington port workers voted against a concession pact for Philadelphia port workers, even though a Chilean fruit shipper threatened to divert traffic to a lower-cost Wilmington port); Alex S. Jones, *Paper Brinksmanship: Times and Drivers Are Joined in Fear Both Would Lose All-Out Labor War*, N.Y. TIMES, May 15, 1992, at B2 (reporting that a deal between the *New York Times* and its drivers would be subject to a majority vote of the entire union, including drivers for its competitors, the *Daily News* and the *New York Post*).

work rules and who will not yield those rules absent a palpable crisis affecting their jobs.¹⁰⁶

Mackay Radio is relevant to these latter situations of bargaining failure. When the firm is unable to continue operations by other means, the firm should not be locked into an acceptance of the union's demands; rather, it should be able to force a marketplace test of the union's bargaining position. If the employer makes known at the outset its intention to hire permanent replacements, it can minimize the need for an endurance contest and avoidable job loss for strikers, as well as induce an earlier moderation of the union's demands.¹⁰⁷

2. *Requiring a Prior Showing of Business Necessity*

The objective of labor law reform in this area should be to devise a means of minimizing the strategic use of *Mackay Radio*¹⁰⁸ — that is, when firms permanently replace strikers for the purpose of ousting the union and deterring future unionization rather than in the interest of maintaining operations in the face of a strike —

106. See generally Bruce E. Kaufman & Jorge Martinez-Vasquez, *Monopoly, Efficient Contract, and Median Voter Models of Union Wage Determination: A Critical Comparison*, 11 J. LAB. RES. 401, 414-18 (1990).

107. In a last-minute, unsuccessful attempt to overcome the June 1992 Senate filibuster on S. 55, 102d Cong., 1st Sess. (1991), Senators Packwood of Oregon and Metzenbaum of Ohio, with labor backing, offered a compromise that would have made a proffer of binding interest arbitration a mandatory condition to resort to economic conflict. Under this proposal, an employer who refused to participate in arbitration or to accept an arbitration award could not hire permanent replacements; if the union chose to strike without proffering interest arbitration or accepting the award, the employer would be free to use such replacements. See 138 CONG. REC. S8056-89 (daily ed. June 11, 1992) (amendments to S. 55 nos. 2047-94 submitted by Sen. Packwood), reprinted in Daily Lab. Rep. (BNA) No. 115, at D-1 to D-4 (June 15, 1992).

Although an improvement over a flat-out ban, this proposal suffers from the infirmity of empowering a third party who is likely to be unfamiliar with the competitive pressures operating on the firm to decide the fate of the firm. Interest arbitration is often used in public-sector disputes in which strikes are outlawed and public employers do not face the demands of competitive markets. If arbitration is used as a means of avoiding resort to permanent replacements, it should be advisory only and should provide for an exceedingly prompt award that does not delay resolution of the dispute. For an interesting proposal along these lines, see George S. Roukis & Mamdouh I. Farid, *An Alternative Approach to the Permanent Striker Replacement Strategy*, 44 LAB. L.J. 80, 89-90 (1993) (proposing submission of unresolved issues to advisory arbitration and imposition of mild sanctions as an additional settlement impetus).

108. In my 1987 article, Estreicher, *supra* note *, at 906-07, I favored overturning *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), which allows state law to intervene in a manner that stiffens the resolve of the firm to end the relationship with the union rather than settle the strike. I now believe that it is desirable that management not be able to promise permanent employment to replacements as a means of defeating a strike and yet be free to disregard that promise depending on the outcome of the strike. Although the NLRA should be deemed to preempt any state law requiring specific performance of the promise of permanent employment, employers should have to pay substitutional relief to replacements who are displaced by returning strikers.

while preserving the beneficial check on union demands for employers who cannot maintain operations without hiring replacements. This statement of the objective suggests that all that is needed is a rejection of the irrebuttable presumption in the *Mackay Radio* opinion that permanent replacements are always needed to maintain operations.¹⁰⁹

Under this view, the firm would have to make an affirmative showing that it could not maintain operations with temporary help before resorting to permanent replacements. A firm that can attract temporary replacements on the terms of its final offer to the union has no need for permanent replacements and should not be allowed to inflict permanent job loss without economic justification.

It is often thought that a requirement of a showing of business necessity would effectively eliminate the use of permanent replacements, either because temporary replacements can always be found on the terms offered to striking workers,¹¹⁰ or because the legal uncertainty of a post-hoc administrative inquiry would make the step too costly for employers to consider.

In my view, a prior showing of business necessity should be required only if an administrative mechanism is available for obtaining a prompt declaratory ruling, keying the availability of temporary replacements to objective indicators, such as unemployment rates in the particular locality or industry. Uncertainty is unfair to workers who should not have to bet their jobs on the hope that the Labor Board will at some point in the distant future treat them as "unfair labor practice strikers" entitled to displace their replacements. Employers, too, should be able to respond to union demands with a minimum of legal uncertainty. We also lose a good deal of the educative value of the risk of permanent replacement as a moderating influence on bargaining positions if the employer's right to hire such replacements will be determined in post-hoc, fact-intensive proceedings years after the strike is over. During the strike, both the firm and its striking workers should be operating with complete information about the true risk of permanent replacement.

109. See authorities cited *supra* in note 15.

110. See, e.g., WEILER, *supra* note 3, at 267-68. Weiler also seems to suggest that the required showing almost never could be made because employers rarely promise truly permanent status to replacements. See *id.* He is certainly right that any promise made to replacements is contingent on the outcome of the negotiations with the union, but the promise of status as regular, not temporary, employees who will not necessarily be bumped at strike's end and who, if they are bumped, may have recall rights under the labor agreement has economic value to replacement workers.

Moreover, while such a showing would be based in part on unemployment rates in particular industries and regions, it would also have to take account of the educational, skill, and motivational requirements of the positions in question.¹¹¹ Competitive forces buffeting American companies, particularly in manufacturing, are transforming the traditional workplace. In many industries, job requirements for operators and technicians have expanded in recent years as employers have taken advantage of advances in computer-based technology to delegate what had been managerial and supervisory tasks to teams of front-line workers.¹¹² These positions require better educated workers who are willing to cross-train and able to function effectively in a team-based system. The availability of such workers is not likely to be fully captured by unemployment statistics, and extensive reliance on temporary help is likely to be inconsistent with the high level of commitment to firm objectives required of front-line workers in this new environment.¹¹³

If both of these qualifications — prompt determinations and true measures of the availability of temporary help — are accepted, any prior showing of business necessity will have “bite” only for unskilled, high-turnover positions and, for other positions, only in areas where there is a high rate of unemployment of educated, skilled workers.

111. Some of my students have suggested that if an employer were in fact able to secure temporary replacements during a strike, there would be no further need for inquiry into the question of business necessity for hiring permanent replacements. Though this is a plausible position, I am inclined to favor an approach to proof of the business necessity question that is not dependent on the actual behavior of the particular employer. The students' suggested approach has several drawbacks. First, those employers who are determined to pursue the permanent replacement route would have an incentive to “reveal” difficulties in hiring suitable temporary workers. Second, if the test were dependent on the employer's poststrike behavior, it would be exceedingly difficult for the NLRB (or other agency) to provide a prompt ruling on business necessity so that the parties could structure their prospective conduct with complete information about their respective rights. Finally, because employers will do what they must to maintain operations, the fact that they have hired temporary workers does not conclusively show that they have been able to secure workers of the caliber they would hire under nonstrike conditions. For all these reasons, it is best to develop an early declaratory ruling procedure that is based on objective labor market information offering meaningful availability figures; if this is not feasible, the business necessity requirement should be abandoned.

112. For some of the labor-law implications of this workplace transformation, see Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of § 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125 (1994).

113. See *supra* note 111. Even if the company prior to the strike uses some contract workers already, that does not necessarily mean it could function effectively with an all-temporary work force. In site visits I made to a number of “high performance” nonunion companies, I found that only a small percentage (5-10%) of the work force was comprised of contract workers, typically in supplementary maintenance functions.

3. *A Six-Month Moratorium Period on Job Loss Due to the Hiring of Permanent Replacements*

Even when the employer is able to obtain a declaratory ruling that temporary workers are not available in sufficient number and quality to meet its requirements — or if the administrative difficulties of providing such a ruling argue against requiring a showing of business necessity — there remains a need for a substantial moratorium period during which the process of collective bargaining has a chance to work free of labor-market pressures. I favor the approach that was Ontario law until very recently — requiring reinstatement of strikers who announce their intention to return to work at any point within the first *six months* of a strike.¹¹⁴

A clearly defined period of immunity from permanent replacement is desirable. It encourages the parties to continue talking even though a strike has occurred, yet it preserves the corrective influence of the prospect of permanent replacements. Moreover, it helps avoid mistakes; workers are not rashly betting their jobs. By striking, workers indicate the intensity of their preferences and test the employer's resolve and ability to operate without them. After six months, any useful information of this type has already been imparted; workers who persist in their demands do so at peril of losing their jobs if they misjudge their bargaining position.

Advocates of a flat-out repeal of *Mackay Radio* criticize this six-month moratorium approach for allowing employers bent on ousting the union to prolong disputes beyond the sixth month. Six months is, however, a long time in the life of any company to endure the disruption of a strike — particularly during a period when firms maintain "just-in-time" inventory levels.¹¹⁵ And under my proposal, developed below, the Labor Board would be authorized to avoid representational issues in the course of an active strike. Under these restraints, economic factors rather than purely strategic maneuvers are likely to be dominant. If the strike nevertheless persists, we have a fundamental dispute over terms to be resolved

114. I would not, however, import the administrative gloss of the Ontario Labour Relations Board in *Shaw-Almex Indus.*, 15 C.L.R.B. Rep. 23, *aff'd*, 87 C.L.L.C. 14,019 (1986). According to Brian Shell, an Ontario solicitor: "When the only issue still in dispute [even after the six-month period] is who gets recalled, *Shaw-Almex* holds that it is unlawful for the employer to insist on keeping replacements at work, letting the strikers return only as vacancies occur." See Brian Shell, *The Rights of Strikers and Their Unions in Canada*, in SEMINAR, *supra* note 63, at 81, 87.

115. See, e.g., *UAW Calls Strike at GM's Buick City Assembly Plant; Other Closures Likely*, Daily Lab. Rep. (BNA) No. 186, at A-13, A-14 (Sept. 28, 1994) (noting the vulnerability of automobile manufacturers to debilitating strikes because of their reliance on just-in-time parts delivery systems).

in the marketplace. A rule barring the hiring of permanent replacements in such circumstances may strengthen the union's position in a particular dispute; it does not, however, improve the economic position of the union-represented firm or the relationship between the parties.

4. *Mandatory Strike Ballots on the Employer's Final Offer*

Ensuring accuracy of information is vital to this vision of the bargaining process. I favor the rule present in many of the Canadian provinces that requires mandatory strike votes on the basis of the employer's final offer to the union. The University of Toronto study mentioned above¹¹⁶ indicates that this rule has had a significant impact in reducing both the incidence and longevity of strikes.¹¹⁷ It does so by reducing principal-agency problems between the union and its members and by imparting information to the employer about the workers' preferences and their collective resolve.¹¹⁸ Congress should amend the NLRA to give all workers in the bargaining unit, including fee-paying nonmembers of the union, the right to vote both on the employer's final offer and on strike authorization.¹¹⁹ Also, the employer should be permitted to address the workers on the terms of its final offer in the presence of the union.

5. *Avoiding Resolution of Representational Disputes During an Active Strike*

In order to reduce further the strategic use of *Mackay Radio* and to enhance the prospect of continuing union organization at strike's end as a check on management demands, the NLRA should be amended to authorize the NLRB to decline to consider a question concerning representation during the course of an active labor dispute — say, for strikes of up to twelve months' duration. Moreover, employers should be required to petition for an election if

116. See *supra* note 61 and accompanying text.

117. See Gunderson & Melino, *supra* note 60, at 313-14.

118. *Id.* at 301.

119. The Taft-Hartley experience with employee votes on management's final offer suggests, however, that employees will typically vote to reject. See DONALD E. CULLEN, NATIONAL EMERGENCY STRIKES 56-57, 61 (1968). It is unclear whether this would occur generally outside of Taft-Hartley's "emergency disputes" context. See LMRA, Pub. L. No. 80-101, §§ 206-210, 61 Stat. 155-56 (1947) (current version at 29 U.S.C. §§ 176-180 (1988)). In any event, whether or not the procedure reduces the incidence of strikes, employers — and the public — should know that the strike enjoys the informed support of the affected employees rather than adherence to a top-down direction from union leadership.

they want to test the striking union's continued majority.¹²⁰ These steps should diminish the incentive firms currently have to use the strike as a weapon to eliminate the union altogether.

6. *Curbing Picket-Line Violence*

Finally, I also favor a stronger federal role in curbing acts of violence by unions or their supporters during strikes.¹²¹ There is a tendency for local authorities to condone such violence, which places illegitimate pressure on firms to give in to union demands. When permanent replacements are hired after six months — and after obtaining a declaratory ruling as to the unavailability of temporary replacements — management would be exercising a lawful right and would be entitled to the law's assistance.¹²²

CONCLUSION

The strike is a necessary part of collective bargaining. Workers should not ordinarily lose their jobs by pressing their disputes in this manner. But neither should strikes be viewed as a risk-free means of empowering unions to lock employers into uncompetitive contracts. The approach outlined above would more effectively align collective bargaining under current conditions with the central premises of the NLRA than would either the Cesar Chavez Workplace Fairness bill or the continuation of *Mackay Radio*.

120. In my article, Estreicher, *Labor Law Reform for a World of Competitive Markets*, *supra* note 11, I advocate amending the NLRA to prevent employers from withdrawing recognition from unions except through a test of the union's majority in a secret-ballot election. Conceivably, one might interpret the Supreme Court to have left open the validity of unilateral withdrawal of recognition in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 n.8 (1990). See Brief for the AFL-CIO as Amicus Curiae Supporting Petitioner, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) (No. 88-1685). Thus, even within existing law, the NLRB may have authority to require representational issues in the course of a strike to be resolved only by Board-conducted elections.

121. See generally ARMAND J. THIEBLOT, JR. & THOMAS R. HAGGARD, *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB* (Labor Relations and Public Policy Series No. 25, 1983). For an example of violence to replacement workers, see *Brown & Sharpe Mfg.*, 299 N.L.R.B. 586 (1990).

122. Several other important issues remain to be worked out: (i) the possibility of different rules for first-time contract situations; (ii) the wisdom of disenfranchising replaced strikers after a strike has gone on for more than one year; and (iii) the merits of continuing to condone special rules for unfair labor practice strikes — the principal justification for which may have been that it served as a second-best corrective for *Mackay Radio*.