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Restoring Balance to Collective Bargaining: Prohibiting Discrimination against Economic Strikers

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For the last several decades, labor law classes around the country have annually broken out in laughter at the thought that lawyers and judges would draw such a spurious distinction between discharging and permanently replacing an [economic striker]. But to ordinary workers, this legal distinction is no joke at all. The employee may have spent twenty to thirty years with a firm, investing his whole working life building up a stake of experience and security in this enterprise that cannot possibly be duplicated somewhere else. Then, if the employee chooses to go out on strike, pursuing the course labor law says is the only way to try to improve (or even maintain) terms and conditions of employment, the firm’s management is free to hire replacements who with less than twenty or thirty minutes on the job get a permanent claim to the position as against the striker.¹

¹ Prohibiting Discrimination Against Economic Strikers: Hearing Before the
I. INTRODUCTION

This country needs sweeping labor law reform if the ongoing and well-documented decline of the labor movement is to be reversed. Although many facets of labor law are ripe for reform, no single

Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 102nd Cong., 1st Sess. 88-89 (1991) (statement of Prof. Paul C. Weiler, Harvard Law School). In contrast to economic strikers, unfair labor practice strikers, i.e., those who are displaced in a strike caused or prolonged by an employer’s unfair labor practice(s), cannot be permanently replaced and are entitled to reinstatement on demand.

2. At the direction of President Clinton, labor law reform currently is being studied by the Commission on the Future of Worker-Management Relations, a 10-member panel chaired by former Secretary of Labor John T. Dunlop [hereinafter the “Dunlop Commission”]. On June 2, 1994, the Dunlop Commission released an interim report reviewing its hearings to date. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT, U.S. DEPARTMENT OF LABOR & U.S. DEPARTMENT OF COMMERCE (1994) [hereinafter DUNLOP COMMISSION FACT FINDING REPORT]. It is anticipated the Dunlop Commission will issue a final report in late 1994 recommending specific legislative reforms. Charles J. Morris, widely respected Professor Emeritus at Southern Methodist University, has advised the Dunlop Commission that “a major factor in the decline of the union movement... was the state of [labor] law... and the responses of the parties to the legal opportunities presented by the state of the law.” Recommendations of Professor Charles J. Morris to the Commission on the Future of Worker-Management Relations, Daily Lab. Rep. (BNA) No. 6 (Jan. 10, 1994).

3. An interesting analysis of labor’s decline since the Golden Age of manufacturing is reflected in the case studies in GRAND DESIGNS: THE IMPACT OF CORPORATE STRATEGIES ON WORKERS, UNIONS, AND COMMUNITIES (Charles Craypo & Bruce Nissen eds., 1993), which focuses on the industrial Midwest. Professors Craypo and Nissen conclude, contrary to the conventional wisdom, that the higher costs of production associated with union wage scales are by no means the most important factor in labor’s decline. Instead, they embrace the “relative power” model, which holds that other forces determine the market success of firms and that U.S. employers resist and threaten unions because they want uncontested power over production and the allocation of earnings. Id. at 227-29.

Corporations have exploited four conditions to achieve hegemony over unions and communities: (1) production overcapacity; (2) ineffective, lethargic responses to corporate mobility and demands for concessions by unions and industrial communities; (3) corporate secrecy and centralized authority; and (4) a rightward political tilt which made public policy “indifferent or hostile to unions and collective bargaining.” Id. at 231.


issue is of greater importance than restoring balance to collective bargaining by preventing discrimination against economic strikers. With strike activity at an all-time nadir, passage of the Workplace Fairness Act currently pending in the Senate is labor's highest legislative priority.

This article will present the union perspective on workplace fairness reform. The curious origin of the Mackay doctrine and the dra-
matic changes in the legal, economic, and political climates since 1938 will be reviewed. Then, the principal arguments in favor of banning discrimination against economic strikers will be surveyed. Finally, the various legislative proposals for prohibiting discrimination against economic strikers will be analyzed.

II. ORIGIN OF THE MACKay DOCTRINE

Any observer of labor law would be hard-pressed to identify a more momentous instance of winning the battle but losing the war than the case of NLRB v. Mackay Radio & Telegraph Co.\(^7\) Although the Supreme Court enforced an NLRB order favoring a union, Mackay is neither cited nor remembered as a case labor won. The Court's opinion is noteworthy not only because it introduced a duplicitous distinction between firing and "permanently replacing" economic strikers into jurisprudence under the National Labor Relations Act (NLRA), but also because of the remarkably off-handed manner in which the Court announced such a far-reaching rule of law.

As many commentators have observed over the years, the vast majority of them sharply critical of the Mackay doctrine,\(^8\) the issue of permanent replacement of economic strikers was not properly before the Supreme Court. The Mackay Radio & Telegraph Co. maintained

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7. 304 U.S. 333 (1938).

offices in San Francisco and elsewhere for the receipt and transmission of telegraph, radio, cable, and other messages. On October 4, 1935, all of the employees in the San Francisco office went out on strike; the company responded by importing workers from its Los Angeles, Chicago, and New York offices to fill the strikers' places. What was supposed to be a general strike nationwide failed to materialize, and the San Francisco strikers voted to return to work on the evening of October 7, 1935. The company indicated that all strikers could return to work; the only problem was that it had already told eleven employees, who transferred in during the strike, that they could continue working in San Francisco if they so desired. Consequently, the company drew up a list of eleven strikers who would be required to file applications for reinstatement with headquarters in New York.

As matters developed, only five of the eleven replacement workers elected to remain in San Francisco. Six of the strikers were allowed to return to work, but the company refused to reinstate five strikers, all of whom had been "prominent in the activities of the union and in connection with the strike." The union responded with an unfair labor practice charge alleging violations of sections 8(1) and (3) of the Wagner Act, which took effect on July 5, 1935. The NLRB held for the union, reasoning that the company had taken advantage of the labor dispute to rid itself of the leaders of the recent strike. The Board ordered the company to reinstate the five strike leaders, but expressly refused to decide whether the employer had a right to hire permanent replacements for the strikers, commenting "since we find a decision on the point is not necessary to the final judgment in this case, we will not decide the matter." The Ninth Circuit Court of Appeals refused to enforce the NLRB's Order, and the case was appealed to the Supreme Court, which only months earlier had upheld the constitutionality of the Act.

The Supreme Court had no difficulty enforcing the NLRB's decision insofar as the employer had violated the Act by discriminatorily

11. NLRB v. Mackay Radio & Telegraph Co., 87 F.2d 611 (9th Cir. 1937).
denying reinstatement to the strike leaders. Unfortunately, the Court went on to address the permanent replacement issue, which had not been raised or decided in the proceedings below. In bald and wholly unsupported *dicta*, Justice Roberts announced that:

> [It] [was not] an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although Section 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 he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.* The assurance by [the company] 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.

This ill-conceived *dicta* has evolved over 56 years, in conjunction with subsequent legal, economic, and political developments, to the point that collective bargaining in the United States has been reduced virtually to an exercise in "collective begging."

III. LEGAL, ECONOMIC, AND POLITICAL DEVELOPMENTS SUBSEQUENT TO THE *MACKAY* DECISION

It is undoubtedly an understatement to observe that the labor relations arena in the United States is vastly different in the 1990s than it was in the 1930s. Legal, economic, and political developments and trends all have coalesced to severely erode collective bargaining and the right to strike. A review of these developments and trends, and their impact on collective bargaining, suggests that a compelling need has arisen to restore a semblance of balance to collective bargaining by banning the hiring of permanent replacements for economic strikers.

13. 304 U.S. at 346.
14. *Id.* at 345-46 (emphasis added) (footnote omitted).
The contemporary legal arena in which labor must attempt to conduct collective bargaining and when necessary, a strike, is far less hospitable than that which existed in the 1930s. Amendments to the NLRA and countless judicial and NLRB decisions have undermined the right to strike which, at least in theory, rests at the core of rights guaranteed by the NLRA. Unions have lost many of the avenues available to influence collective bargaining under the original NLRA, and consequently, the Mackay doctrine is far more potent today than it was in the 1930s.

When the Mackay doctrine was announced in 1938, unions were allowed to engage in all sorts of peaceful secondary activities. Strikers could exert secondary pressure on their employer by appealing to its customers and suppliers. Secondary picketing, sympathy strikes, consumer picketing of a struck employer's suppliers and customers, and the use of hot cargo agreements all were permissible tactics in labor disputes. Unions in the 1930s were allowed to negotiate closed shop agreements, which assured that only union members who were bound by internal union rules (including those enforcing strike solidarity) were hired. The Taft-Hartley and Landrum-Griffin amendments to the NLRA in 1947 and 1959, respectively, outlawed these union tactics.

Specifically, the Taft-Hartley amendments added a panoply of union unfair labor practices to the NLRA. Secondary boycotts were expressly outlawed, and a potent provision allowing employers to file damage actions against unions violating the ban against secondary boycotts was added. The Taft-Hartley Act also outlawed the closed shop nationwide and gave each individual state the option to pass so-called "right to work" statutes banning union shop arrangements.

16. The Act provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. 29 U.S.C. § 163 (1988) (Taft-Hartley Amendments in italics).

17. Hot cargo agreements essentially authorize secondary boycotts on a prospective basis. Historically, such agreements allowed the unionized workers of secondary employers to refuse to handle goods produced by an employer with whom another union had a labor dispute, such as an employer attempting to operate during a strike.


20. The Supreme Court has ruled that union membership cannot be required of em-
Finally, the Taft-Hartley amendments expressly protected the "right to refrain" from engaging in concerted activities, a provision which has been construed broadly by the NLRB and courts. In 1959, the Landrum-Griffin amendments, *inter alia*, banned peaceful consumer picketing of a struck employer's suppliers and customers, outlawed hot cargo agreements, and limited the period in which replaced strikers can vote in decertification elections to one year.

Supreme Court decisions subsequent to *Mackay* also have eroded the right to strike substantially, especially in recent years. In 1983, the Supreme Court held that permanent replacement workers who are displaced to make way for returning economic strikers may sue their employer based on a common law misrepresentation theory. The Court in 1985 eviscerated a union's ability to maintain and enforce respect for its own picket line, ruling that a union rule which forbade resignations from the union "during a strike or lockout or at a time when a strike or lockout appears imminent" violated section 8(b)(1)(A) of the NLRA because it was inconsistent with the policy of "voluntary unionism." The right to strike was eroded further in *Trans World Airlines v. Independent Federation of Flight Attendants*. That case,

employees subject to a union shop clause. Instead, union membership may, at the employee's option, be reduced to its "financial core." The most a union can require is the payment of an agency fee equivalent to union dues without becoming a full-fledged member subject to union discipline. NLRB v. General Motors Corp., 373 U.S. 734 (1963). In another line of decisions, the Supreme Court has further eroded even the limited agency fee obligation, concluding that unions may charge non-members only for such union activities as are relevant to contract negotiation, contract administration, and grievance adjustment activities, not for general organizing expenses. Communications Workers of America v. Beck, 487 U.S. 735 (1988); Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984).

which arose under the Railway Labor Act,\textsuperscript{28} upheld an employer's ability to undermine strike solidarity by ruling that "crossover" employees, whom the employer induced to abandon the strike and resume work, need not be displaced to make way for returning strikers with greater seniority.\textsuperscript{29} NLRB decisions in the 1980s, far too numerous to review here, seriously eroded the duty to bargain, right to strike, and any semblance of balance in the collective bargaining process.\textsuperscript{30}

As the foregoing survey indicates, the contemporary legal climate for collective bargaining and conducting a strike is a far cry from that which prevailed in 1938. In addition, powerful economic trends also must be considered in developing an understanding as to how collective bargaining and the right to strike reached their current critical condition. The United States economy flourished in the 1950s and 1960s by embracing and perfecting the mass production system developed by Frederick W. Taylor\textsuperscript{31} and popularized by Henry Ford.\textsuperscript{32} However, beneath the rosy surface of the post-World War II "social

\textsuperscript{29}TWA enticed strikers to "crossover" by assuring them they could retain more desirable job and domicile assignments which had been occupied by more senior flight attendants. One management-oriented academic bluntly advocates using this tactic in all labor disputes, including those arising under the NLRA:

An example of a vulnerable group is commonly the most junior employees. By providing an incentive to the junior worker to abandon the strike, the employer may have within its grasp the ability to end the strike or at least to greatly diminish the union's ability to continue it with effectiveness.

More senior workers will view the defection by junior workers in a decidedly negative light, and such action by the defectors will be destructive to the cohesiveness so desired and required by the union. This is, of course, precisely what the company hopes to achieve.


\textsuperscript{31}Fredrick W. Taylor, \textit{The Principles of Scientific Management} (1911).

contract," employers in the 1960s and 1970s were sowing the seeds of labor's decline by buying and selling businesses to create diversified conglomerates and relocating plants domestically and abroad to avoid unionization.

In the late 1970s and 1980s, increasing global competition and the deregulation of highly unionized industries, including airlines, communications, and trucking, unleashed powerful competitive pressures. Bluestone and Bluestone have summarized these economic developments aptly:

As monopoly profits vanished, firms were left in a serious bind. If their unions continued to push for wage increases that exceeded productivity advances, the time-honored method of costlessly passing the difference on to customers would no longer wash. In this case, firms had an uncomfortable choice. They could raise their prices anyway, sacrificing market share; they could settle for lower profits and the enmity of their stockholders; or they could aggressively challenge the wage demands of their employees and insist on economic concessions. In the end, they did all three, but concentrated overwhelmingly on the last of these options.

The fact that many corporations continued to reward their top executives with large bonuses despite plummeting sales and declining market

33. Diversification in the 1960s blunted the impact of a strike in one business sector as a stream of profits continued flowing from its other sectors. Ironically in the 1980s, diversification was denigrated by leading Wall Street strategists as "diworseification." Peter Lynch, One Up on Wall Street 146-50 (1989). Recently, the strategic mantra for businesses has been to focus exclusively on a firm's "core business," while divesting all other business segments.

34. Barry Bluestone & Bennett Harrison, The Deindustrialization of America 164-78 (1982). Professors Bluestone and Harrison noted that:

even as the post-World War II social contract was being developed, companies were violating the spirit, if not the substance, of the "agreement" by shifting operations (or differentially expanding) into the Sunbelt, non-union peripheries within the North, and abroad. During the 1950s and 1960s the practice of running away from the unions grew so much, that by the 1970s the northern-based industrial unions had been severely weakened.

Id. at 165. The authors further observed that the establishment of multistate and multinational systems of plants allowed employers to take advantage of parallel (duplicative) production and multiple sourcing schemes, which further diminished the impact of a strike. Id. at 166.

share did not make it any easier for unions to sell "concession bargaining" to their members.\textsuperscript{36}

The 1980s also were characterized by an explosive increase in the mobility of capital, evidenced most obviously by "dealmaking," \textit{i.e.}, a wave of restructurings, divestitures, and leveraged buyouts,\textsuperscript{37} and a concomitant diminution in corporate responsibility and sense of commitment to community.\textsuperscript{38} Sweeping technological changes in manufacturing and service industries, coupled with management's exclusive control of the workplace, have eroded unions' bargaining power.\textsuperscript{39}

On the political front, the Reagan administration inaugurated a new era—one in which union-busting through the permanent replacement of economic strikers became entirely acceptable, if not fashionable. Reporting the Workplace Fairness Act out of committee, the Senate Committee on Labor and Human Resources observed that:

President Reagan's firing and permanent replacement of 12,000 striking air traffic controllers in 1981 had a dramatic impact on the way many American employers view strikes, including the view taken by a new generation of corporate managers. Even though that strike by Federal employees, was illegal, American employers did not readily make this distinction. President Reagan's action was regarded by many observers as a signal to the employer community that it was acceptable to dismiss striking workers. The events surrounding the air traffic controllers' strike ushered in a much more aggressive, and even hostile, employer strategy toward lawful strikes.\textsuperscript{40}

Several studies and surveys confirm that employers' practice of permanently replacing economic strikers increased in the 1980s, in the wake of the disastrous PATCO strike.

\textsuperscript{36} Id. at 67.

\textsuperscript{37} For a devastating, Pulitzer Prize-winning critique of the human toll taken by leveraged buyouts in the 1980s, see Susan C. Faludi, \textit{Safeway LBO Yields Vast Profits but Exacts A Heavy Human Toll}, \textit{WALL ST. J.}, May 16, 1990, at 1, col. 6.

\textsuperscript{38} S. Rep. No. 110, 103rd Cong., 1st Sess. 11-12 (1993); GRAND DESIGNS: THE IMPACT OF CORPORATE STRATEGIES ON WORKERS, UNIONS, AND COMMUNITIES, supra note 3, at 227-35.

\textsuperscript{39} Richardson, \textit{The Role of Technology in Undermining Union Strength}, in \textit{RESTORING THE PROMISE OF AMERICAN LABOR LAW} 223-37, supra note 4.

\textsuperscript{40} S. Rep. No. 110, 103rd Cong., 1st Sess. 13 (1993).
A 1989 study by Professor Cynthia Gramm\(^4\) reviewed random samples of strikes from 1984-88 across the nation and within the state of New York. The Gramm Study found that permanent replacements for economic strikers were hired in 23.8% of the New York strikes and 15.6% of the strikes nationwide and that permanent replacements were used by employers more than twice as often as temporary replacements in each sample.\(^4\) Gramm asked managers who previously had experienced strikes whether they ever had hired replacement workers in the past and tellingly, "[e]very single manager said that this strike was the first attempt to hire replacement workers."\(^4\)

In 1991, the U.S. General Accounting Office (GAO) conducted a survey aimed at determining whether the use of permanent replacements increased during the 1980s.\(^4\) The GAO Report found that permanent replacements actually were hired by employers in approximately 17% of strikes in both 1985 and 1989; employers announced an intent to hire permanent replacements in 31% of the strikes in 1985 and 35% in 1989.\(^4\) The GAO Report estimated that 14,000 workers subject to the NLRA were permanently replaced in each year.\(^4\)

Among experienced management and union representatives who had an opinion on the issue, 66% of the management and 87% of the union representatives believed that permanent replacements were used more frequently in the late 1980s than in the late 1970s.\(^4\)

Several recent surveys by labor organizations are consistent with the foregoing reports and disclose the tragic human consequences behind the statistics. Specifically, a survey of 1990 strikes involving

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41. CYNTHIA GRAMM, EMPLOYEE RIGHTS IN A CHANGING ECONOMY: THE ISSUE OF REPLACEMENT WORKERS (Economic Policy Institute 1991) [hereinafter GRAMM STUDY].
42. Temporary replacements were hired by 6% of the employers nationwide and by 10% of the firms in New York state. Id. at 34.
43. Id.
45. Id. at 13-16.
46. Id. at 17. Because the study did not include industries subject to the Railway Labor Act, permanent replacements hired during labor disputes at TWA, Continental Airlines, Alaska Airlines, and Eastern Airlines, among others, were not included in the total.
47. Id. at 18-20.
1000 or more workers by the AFL-CIO Employee Benefits Department disclosed that health care benefits were a major issue for 55% of the strikers, and 65% of the workers who were replaced (permanently or temporarily) struck over health care as a major issue.\(^4\) A survey of strike activity within the United Automobile, Aerospace and Agricultural Implement Workers Union disclosed that in 62% of the strikes, permanent replacements were hired before, immediately after, or within two weeks of, the onset of the strike.\(^4\) A United Steelworkers of America survey of labor disputes involving replacement workers, primarily between 1983 and 1991, disclosed that workers struck simply to resist wage and benefit concessions in 61% of the strikes, and almost 64% of the workers who engaged in economic strikes were permanently replaced.\(^5\)

IV. ARGUMENTS IN FAVOR OF WORKPLACE FAIRNESS REFORM

Broadly stated, there are three principal arguments in favor of workplace fairness reform. First, abolishing the Mackay doctrine will restore a measure of balance to the collective bargaining process by redressing the extreme inequality of leverage which currently prevails. Second, it will restore equity to labor law, eliminate unnecessary human suffering, and harmonize labor law with the larger body of labor and employment law, which does not permit employees to lose their jobs for exercising protected legal rights. Finally, it will facilitate, rather than frustrate, this nation’s ability to compete in a global economy by encouraging legitimate strategies for labor-management cooperation based on equal bargaining power and mutual respect.


\(^{50}\) UNITED STEELWORKERS OF AMERICA, AFL-CIO, STRIKER REPLACEMENT SURVEY (June 8, 1992).
A. Restoring Balance to Collective Bargaining

In order to function properly, collective bargaining requires that the parties have adequate negotiating leverage and comparable incentives to resolve conflict in a mutually beneficial manner.\textsuperscript{51} Employers' overwhelming power to transform an economic dispute about wages and benefits into an epic struggle for a union's survival presents a stark contrast with the modest economic weapons at labor's disposal. Walter Kamiat, Associate General Counsel of the AFL-CIO, aptly expressed this point as follows:

In comparing the employer's \textit{Mackay} weapon with the economic weapons utilized by employees, it is important at the outset to recognize an enduring truth regarding virtually all \textit{employee} weapons: ultimately . . . employees cannot harm their employer's firm without harming themselves. This fact provides a limitation on the bargaining demands of a union as well as on the union's willingness to strike or utilize other economic weapons against the employer. It is simply not in the employees' interests to burden the employer with costs that will render the firm unable to compete and thus unable to provide secure employment.

. . .

No matter how bitter a strike may be, strikers normally envision only the imposition of \textit{temporary} hardships on the employer. Strikers fully

\textsuperscript{51} Establishing and maintaining a balance of power between employers and employees was one of the principal goals of the original Wagner Act. The NLRA provides, \textit{inter alia}, that:

The \textit{inequality of bargaining power} between employees who do not possess full freedom of association or actual liberty of contract, and employers . . . 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.

Experience has proved that the protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by \textit{restoring equality of bargaining power between employers and employees.}

expect that they and the employer will, at the strike's end, resume their long-term continuing relationship to their mutual advantage.\(^{52}\)

Abolishing the *Mackay* doctrine will restore at least some balance to the collective bargaining process by taking away employers' ability to undermine with impunity unions' only meaningful economic weapon.

Critics of workplace fairness reform assert that it will disturb a "delicate balance" in collective bargaining and result in a dramatic increase in strike activity. It is charged that unions will be emboldened to make irresponsible and unreasonable bargaining demands. This theory overlooks several considerations. First, a panoply of options remain open to employers seeking to continue operating their business during a strike,\(^{53}\) even under the most restrictive workplace reform proposals.

Employers faced with economic strikes still may hire temporary replacement workers\(^{54}\) and use supervisory and other personnel to maintain their business. They may transfer work to nonstruck facilities and subcontract for the performance of bargaining unit work.\(^{55}\) Employers may stockpile inventories in advance of a strike and rely on strike insurance.\(^{56}\) They also may lock out potential strikers, at a time strategically selected by the employer to maximize negotiating leverage.\(^{57}\) Finally, employers may close their business temporarily and allow the rigors of unemployment to wear down the strikers and eventually force concessions and a settlement.\(^{58}\) Under these circumstanc-

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52. Kamiat, *supra* note 8, at 43.
55. *Id.*
56. *Id.*
57. *Id.*
58. Typically, strikers are not eligible for unemployment benefits. If their union pays any strike benefits at all, they seldom approach a level of 25% of regular compensation. Many union workers live paycheck to paycheck, and do not have any significant accumulated savings to cushion their families during an economic strike.
es, there is no appreciable risk that workplace fairness reform will spawn a wave of irresponsible strikes.

Second, and equally important, the theory that unions will become strike-happy is unwarranted in light of the extreme mobility of capital which characterizes the contemporary global economy, even more so after passage of the North American Free Trade Agreement (NAFTA). Professors Craypo and Nissen predict that the economic trends of the 1980s are likely to continue:

[W]e would expect that the widespread dislocations of the 1980's would embolden opportunist firms to make heavy demands on unions and communities in the 1990's and for the latter to accept them. Unions will accept such demands in view of the threat of plant shutdowns and to preserve jobs that still pay comparatively well in a period of overall decline in real wages and of a proliferation of low-wage service-producing jobs. In addition, communities can be expected to pressure unions and workers to accept the new labor relations . . . community leaders believe that retaining and creating any manufacturing jobs at all takes priority over challenging the terms and conditions of employment.

59. Workplace fairness reform will not place the U.S. at a competitive disadvantage in the global economy as our major trading partners, Germany, Japan, France, and Canada, ban permanent replacements for economic strikers. H.R. Rep. No. 116, 103rd Cong., 1st Sess. 33 (1993). Economist William Spriggs has expressed the point this way:

With the exception of South Africa, no other Western industrialized country allows employers to interfere with the exercise of workers' right to strike.

. . . .

Canada adopted the Wagner Act as a model for its labor laws, yet rejects the Mackay rule as inconsistent with free collective bargaining. All Canadian provinces . . . require the reinstatement of striking employees to their jobs at the conclusion of a work stoppage. All measures of profitability show that comparable U.S. firms operating in Canada without the Mackay rule are as profitable as American firms operating under Mackay in the United States.


60. GRAND DESIGNS: THE IMPACT OF CORPORATE STRATEGIES ON WORKERS, UNIONS, AND COMMUNITIES, supra note 3, at 238. They note that unions will have to develop new bases of institutional power to combat these relentless economic trends:

unions [must] change their own grand design from one that depends exclusively on sustaining a . . . relationship with management, which may sever that relationship at any time, to one that focuses on creating strategic alliances with other stakeholders who stand to lose from corporate reorganizations and relocations.
Thus, the harsh realities of the economic and political climate for the foreseeable future are such that barring the permanent replacement of economic strikers is not likely to trigger a raft of strikes based on unrealistic bargaining demands.

A final consideration in assessing the impact of the Mackay doctrine on the balance of power in labor-management relations is the recognition that it poisons union organizing efforts as well. Apart from running a gauntlet of discriminatory discharges and interminable administrative delays, culminating with inadequate remedies, those employees who consider voting for a union routinely face a barrage of speeches and letters in which the employer advises them they will have to strike to secure a contract and will be permanently replaced when they strike. Even before a union has been certified as the exclusive bargaining representative and collective bargaining commences, the Mackay doctrine is a potent deterrent to union organizing that unfairly tips the balance of power in favor of employers.

B. Equitable Considerations and Avoiding Unnecessary Human Suffering

Increasingly during the last 14 years, the Mackay Doctrine has caused widespread and unnecessary human suffering and misery. Recalcitrant employers, aided and abetted by the merchants of misery (union-busting law firms and unsavory guard services with ubiquitous video cameras), have discarded loyal employees, many of whom have invested decades in their jobs, simply for engaging in "protected" conduct, which is their only significant means of improving or main-

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Three ways in which some unions have sought new allies to challenge business hegemony are by establishing control over mergers and acquisitions, undertaking corporate campaigns, and building labor-community coalitions.

Id. at 245.

61. See, e.g., DUNLOP COMMISSION FACT-FINDING REPORT, supra note 2, at 63-80; RESTORING THE PROMISE OF AMERICAN LABOR LAW, supra note 4, at 61-121; GOULD, supra note 4; Weiler, supra note 4.

62. Pollitt, supra note 8, at 306-07; Kamiat, supra note 8, at 34-35.

63. See generally From Coal to Diamonds, LEGAL TIMES, July 24, 1989, at 1.
taining working conditions. The law pertaining to economic strikers holds the dubious and inequitable distinction of being the only niche in the whole field of labor and employment in which employees may lose their job for engaging in protected activity. It is also the only area in labor and employment law where an incumbent employee’s accrued seniority—ordinarily a precious commodity—is so devalued that it is of no consequence against the job rights of a “permanent” replacement. The stories of economic strikers who have been permanently replaced, frequently after their unions have made extensive concessions in collective bargaining, are poignant and probative in their own right of the need to restore equity to the law.

Karen Behnke worked for Curtis Industries in a Cleveland, Ohio suburb for almost 24 years. The family-owned company went through a leveraged buyout in the 1980s, and new management in 1987 successfully demanded concessions from the UAW, which had represented employees without a strike for 40 years. When the collective bargaining contract expired on April 5, 1990, all 95 employees struck. The next day, they received a letter from the Director of Employee Relations encouraging them to crossover the picket line, ex-

64. Critics of workplace fairness reform are quick to argue that a significant distinction exists between being fired and permanently replaced in that economic strikers retain preferential recall rights after their union makes an unconditional offer to return to work. As the Senate Labor Committee has observed:

the fact that one has not been (illegally) discharged but rather (legally) permanently replaced is truly a distinction without a difference.

It is impossible to convince a long-term, conscientious employee of the law’s justice after the employee has lost a job for doing no more than exercising a protected right.


65. Ordinarily, accrued seniority and incumbent status are among the most sacrosanct benefits recognized by labor and employment law. See generally FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS Ch. 14 (4th ed. 1985) (“One of the most severe limitations upon the exercise of managerial discretion is the requirement of seniority recognition.”); Teamsters v. United States, 431 U.S. 324 (1977) (seniority system in collective bargaining agreement which perpetuated pre-Act discrimination was exempt from Title VII of Civil Rights Act of 1964).

plaining how to resign from the union, and advising that, "[d]uring an economic strike . . . you could be permanently replaced . . . this company has a federally protected right to find people to work in your place and [you will] not get [your] jobs back just because the strike ends."67 Indeed, replacements were hired immediately and made permanent within three or four months.68 Ms. Behnke explained the consequences:

The strike has caused enormous hardship for the strikers and their families. Most of the strikers have suffered financially. With no regular paychecks, they have had to use up their savings in order to get by. It has been difficult to get temporary jobs because other employers won't hire us once they learn we are on strike at Curtis Industries.

One striker had her heat and telephone turned off because she could not make payments. She thought she was going to lose her home. She had diabetes and went into a coma. Because her phone was turned off, she was not discovered for 2 days and almost died.

The strike has also placed enormous stress on the families of the strikers. Many . . . are depressed over having been rejected by the company after so many years of loyal service. You can see the tension and grief on their faces.69

In recent years, the contentious issue of health care costs which cannot be solved in the limited context of a single bargaining relationship has caused a number of strikes, many of which resulted in the permanent replacement of strikers.

In Hope, Arkansas, Juanita Landmesser was the head of a UAW Local which since 1960 had represented workers at Champion Parts Rebuilders; they averaged $6 per hour.70 Having already been granted concessions in the previous round of negotiations, the company in 1991 demanded that workers continue paying 24% of premiums; pay a substantially increased deductible and a 20% copayment for costs

67. Id. at 71.
68. Id. at 63-64.
69. Id. at 64.
above the deductible; and accept reduced maximum payments of $35,000 (down from $250,000) a year and $100,000 over a lifetime. When the strike began, several UAW members had major health problems costing over $50,000 per worker.

The union accepted the increased deductible and 20% copayments, offered concessions on payments for psychological treatment, but rejected the $35,000 yearly cap on claims. The company refused to budge and the result was predictable:

Champion was a profitable company. We never heard the company plead poverty . . . . But with an unemployment rate in the community above 9%, there were many individuals ready to step into our jobs during the strike. We are now convinced that the company knew we could not accept such severe cuts in health care and that it planned to force us out on strike in order to bring in permanent replacements.71

Out of 300 strikers, “less than ten” found comparable jobs, 60% applied for and received government assistance, including food stamps and AFDC, and “a lot of families [were] broken up.”72 Ms. Landmesser found work as a hamburger cook in her husband’s restaurant, and many co-workers ended up at McDonald’s and Burger King.

Professor Julius Getman’s field study73 of the ill-fated strike by Local 14 of the Paperworkers Union at an International Paper Co. mill in Jay, Maine, examines the human dimensions of the Mackay doctrine from every perspective in exhaustive detail. Striker Tom Pratt regarded himself as lucky for getting another job, even though the strike depleted his savings for home improvement and his children’s education. He described the family rifts caused in the Jay community as follows:

Some were not as fortunate as I was. There were divorces. There were problems, physical [and] mental. It’s devastating. You’re pitting brother against brother in many cases . . . I saw one brother on one side of the coin and the other as a striker and they literally would fight each other because one was working for the company and one was not . . . All of

71. Id. at 51.
72. Id. at 53.
the top management that makes these decisions, they don’t live here in this
town. They live in towns removed from the area.  

Former Town Manager Charles Noonan said of the strike: “It has
caused tremendous problems in the social fabric of the community. It
has torn the community apart. Friendships that existed for lifetimes are
gone; people who went to high school together and grew up together
will not speak to each other.”

Workplace fairness reform would correct the perverse inequity
created by the Mackay doctrine by factoring strikers’ years of loyal
service and accrued seniority into the calculus. Employers would retain
a variety of options available to continue running their business, in-
cluding relying on temporary replacements. Under this arrangement,
economic strikers still would suffer all the usual hardships associated
with work stoppages and be protected solely from the catastrophic
economic and emotional harm of losing their job. Replacement workers
would experience a mere opportunity loss, i.e., the ability to perma-
nently displace a striker.

Workplace fairness reform also would correct the inequity intro-
duced into labor law by the Supreme Court’s decision in Trans World
Airlines v. Independent Federation of Flight Attendants. Specifically,
the rights of economic strikers would be elevated to a status equal to
the rights of crossover employees, who have exercised their Taft-
Hartley Act “right to refrain” from engaging in concerted activity.
This is only fair and equitable, particularly in light of a line of Su-
preme Court decisions which take an expansive view of the scope
of employees’ “right to refrain.”

Workplace fairness reform also will bring the NLRA into line
with all other federal and state anti-discrimination statutes, as well as a

74.  Id. at 1844-45.
75.  Id. at 1844.
76.  See supra notes 26-28 and accompanying text.
78.  See Pattern Makers League of North America v. NLRB, 473 U.S. 95 (1985); see
also NLRB v. Textile Workers Union, Local 1029, Granite State Joint Board, 409 U.S. 213
(1972) (fines imposed for strikebreaking activities subsequent to individuals’ resignation from
union violated NLRA).
substantial body of caselaw establishing exceptions for individual employees in many states to employment at will. As Professor Weiler has observed, employers are not permitted to defend lawsuits brought under other anti-discrimination statutes, nor common law suits for discharge in violation of public policy, on the theory that the employee in question was “permanently replaced” rather than discharged because such a contention would be “laughed out of court.”

Indeed, but for the Mackay doctrine, the circumstances surrounding the replacement of an economic striker would constitute an overwhelming case of discrimination—an employer has taken an adverse action against a cognizable group of employees for an explicitly-stated reason, in close temporal proximity to the exercise of “protected” activity. No principled basis exists for differentiating the rights of economic strikers from those enjoyed by employees under other anti-discrimination statutes and judicially-created exceptions to employment at will. Discrimination is discrimination, and the NLRA should be elevated to a status of equal dignity with other statutes and common law doctrines.

C. Enhancing Legitimate Cooperation Between Labor and Management

In an era when public policy should facilitate legitimate (but not superficial) strategies for labor-management cooperation, the Mackay doctrine promotes conflict. Hiring permanent replacements is the most confrontational step an employer can take in a labor dispute. The results are understandable bitterness on the part of strikers, and on

79. Gramm Study, supra note 41, at 75.
80. As Professor Getman has observed, the Mackay doctrine in recent years has operated as a perverse incentive for employers to engage in surface bargaining so as to provoke a strike, as a means of getting rid of union supporters and/or the union itself. Getman & Marshall, supra note 73, at 1880-81.
81. The sentiments of many strikers are captured by the following definition of a scab, attributed to Jack London:
   
   The Scab
   
   After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a scab.
   
   A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
occasion, picket line violence. Hiring permanent replacements dramatically complicates the settlement of a strike, inasmuch as the future status of the replacement workers immediately becomes the paramount issue, apart from whatever differences prompted the work stoppage in the first instance. Moreover, the hiring of permanent replacements more than triples the average length of strikes from 27.26 days to 84.23 days. Thus, the Mackay doctrine promotes conflict rather than cooperation.

Another irony of the Mackay doctrine is that it decimates precisely the type of employees most likely to succeed in legitimate schemes of labor-management cooperation. Professors Getman and Marshall have stated the point well:

The employees most capable of subordinating their own interests to those of a group—those who refuse to cross the picket line in the face of permanent replacement—are the ones most likely to be replaced permanently under the doctrine. The [International Paper strikers] demonstrated throughout their struggle the characteristics that are most valuable to jointness programs: group cohesiveness, loyalty, creativity, discipline, intelligence, and decency.

They were not guilty of disloyalty, greed, or excessive zeal for combat. These are precisely the type of people whose interests the law is intended to protect. Yet they are the ones most likely to be permanently replaced under the [Mackay] Doctrine.

Hiring permanent replacements substitutes an inexperienced, divided, and ultimately demoralized workforce for a productive, cohesive
workforce. Even viewing the Mackay doctrine solely from the perspective of profits and impact on shareholder value, there is substantial evidence that union-busting simply is an unwise business practice. Astute observers of the coal industry believe that is the lesson of the Pittston strike.

If enacted, workplace fairness reform will enhance industrial peace and stability. Employers no longer will have any incentive, nor the

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offer to return to work under Laidlaw v. NLRB, 171 NLRB 1366 (1968), enf'd, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).


86. Professor Birecree has expressed the teaching of the Pittston strike as follows:
In the final analysis the case suggests that for employers, employees and community members alike, more cooperative approaches to competitive problems, no matter their severity, are preferable to forcing a solution. In the union's defense, it appears that the UMWA leadership recognized this fact but was unable to convince company officials of its validity. As one industry observer put it, further labor upheavals will only lead to further industry restructuring, in which efficient operators with solid production contracts and harmonious labor relations will be sitting pretty.


87. The Secretary of Labor, Robert B. Reich, has explained the Clinton Administration's support of the Workplace Fairness Act as follows:
The economy we are entering . . . is [one] in which workers and managers have got to become partners . . . . It is time to close the chapter on a period of hostility and distrust, a period in which labor felt and still feels that it cannot rely upon the good faith of many executives and many managers in this country.

The permanent replacement of striking workers has left a lot of scars, a lot of distrust . . . . I am surprised and disturbed by the degree of distrust that still exists, a lot of that holdover from the 1980's from Eastern Airlines, from Greyhound, from Pittston, from Caterpillar.
unilateral discretion, to destroy their bargaining partner. With the fundamental issue of job loss due to an economic strike out of the way, public policy will promote mutual respect between the parties and the resolution of labor disputes. Ideally, management would voluntarily embrace cooperative approaches predicated on mutual respect.\textsuperscript{88} Where reason and judgment are lacking, as they are on this issue, a statutory proscription is necessary to prevent union-busting.

To the extent that public policy seeks to promote a high skills, high wage economy,\textsuperscript{89} as distinguished from a low skills, low wage model of work organization, viable unions have an invaluable role to play in the process. Former Secretary of Labor Ray Marshall explains that:

\ldots [T]here is a connection between not permitting the permanent replacement of striking workers and moving to a new era; closing the book on this old era of hostility and distrust and moving on to a new era in which we can really build a partnership between labor and management.

\textit{Prohibiting Discrimination Against Economic Strikers: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 103rd Cong., 1st Sess. 5-6 (1993)} (statement of Robert B. Reich, Secretary of Labor).

88. Coal industry management opposes workplace fairness reform, as do all other segments of the business community. The National Coal Association (NCA) claims that such reform would "seriously undermine" companies' ability to negotiate and service long-term supply contracts. While conceding that "temporary replacement workers can be hired ... which would enable coal companies to fulfill commitments," the NCA contends that such workers would not be sufficiently attentive to safety, and that offering permanent status would be necessary to induce skilled workers to accept jobs. \textit{Prohibiting Discrimination Against Economic Strikers: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 103rd Cong., 1st Sess. 91-93 (1993)} (prepared statement of NCA).

As the 1992-93 national contract negotiations indicate, the industry is, at best, ambivalent about the existence of the UMWA. B.R. Brown, CEO of CONSOL, Inc., and lead negotiator for the BCOA, has derided the UMWA's job security initiative in the recent negotiations as "the institutional security issue." Brown further charges that "the union's hidden agenda was the perpetuation of the union as an organization." B.R. Brown, Remarks to the 12th Annual World Coal Conference of the Mississippi Valley Coal Exporters Council 2 (Feb. 10, 1994) (on file with the West Virginia Law Review).

Unions in the 1930's and 1940's enjoyed favorable public opinion in part due to the belief that unions were good for the economy because they helped maintain purchasing power, in keeping with the prevailing Keynesian policies. However, these policies became anachronistic in a more competitive internationalized information world, which also makes the oligopolistic mass production system less effective. This leads some people to believe that unions have become obsolete. I have argued that this is a false conclusion: high performance organizations require much greater worker involvement, which, in turn is most effective if workers have an independent source of power to represent their interests.

Stronger labor movements are clearly in the national interest. The U.S. should therefore modernize its labor relations laws to make it easier for workers to organize and bargain collectively and more difficult for employers to thwart those rights by legal and illegal means.\(^9\)

The permanent replacement of economic strikers is at the top of the list of "legal means" for employers to thwart employees' rights. Workplace fairness reform is necessary to establish a foundation of mutual respect on which collective bargaining can emphasize common interests, rather than antagonism.\(^91\)

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A more thorough analysis of the constructive role unions can play in fostering employee participation and other work organization improvements has been undertaken by Professors Eaton and Voos. They conclude that the supposed "flexibility" enjoyed by non-union employers is illusory, particularly over the long term, because only union workplaces have institutions equipped to engage in serious productivity bargaining. In their view, unionized employers have better potential to realize the benefits of employee participation because unions (1) protect workers against job loss due to productivity improvements or management reprisal; (2) provide a "collective voice" for workers in the design and organization of a participation program over the long-term; and (3) may extend participation from the shopfloor to the entire enterprise. Paula B. Eaton & Adrienne E. Voos, *Unions and Contemporary Innovations, in Work Organization, Compensation, and Employee Participation* 173-215 (Mishel & Voos eds., 1992).

91. The AFL-CIO recently has embraced the notion that unions have an important role in developing a new model of work organization, based on five basic principles: (1) a rejection of the traditional dichotomy between thinking and doing, as well as conception and execution; (2) redesigning of jobs to include a wider variety of skills and greater responsibility for the ultimate output of the enterprise; (3) substitution of a flatter management structure for the traditional multi-layered hierarchy; (4) union involvement in decision-making at all levels of the enterprise; and (5) distribution of the rewards realized from the new model on equitable terms arrived at through collective bargaining. AFL-CIO COMMITTEE ON
V. ANALYSIS OF WORKPLACE FAIRNESS REFORM ALTERNATIVES

The debate over workplace fairness reform has generated several alternative proposals. These include: (1) banning the hiring of permanent replacements for a fixed period of time; (2) permitting the hiring of permanent replacements only in cases of “business necessity”; (3) permitting the hiring of permanent replacements only after a union refuses to accept non-binding mediation; and (4) banning permanent replacements for economic strikers (as well as crossover inducements) entirely. The first two proposals are wholly inadequate or unworkable for various reasons. The third alternative represents a coherent but less than optimal solution. An outright ban on permanent replacements and crossover incentives is the preferable alternative.

Placing a time limit on hiring permanent replacements is unsatisfactory in several respects. Employers inclined toward union-busting simply will go through the motions of bargaining, wait for the deadline to pass, and proceed to hire permanent replacements. Every labor dispute takes on its own character based on the parties’ relative strength and objectives and an arbitrary time limit which is meaningful in one strike may be inconsequential in another. Finally, the time limit approach fails to remove the job security issue from negotiations, and does little to foster legitimate labor-management cooperation over the long term. The best that can be said is that a time limit on hiring permanent replacements would be a bright-line standard for both sides.

Some commentators and jurists have advocated allowing the hiring of permanent replacements in cases of "business necessity."

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92. GOULD, supra note 4, at 194-203.
93. Although the NLRA imposes a mandatory duty to bargain in good faith, any moderately sophisticated employer can discharge its legal obligation through perfectly lawful "hard bargaining." See generally PATRICK HARDIN, THE DEVELOPING LABOR LAW 624 (3d ed. 1992).
94. Gillespie, supra note 8.
Apart from the fact that "business necessity" in the context of an economic strike is something of an oxymoron, this approach is seriously flawed. Litigation as to whether the requisite "necessity" exists undoubtedly would be complex and protracted—a boon to labor lawyers, but certainly not their clients. Defining "business necessity" would be problematic given the various permutations and combinations of business enterprises, and the definition would be susceptible to manipulation through creative accounting practices. Unions would have difficulty assessing whether "business necessity" existed in a given instance because they ordinarily lack access to an employer's books in strike situations.

A far more sophisticated proposal than the business necessity exception is the Packwood Amendment. The Packwood Amendment would condition an employer's ability to replace economic strikers on a union's willingness to accept non-binding recommendations by a tripartite mediation board composed of one labor and one management representative, and an independent mediator. Unions would have to observe certain procedural requirements to secure protection against permanent replacement, the existing collective bargaining agree-

96. A recurrent concern flowing from high-profile, protracted labor disputes is that hardline management attorneys face an arguable conflict of interest with their clients. Some observers have noted that such attorneys may prolong the dispute as long as possible to continue generating hourly billings, while the client's interests would be better served by an expeditious settlement. From Coal to Diamonds, supra note 63.

97. GOULD, supra note 4, at 193. Some type of administrative or judicial approval or certification could be required before allowing employers to hire permanent replacements. However, appeals would drag on and difficulties in sorting out job rights would result in the event of a reversal on appeal. If employers were not required to obtain prior approval or certification, the same problem would obtain in the event that subsequent litigation resulted in a judgment that the employer did not satisfy the business necessity exception.

98. In NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956), the Supreme Court ruled that an employer must open its books for inspection if it unequivocally claims inability to pay in collective bargaining. However, this rule has little impact as competent management attorneys routinely advise employers how to avoid the "poverty" exception to the general rule of non-disclosure.


100. If it rejected mediation altogether, a union could strike. However, the strikers would be subject to permanent replacement as a consequence. Id.

101. Specifically, a union would be required to give seven days' notice to the employ-
ment would be extended to maintain the status quo, and a strike would be barred while a 45-day fact-finding process ran its course. If an employer refused to accept mediation—either before or after the fact-finding process—it could not hire permanent replacements. If a union rejected the findings of the mediation board, an employer would be free to hire permanent replacements; however, a union would be able to terminate such hiring by accepting the board’s recommendations after a strike began.

The Packwood Amendment constitutes a complex but comprehensive dispute resolution mechanism; it is an interesting blend of mandates and options. From labor’s standpoint, it ameliorates the Mackay doctrine to the extent that a union could take unilateral action which would preclude the hiring of permanent replacements. Given its inherently Solomonic nature, it is not surprising that neither labor nor management evinces much enthusiasm for the Packwood Amendment. Historically, the proposal has not generated enough additional votes in the Senate to invoke cloture and defeat a Republican filibuster.

Labor’s lack of enthusiasm for the Packwood Amendment flows from its traditional hostility to third-party dispute resolution mechanisms as a substitute for collective bargaining. Stronger unions, which have maintained a semblance of pattern bargaining within an industry, fear that the Packwood Amendment will cause an erosion of labor standards. However, acceptance of the Packwood Amendment by labor may serve to illuminate management’s motives in opposing it. No employer that accepts a union as a legitimate bargaining partner could reject the Packwood Amendment entirely. Insofar as it opposes the Packwood Amendment, management apparently seeks to retain unilateral discretion to destroy a union during an economic strike.

The final and certainly most desirable workplace reform proposal is an outright ban on hiring permanent replacement workers during economic strikes. Senate Bill 55 embraces this approach; it broadly

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er and Federal Mediation and Conciliation Service of its willingness to accept the formation of a fact-finding panel. *Id.*


103. *Id.*
protects workers in all labor disputes where a union is: (1) certified or recognized as the exclusive bargaining representative or (2) seeking lawful recognition based on the execution of authorizations from a majority of employees in the relevant group. It also outlaws crossover inducements, such as those sanctioned by the Supreme Court in Trans World Airlines v. Independent Federation of Flight Attendants. However, the Act would not protect union-represented employees engaged in unauthorized work stoppages, nor unrepresented employees engaged in spontaneous concerted activities.

Senate Bill 55 restores balance to collective bargaining by eliminating management's unilateral discretion to destroy its bargaining partner, and precludes the human suffering experienced by many economic strikers in the 1980s. With this aspect of job security off the bargaining table, the parties should have greater incentive to focus on resolving legitimate issues in a mutually satisfactory manner. All of the hardships typically associated with a strike will remain an impetus for a union to settle the labor dispute. Moreover, elimination of the risk of permanent replacement should encourage unions to embrace more innovative approaches to bargaining, such as the “Enterprise Compact,” which are in the long-term interest of both parties.

VI. CONCLUSION

Labor and management currently find themselves at a crossroads, with one path leading to confrontation and the other to increased coop-

104. See supra note 6.
106. Unions still will face the panoply of problems that go with highly mobile capital and cost-cutting efforts, i.e., plant closings, relocations, contracting out, and the like.
107. Bluestone & Bluestone, Negotiating Our Future, supra note 34, at 226-40. As an example, an Enterprise Compact for a manufacturing firm might include the following points: (1) mutual agreement on goals for annual productivity improvement; (2) agreed-upon wage increases with cost of living adjustments; (3) price reductions based on productivity growth; (4) product quality would be a potential strike issue; (5) agreement on a no-layoff provision, with workforce reductions to be implemented through attrition and early retirement incentives; (6) bonus pay based on profit sharing and gain sharing; (7) elimination of the traditional management rights clause in favor of union involvement in decision-making at all levels of the enterprise.
eration. Standing alone, workplace fairness reform is not a panacea; it is an important first step toward the workplace of the future. Staunch opposition to workplace fairness reform by much of the business community suggests that, despite rhetoric to the contrary, many in management rigidly adhere to a system of unilateral, autocratic control of the workplace. As the foregoing discussion demonstrates, unions have an essential role to play in a high skills, high wage economy—provided management recognizes their legitimacy. As of this writing, a Senate vote remains pending. Whatever the outcome, the vote clearly will influence labor law reform efforts for years to come.

ADDENDUM

Once again, a Republican-led filibuster in the Senate has thwarted labor law reform. However, it is clear that labor will not walk away from the effort to ban permanent replacements for economic strikers. As the Dunlop Commission completes its work and prepares its legislative recommendations, there will be additional opportunities to revisit the issue. If this country truly wants a high-skills, high wage economy, we must restore a level playing field for labor and management to resolve their differences. Political winds are notoriously unpredictable, and we can only hope the Senate eventually will recognize the merit of workplace fairness reform.

108. Reich Hopeful Administration Can Overcome Filibuster Attempts on Striker Replacement, Daily Labor Report (BNA) No. 76 (Apr. 21, 1994). Workplace reform supporters apparently need three to four additional votes to overcome a certain Republican filibuster.