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The National Labor Relations Act Does Not Preempt a Discharged Permanent Replacement Worker's State Cause of Action

Stephanie L. Stromire

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I. INTRODUCTION

Congress enacted the National Labor Relations Act (NLRA or the Act)[1] to provide a uniform national labor policy[2] and to promote the free flow of interstate commerce by defining the rights of

1. 29 U.S.C. §§ 151-69 (1976 & Supp. V 1981).

2. Congress enacted the NLRA to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1953). For a background of state activity in the labor field before the NLRA, see Note, *Union Trespass*: Sears v. Carpenters *and Labor Law Preemption*, 40 U. PITT. L. REV. 779, 779-80 (1979) [hereinafter cited as Note, *Union Trespass*].

employees, employers, and labor organizations.[3] The NLRA authorizes the National Labor Relations Board (NLRB or the Board) to implement and enforce the Act.[4] Although the supremacy clause of the United States Constitution dictates that the NLRA preempts conflicting state law,[5] the Act leaves room for the states to regulate some labor activity.[6] Congress, however, has not yet defined the states' role in the labor relations area.[7] The Supreme Court, on the other hand, has declared that the states' powers "can be rendered progressively clear only through the course of litigation."[8] While this case law approach allowed the Court to develop a preemption doctrine, the Court has not determined the extent of permissible state action under the NLRA.

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3. The NLRA provides:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976).

4. According to the Act:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

29 U.S.C. § 160(a) (1976).

5. The supremacy clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the contrary notwithstanding." U.S. CONST. art VI, cl. 2.

The Supreme Court first addressed the federal preemption of state commerce law in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Framers designed the constitutional principles of preemption to avoid possible conflicts between official bodies having authority to regulate the same subject matter. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 285-86 (1971).

6. The Supreme Court has refused to hold that federal law preempts all "local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 289 (1971).

7. The Supreme Court recognized that the Act "leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." Garner v. Teamsters Local 776, 346 U.S. 485, 488 (1953).

8. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955) (state court did not have power under NLRA to enjoin union picketing). The Court noted in International Ass'n of Machinists v. Gonzales 356 U.S. 617 (1958) that: "[t]he statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." *Id.* at 619.

The Supreme Court recently reexamined the labor preemption doctrine in *Belknap, Inc. v. Hale.*[9] *Belknap* raised the novel question whether the NLRA preempts discharged permanent replacement workers'[10] state causes of action against their former employer for misrepresentation and breach of contract. The *Belknap* decision highlights the Court's inadequate guidelines for analyzing labor preemption questions and underscores the uncertainties surrounding current labor decisions addressing the role of permanent replacement workers.

The purpose of this Recent Development is to examine the issues surrounding discharged permanent replacement workers and to discuss problems confronting state courts that try to implement the *Belknap* decision. Part II of this Recent Development analyzes the legal background leading up to *Belknap*. Part III examines the *Belknap* opinion. Part IV criticizes the decision on three fronts and suggests possible ways of addressing the problems that *Belknap* presents.

II. Legal Background

A. The NLRA and the Common-Law Development of a Federal Labor Preemption Doctrine

Most labor preemption cases consider whether the NLRA protects the activity in question under section 7[11] or prohibits the activity under section 8.[12] Section 7 grants employees the right to

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9. 103 S. Ct. 3172 (1983).

10. For the purposes of this Recent Development, a permanent replacement worker is anyone who accepts an offer of employment with the expectation that the employment will continue after the strike ends.

11. 29 U.S.C. § 157 (1976). Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id.

12. Casenote, *Labor Law*—New York Telephone Co. v. New York Department of Labor, 13 Creighton L. Rev. 1005 (1980). The Supreme Court in New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979), noted that almost all labor decisions which discuss the preemption of state action concern state regulation that section 7 protects or section 8 prohibits. *Id.* at 529.

Section 8 states in relevant part:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights

join and form labor organizations, to bargain collectively, and to engage in other concerted activities to further these rights.[13] Section 8(a) declares that an employer commits an unfair labor practice if he interferes with his employees' section 7 rights or refuses to bargain collectively with the employees' representative.[14] The NLRB has the authority to prevent any person from engaging in a section 8 unfair labor practice.[15] In the early preemption cases the Supreme Court strictly interpreted sections 7 and 8[16] and permitted states to retain jurisdiction only when the NLRA clearly did not regulate the conduct in question.[17]

In *Garner v. Teamsters Local 776*[18] the Supreme Court developed a two-pronged preemption test to determine when the NLRA preempts state regulation of labor activities. *Garner* concerned union picketing to encourage nonunion employees of a trucking operator to join the union. A state court issued an injunction to stop the picketing.[19] In overruling the state court injunction, the Supreme Court gave two reasons for preempting state regulation. First, the Court stated that the NLRA preempts state action whenever the activity falls within the unfair labor practice jurisdiction of the NLRA.[20] The Court expressed concern that if the Board did not retain primary jurisdiction over unfair labor practices,

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guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

. . . .

(5) to refuse to bargain collectively with the representatives of his employees . . . . 29 U.S.C. § 158 (1976).

13. 29 U.S.C. § 157 (1976). One commentator characterized section 7 as the basic principle of the NLRA. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 1 (1976).

14. 29 U.S.C. § 158(a) (1976).

15. 29 U.S.C. § 160 (1976).

16. *See, e.g.*, Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945) (section 7 preempted licensing provision in state law because provision interfered with employees' freedom to bargain collectively).

17. *See, e.g.*, Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (NLRA does not preempt the states from regulating picketing or disorders arising out of labor disputes).

18. 346 U.S. 485 (1953).

19. *Id.* at 486-87.

20. *Id.* at 490.

state and federal courts might provide different remedies for the same conduct.[21] Only exclusive Board jurisdiction ensures the uniformity in procedure and remedy that Congress intended the NLRA to provide.[22] Second, the Court found that the NLRA preempts state action whenever Congress meant to leave the labor activity unregulated.[23] Subsequent decisions have refined the *Garner* two-pronged preemption test.[24] These decisions have become the foundation of the present labor preemption doctrine. This section of the Recent Development discusses the two prongs of the preemption test and the relevant case law.

1. The NLRB's Primary Jurisdiction: Conduct that the NLRA Protects or Prohibits

In *San Diego Building Trades Council Local 2020 v. Garmon*,[25] a landmark preemption case,[26] the Supreme Court established specific guidelines for determining when a state must yield its jurisdiction to the NLRB. In *Garmon* the labor unions picketed the employer's business and exerted pressure on customers and suppliers to cease doing business with the employer because the employer refused to sign an agreement with several labor unions.[27] A lower court found that the picketing constituted an unfair labor practice under state law and awarded damages to the employer.[28] The Supreme Court reversed the lower court decision and held

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21. *Id.* at 498-99. The Court stated that "[t]he conflict lies in remedies, not rights. The same picketing might injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent." *Id.*; *see* 77 HARV. L. REV. 377, 378 (1963) (noting that courts preempt matters of remedy as well as substance to achieve uniform application of federal labor policy).

22. 346 U.S. at 490.

23. The *Garner* Court stated:

> [T]he policy of the national Labor Management Relations Act is not to condemn all picketing . . . . For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.

Id. at 499-500.

24. For a critical analysis of the *Garner* decision, see Rose, Garner v. Teamsters: *The Supreme Court and Private Rights*, 40 VA. L. REV. 177 (1954); Recent Development, *Federal Pre-emption of Peaceful Stranger Picketing*, 54 COLUM. L. REV. 997 (1954); Recent Case, *Labor Law—Pre-emptive Effect of Taft-Hartley—Scope of State Jurisdiction*, 7 VAND. L. REV. 422 (1954).

25. 359 U.S. 236 (1959).

26. The concurrence called the opinion "a landmark in future 'pre-emption cases' in the labor field. . . ." *Id.* at 250 (Harlan, J., concurring).

27. *Id.* at 237. The unions wanted the employer to agree to retain only workers who were members of the unions or who applied for membership. *Id.*

28. *Id.* at 237-38.

that the NLRB, not the state, has primary jurisdiction over the labor activity.[29] The *Garmon* Court, by reaffirming the primary jurisdiction of the NLRB over unfair labor practices, expanded the first prong of the *Garner* preemption test and ensured uniform application of the NLRA.[30]

Growing dissatisfaction with *Garmon*[31] and its exceptions[32]

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29. *Id.* at 244-45, 248.

30. *Id.* at 244-45; *see supra* note 2 and accompanying text.

31. Both members of the Court and commentators have criticized the "arguably protected and prohibited" rule of *Garmon*. For example, Justice White declared in International Longshoremen's Local 1416 v. Adriadne Shipping Co., 397 U.S. 195 (1970), that "only labor activity determined to be actually, rather than arguably, protected under federal law should be unmune from state judicial control. To this extent [*Garmon*] . . . should be reconsidered." *Id.* at 202 (White, J., concurring) (citation omitted); *see* Benke, *The Apparent Reformulation of* Garmon: *Its Effects on the Federal Preemption of Concerted Trespassory Union Activity*, 9 U. TOL. L. REV. 793, 798-800 (1978) (discussing cases which criticize the *Garmon* rule); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) (arguing that the *Garmon* rule is both too broad and too narrow).

Despite this criticism, the Supreme Court affirmed *Garmon* in Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). *Lockridge* raised the issue whether the NLRA preempted a union member's state cause of action against his union for an allegedly wrongful discharge. *Id.* at 277. The Supreme Court held that under *Garmon* wrongful discharge falls within the exclusive jurisdiction of the NLRB. *Id.* at 292. In what one commentator termed a "defense of the [*Garmon*] test," Benke, *supra*, at 800, the majority reasoned that the desire for a uniform labor policy, 403 U.S. at 286-88, the need for a rule that lower courts could apply easily, and the need for judicial uniformity between conduct the Act protects and conduct the Act prohibits, *id.* at 290, mandate that the Court apply the *Garmon* rule. The Court recognized that the rule was not perfect, but held that without a better preemption theory, stare decisis and deference to the legislative role of Congress in defining federal preemption require that the Court apply *Garmon*. *Id.* at 302. In a bitter dissent, Justice White declared that "the [*Garmon*] 'rule' of uniformity that the Court invokes today is at best a tattered one, and at worst little more than a myth." *Id.* at 318 (White, J., dissenting).

32. In formulating the "arguably protected or arguably prohibited" standard, the *Garmon* Court acknowledged that exceptions exist to the general rule. *Garmon*, 359 U.S. at 243-44. Cases following *Garmon* have increased the number of exceptions, *see, e.g.*, Vaca v. Sipes, 386 U.S. 171, 180 (1967), to a point where "the Garmon test can now be described only by reference to its exceptions." Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037, 1041 (1973). The exceptions to the *Garmon* rule allow states to regulate labor activity that the Act otherwise would foreclose.

The Supreme Court typically groups the *Garmon* exceptions into three broad categories in which the NLRA does not preempt state regulations. *See, e.g.*, Farmer v. United Bhd. of Carpenters, 430 U.S. 290, 295-97 (1977); Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 297-98 (1971). The first exception arises when the activity touches interests "deeply rooted in local feelings and responsibility." *Garmon*, 359 U.S. at 244. The Court has not clearly defined the interests that fall within this exception, but it has developed a balancing test. The Court weighs the degree to which the conduct offsets the state's interest in protecting the health and welfare of its citizens against the degree to which the exercise of state jurisdiction will interfere with the federal scheme. The only cases that fall within this exception involve violence. Note, *State Trespass Laws Not Preempted by the National Labor Relations Act*, 1979 WIS. L. REV. 217, 226; *see, e.g.*, International Union v.

persuaded the Court to modify the primary jurisdiction rule. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[33] the Court considered the power of a state to issue an injunction against a union for picketing on an employer's property. The union's trespass violated state law, but the NLRA arguably protected the activity.[34] The Court determined that the NLRA does not preempt the states from enjoining all conduct that the NLRA arguably protects and which, therefore, is under the primary jurisdiction of the NLRB.[35] In reaching this conclusion, the Court expanded the traditional method of analyzing preemption issues under *Garmon*.

The Court first examined *Garmon*'s arguably prohibited strand. The Court believed that the critical inquiry should be

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Russell, 356 U.S. 634 (1958) (NLRA does not preempt employee's action against union for malicious interference); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (NLRA does not prevent state court from issuing injunction to potentially violent picketers); United Auto., Aircraft & Agricultural Implement Workers v. Wisconsin Employee Relations Bd., 351 U.S. 266 (1956) (state has power to enjoin violent union conduct during a strike even though it constitutes an unfair labor practice); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (NLRA does not grant NLRB exclusive jurisdiction over common-law tort actions); *see also* Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977) (intentional infliction of emotional distress); Linn v. United Plant Guard Workers Local 144, 383 U.S. 53 (1966) (malicious libel). The *Garmon* Court explained that, "[s]tate jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." 359 U.S. at 247.

The second exception to the *Garmon* rule arises when the activity is only of peripheral concern to the NLRA or would not frustrate the purposes of the Act. *Id.* at 243. States have regulated the expulsion of union members under this exception. *See, e.g.*, International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958). *But see* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). In *Lockridge* the Court held that the NLRA preempted a cause of action by a union member for wrongful discharge under the terms of the collective bargaining agreement. *Id.* at 297. The action in *Lockridge* fell under the exclusive jurisdiction of the NLRB. *Id.* The Court distinguished *Gonzales* because *Gonzales* concerned only internal union matters. *Id.* at 296.

The third exception to the *Garmon* rule arises when Congress provides that the states should have the power to regulate the activity. *Lockridge*, 403 U.S. at 297. These provisions include: Section 10(a) of the Act, 29 U.S.C. § 160(a) (1976), which authorizes the NLRB to relinquish its jurisdiction to the states under certain circumstances; § 14(b), 29 U.S.C. § 164(b) (1976), which grants states the power to prohibit agreements requiring membership in a labor organization as a condition of employment; § 14(c), 29 U.S.C. § 164(c) (1976), which empowers states to assume jurisdiction if the NLRB declines to assert jurisdiction; and § 303, 29 U.S.C. § 187 (1976), which grants federal and state courts concurrent jurisdiction over actions resulting from a secondary activity that is an unfair labor practice. For a thorough discussion of the exceptions to the *Garmon* rule, see Hooton, *The Exceptional Garmon Doctrine*, 26 LAB. L.J. 49, 49-65 (1975).

33. 436 U.S. 180 (1978).

34. *Id.* at 182.

35. *Id.* at 207.

whether the controversy before the state court would be identical to or different from the controversy that the plaintiff could bring before the NLRB. A risk of interference with the unfair labor practice jurisdiction of the Board exists only when the state court and the NLRB hear identical controversies.[36] Turning to the arguably protected strand of *Garmon*, the Court noted that the NLRB's primary jurisdiction does not extend to cases in which an employer has no means of invoking Board jurisdiction and the union, which could invoke Board jurisdiction, refuses to do so.[37] The Court held, however, that the NLRA preempts a state cause of action only when a significant risk exists that the state court will misinterpret federal law and protect prohibited activities.[38]

Applying the new interpretation of the *Garmon* rule, the *Sears* Court held that the NLRA did not preempt the state action, even though section 7 arguably protects union picketing,[39] because the controversy in the state court would not be identical to the controversy before the Board.[40] In addition, the only way for the employer to determine whether the union had a federal right to remain on the property was by proceeding in state court.[41] Significantly, in *Sears* the Court first sanctioned state regulation of a section 7 right and thereby impeded the intent in *Garmon* to ensure uniformity through complete deference to the Board's primary jurisdiction.[42] After *Sears* some commentators questioned the continued validity of the *Garmon* rule,[43] but most commenta-

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36. *Id.* at 198.

37. *Id.* at 202-03.

38. *Id.* at 203.

39. *Id.* at 207. The dissent noted that § 7 "declares that 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,' including specific types and forms of picketing, are protected from interference from any source." *Id.* at 217 (Brennan, J., dissenting).

40. The state action in *Sears* only challenged the location of the picketing, while the issue before the NLRB would be the object of the picketing. The NLRB's determination would have extended beyond the question of whether a trespass occurred. *Id.* at 198.

41. The plaintiff in *Sears* could not obtain a ruling from the Board on whether the NLRA protected the union trespass. Only if the union filed unfair labor practice charges against the defendant for interfering with the union's § 7 right to picket would the NLRB have jurisdiction. The defendant only could find out whether the union had a federal right to remain on the property by proceeding in state court. *Id.* at 201-02.

42. *See* Note, *supra* note 32, at 236. The dissent in *Sears* reiterated the need for a uniform rule. The dissent feared that the lower courts would apply *Sears* improperly and erode the "goal of a uniform administration of the national labor laws." 436 U.S. at 234 (Breunan, J., dissenting).

43. *See, e.g.*, Comment, Sears, Roebuck & Co. v. San Diego County District Council of Carpenters: Garmon *Reconsidered and the Reaffirmation of Property Rights*, 13 U. RICH. L. REV. 351, 352 (1979); *see also* Note, *supra* note 32, at 241.

tors agreed that *Sears* established a "narrow exception to the still vital *Garmon* test,"[44] which the Supreme Court "created in response to a rather limited set of circumstances: when a wronged party is left without a forum to provide a remedy."[45]

2. Permitted Activities: Conduct that the NLRA Does Not Regulate

The second prong of preemption analysis embodies the Court's recognition that Congress intended "the free play of economic forces" to regulate some labor activities.[46] State regulation of these activities impinges on federal labor policy by interfering with economic weapons Congress intended labor and management to retain under the NLRA.[47] For example, in *Local 20, Teamsters v. Morton*[48] an employer sued a union representing striking employees. The employer alleged that the union had violated federal labor law and state common law by persuading some of the employer's customers to cease doing business with the employer.[49] The district court awarded damages to the employer under state law,[50] but the Supreme Court affirmed only the portion of the award covering union conduct that violated the Act.[51] The Court noted that the Act specifies the kinds of union activity during a strike that gives an employer the right to collect damages.[52] The *Morton* Court believed that Congress intended to maintain a balance of power between labor and management[53] by leaving some activities unregulated as an economic weapon for the unions.[54] Al-

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44. Note, *Union Trespass*, *supra* note 2, at 794; *see* Benke, *supra* note 31, at 815.

45. *Id.*

46. NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971). In New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979), Justice Powell declared, "What Congress left unregulated is as important as the regulations that it imposed." *Id.* at 552 (Powell, J., dissenting).

47. *See, e.g.*, Garner v. Teamsters Local 776, 346 U.S. 485, 500 (1953).

48. 377 U.S. 252 (1964).

49. *Id.* at 253-54.

50. *Id.* at 255. The district court award included: (1) business losses for violating § 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976), by encouraging employees of an employer's customer to force their employer to cease doing business with the striking union's employer; (2) damages for violating state law by persuading management of another customer to cease doing business with the employer; and (3) damages for loss of contract and punitive damages. 377 U.S. at 255.

51. The Supreme Court affirmed the $1600 damage award for the union's violation of § 303. *Id.* at 256.

52. *Id.* at 258.

53. *Id.* at 259.

54. *See id.* at 260. The Court noted that the Act did not prohibit the union from

lowing state courts to award damages under state law for union activity which federal law did not prohibit would upset the balance of power between labor and management and "frustrate the congressional determination to leave this weapon of self-help available."[55]

In *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*[56] the Court continued to refine its preemption analysis by focusing on the union's economic weapons. In *Machinists* union members refused to work overtime in an attempt to pressure an employer during renewal negotiations for an expired collective bargaining agreement.[57] The employer filed unfair labor practice charges with a state commission.[58] The commission held that the union's activities violated state law[59] and ordered the union to stop encouraging employees to refuse overtime work.[60] The Supreme Court reversed the state court decision. The Court determined that the employer had invoked state law only because he lacked sufficient economic strength to bargain successfully with the union.[61] The Court noted that Congress intended employers and unions to use economic weapons during collective bargaining. For the states to balance the bargaining positions of the parties by regulating the economic weapons that the parties could use, in the Court's view, would defeat Congress' purpose in providing self-help measures for labor and management.[62] The Court, therefore, concluded that the

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requesting that the management of an employer's customer cease doing business with the employer. *Id.*

55. *Id.* at 260. The district court could not award punitive damages under the NLRA, however, because § 303 limited recovery to compensatory damages. The breach of contract claim also would not lie under § 303. *Id.* at 260-62.

56. 427 U.S. 132 (1976).

57. *Id.* at 133-34.

58. The employer filed charges with the Wisconsin Employment Relations Commission. The employer also filed unfair labor practice charges with the NLRB, but the Board dismissed them because the union "'policy prohibiting overtime work by its member employees . . . does not appear to be in violation of the Act.'" *Id.* at 135.

59. *Id.* at 135-36. Wisconsin law provides:

> "It shall be an unfair labor practice for an employe individually or in concert with others:
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> . . . .
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> (h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

WIS. STAT. § 111.06(2) (1974).

60. 427 U.S. at 136.

61. *See id.* at 148-49.

62. *Id.* at 149. The Court stated that both the NLRB and the states "are without

state could not prevent the union from encouraging employees to refuse to work overtime.[63]

B. *The Employer's Right to Hire Permanent Replacement Workers*

While the employee's right to strike[64] is his fundamental economic weapon in a labor dispute,[65] an employer has an equally powerful weapon: he may hire permanent replacement workers to continue his business during an economic strike.[66] The right to hire replacements, however, does not exist in an unfair labor practice strike. The NLRB, therefore, must differentiate between the two types of strikes.[67] In an economic strike an employee attempts to obtain economic concessions from his employer, such as higher wages, improved working conditions, or union recognition.[68] An unfair labor practice strike occurs when an employer prevents an employee from joining or forming a labor organization or bargaining

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authority to attempt to 'introduce some standard of properly "balanced" bargaining power,' . . . or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.' " *Id.* at 149-50 (quoting NLRB v. Insurance Agents, 361 U.S. 477, 497, 500 (1960)).

63. *Id.* at 155. This decision overruled UAW Local 232 v. Wisconsin Employee Relations Bd., 336 U.S. 245 (1949), which permitted states to regulate partial strike activities like the one in *Machinists*. 427 U.S. at 151, 155. The dissent in *Machinists* found that Congress intended to regulate partial strike activity and argued that the Court should have followed precedent and allowed the state to regulate the strike. *Id.* at 157-59 (Stevens, J., dissenting).

64. Section 13 of the NLRA 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 (1976).

65. *See, e.g.*, NLRB v. International Rice Milling Co., 341 U.S. 665, 672-73 & n.8 (1951); *see also* Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 VA. L. REV. 1322, 1322 (1959) ("The test of any union's strength is its ability to call and conduct a strike that forces the employer to meet its demands. . . . As the work stoppage is the union's ultimate force, an employer's resilience and ability to resist strike power marks his labor strength.").

66. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938). Courts since *Mackay* have continued to recognize this right. *See, e.g.*, People v. Federal Tool and Plastics, 62 Ill. 2d 549, 554, 344 N.E.2d 1, 4 (1975) ("An employer has a right to hire replacements for striking employees and that right constitutes an important economic weapon left to the employer by Congress when it struck the balance of power between labor and management." (citations omitted)); *see also*, Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1203 (1967) (characterizing the ability to hire replacements during a strike as "[p]ossibly the most significant permissible response" an employer can make to a strike).

67. *See* 29 U.S.C. § 160 (1976); R. GORMAN, *supra* note 13, at 339.

68. *See* R. GORMAN, *supra* note 13, at 339.

collectively.[69] An employer may convert an economic strike into an unfair labor practice strike by committing an unfair labor practice which prolongs,[70] aggravates,[71] or expands the strike to include a protest over the unfair labor practice.[72] The way the NLRB characterizes a strike has important ramifications on an employer's ability to hire permanent replacement workers and on the rights of the replacement workers and the striking employees.

1. Economic Strikes

Under the NLRA an economic striker remains an employee until he obtains "other regular and substantially equivalent employment."[73] In *NLRB v. Mackay Radio & Telephone Co.*,[74] however, the Court held that an economic striker does not have an absolute right to reinstatement at the end of a strike.[75] In *Mackay* workers struck over an employer's failure to execute agreements concerning the terms and conditions of the workers' employment. After the strike the employer did not rehire several of the strikers.[76] The Court found that the employer had not committed an unfair labor practice by hiring replacement workers or by telling the replacements that their jobs might be permanent.[77] Although the NLRA provides that nothing in the Act may interfere with the right to strike,[78] the Court refused to find that an employer loses the right to replace strikers to "protect and continue his business."[79] The employer, the Court concluded, has no duty to rehire

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69. *Id.* See 29 U.S.C. § 158(a) (1976), *reprinted in part, supra* note 12, for a list of what constitutes an unfair labor practice.

70. *See* NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 814 (2d Cir. 1978).

71. *Id.*

72. NLRB v. Top Mfg. Co., 594 F.2d 223, 225 (9th Cir. 1979); *see also*, Stewart, *supra* note 65, at 1327-28.

73. 29 U.S.C. § 152(3) (1976). The NLRA provides: "The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current lahor dispute." *Id.*

74. 304 U.S. 333 (1938).

75. The general rule is that the employer must reinstate the economic striker after the strike is over. *See, e.g,*. NLRB v. Mars Sales & Equip. Co., 626 F.2d 567, 572 (7th Cir. 1980). A striker may forfeit this right by acting violently during a strike or by using unlawful tactics in striking for a protected object. Hirsch, Laidlaw—*The* Mackay *Legacy*, 4 GA. L. REV. 808, 810-11 (1970).

76. 304 U.S. at 336-39.

77. *Id.* at 345-46.

78. 29 U.S.C. § 163 (1976).

79. 304 U.S. at 345.

strikers that he has replaced.[80]

Mackay laid the foundation for the Court's future pronouncements on economic strikes.[81] For example, the Court affirmed *Mac-*

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80. *Id.* at 346.

81. Commentators have criticized *Mackay* on several fronts. *Mackay* curtails a right that the NLRA explicitly grants to employees—the right to strike. *See* 29 U.S.C. § 163 (1976). Commentators list two adverse effects of hiring permanent replacement workers during a strike. First, allowing management to continue operations weakens the strikers' bargaining position. Second, the replacement workers undermine the union's status as the workers' bargaining representative. Replacement workers are likely to be antiunion and may vote in certification elections during a strike. Comment, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 634 (1966). *See also* Gillespie, *The* Mackay *Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 783 (1972).

Another criticism of *Mackay* is that hiring permanent replacement workers confuses the legal rights of the employer, the employee, and the replacement workers during and after a strike. Often the Board or the courts do not determine the nature of a strike until years after the strike ends. This potential delay hinders the strike settlement process. *See* Comment, *supra*, at 640; *see also* Gillespie, *supra*, at 785. An employer who hires permanent replacement workers will characterize the strike as an economic strike to maximize his bargaining power and give him the option to dismiss both the striking union members and their union. *See* Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 384 (1969); *see also* Gillespie, *supra*, at 786. On the other hand, if the court classifies the strike as an unfair labor practice strike, the employer is subject to backpay sanctions from the day the striking employees request reinstatement.

Employees will argue that they are striking against an unfair labor practice to ensure them an absolute right to reinstatement. Employees striking against what they believe is an unfair labor practice, but what a court later characterizes as an economic injustice, lose their jobs if the employer hired permanent replacements. *See* Schatzki, *supra*, at 387-88; *see also* Gillespie, *supra*, at 785. Some commentators believe that abolishing the *Mackay* doctrine in favor of a rule that allows the employer to hire temporary replacements is the only way to ensure uniform treatment of strikes. *See, e.g.*, Comment, *supra*, at 640-41.

An alternative view to abolishing the *Mackay* doctrine is to require the employer to prove that he had no choice but to hire permanent replacement workers. *See* Gillespie, *supra*, at 791-95 (listing factors a court should consider in determining whether the employer acted soundly); *see also* Janes, *The Illusion of Permanency for* Mackay *Doctrine Replacement Workers*, 54 TEX. L. REV. 126, 150 (1975). Commentators have questioned the basic principle of *Mackay*, that an employer can do business only by offering permanent employment to replacement workers. *See* Schatzki, *supra*, at 385. *But see* Unkovic & Harty, *Management's Legal Problems in Continuing Plant Operations During an Economic Strike Under Federal and Pennsylvania Law*, 67 DICK. L. REV. 63 (1962) (arguing that using temporary replacement workers is economically efficient).

Commentators believe that the *Mackay* doctrine is unnecessary because the employer can hire temporary replacement workers, *see* Schatzki, *supra*, at 392, or use other alternatives to combat the strike. For example, the employer could try shutdowns, reductions in the labor force, lockouts, strike insurance, and arbitration. *See* Gillespie, *supra*, at 790-91. In some prounion communities, however, where little unemployment exists and the citizenry is hostile to strikebreakers, the employer may not be able to hire permanent replacement workers. *Id.* In that situation, the employer would have to demonstrate a legitimate and substantial business justification for hiring permanent replacements. *Id.* at 796-97. Certain seasonal occupations, for example, may justify the need to hire permanent workers. *Id.* at 795.

kay in *NLRB v. Fleetwood Trailer Co.*[82] The Court stated that unless an employer can show "legitimate and substantial business justifications"[83] for refusing to reinstate strikers, the employer is guilty of an unfair labor practice.[84] The Court specified that an employer has a business justification when he hires permanent replacement workers to continue his business operations.[85] Because the employer in *Fleetwood Trailer* failed to show a legitimate and substantial business justification for hiring new employees after the strike ended and refused to reinstate the economic strikers, the Court found that the employer had committed an unfair labor practice.[86]

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82. 389 U.S. 375 (1967).

83. *Id.* at 378. The Court formulated this standard in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967). When an employer's conduct is inherently destructive of important employee rights, the Board can find an unfair labor practice even if the employer introduces evidence that business considerations motivated the conduct. If, however, the effect on the employees' rights is comparatively slight, and the employer produces evidence of a legitimate and substantial business justification for his conduct, the employees must prove antiunion motivation to sustain an unfair labor practice charge.

84. The employer would violate 29 U.S.C. § 158(a)(1), (3) (1976).

85. *Fleetwood Trailer*, 389 U.S. at 379.

86. *Id.* at 380-81. The Court concluded that employees lose the right to reinstatement when openings are not available at the time that the employees request reinstatement. In Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the court used *Fleetwood Trailer* to conclude that a legitimate and substantial business justification does not exist when an employer refuses to reinstate economic strikers after replacement workers leave their jobs following a strike. *Id.* at 105. *See* Comment, *Preferential Hiring Rights of Economic Strikers*, 73 DICK. L. REV. 322, 336 (1969) (arguing that in retaining the employer's right to hire permanent replacement workers, *Laidlaw* balances the needs of the employer and the employee). Before *Laidlaw* the NLRB's position had been that if the employer has filled the striker's position with a permanent employee, the employer had no obligation to the striker, except to treat him as a new job applicant. *See, e.g.*, Brown & Root, Inc., 132 N.L.R.B. 486, *enforced*, 311 F.2d 447 (8th Cir. 1963).

Other circuit courts have followed *Laidlaw*. *See, e.g.*, Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163 (8th Cir. 1972); NLRB v. Hartmann Luggage Co., 453 F.2d 178 (6th Cir. 1971); NLRB v. Johnson Sheet Metal, Inc., 442 F.2d 1056, 1061 (10th Cir. 1971); American Mach. Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970). *Laidlaw* and its progeny raise questions about the extent of an employer's obligation to rehire economic strikers when positions become available. For example, for how long does the economic striker have a right to reinstatement? What standard should a court use to determine whether a permanently replaced economic striker obtained regular or substantially equivalent employment? What steps must an employer undertake to locate economic strikers when vacancies arise? What qualifies as a legitimate and substantial business justification? *See* Farmer, *Issues and Practical Problems Caused by* Fleetwood Trailer *and* Laidlaw Mfg., 4 GA. L. REV. 802, 806-07 (1970); Hirsh, *supra* note 75, at 825-28.

2. Unfair Labor Practice Strikes

Like economic strikers, unfair labor practice strikers remain employees under the NLRA.[87] Unfair labor practice strikers, however, possess an absolute right to reinstatement. In *Mastro Plastics Corp. v. NLRB*,[88] for example, the employer wanted one union to represent his employees and threatened to release employees who supported a rival union. A strike resulted when the employer discharged an employee who actively supported the disfavored union.[89] Finding that the employer had engaged in an unfair labor practice, the Court held that the employer had to reinstate the strikers with backpay, even if he had hired replacements.[90] In addition, if an employer abolishes the jobs of unfair labor practice strikers, even for legitimate business reasons, he must rehire the strikers when new jobs become available.[91]

3. Converted Strikes

Although the Supreme Court has not considered an employer's right to hire and retain permanent replacement workers in a strike that begins as an economic strike and becomes an unfair labor practice strike, both the Board and lower federal courts have addressed the issue. In *NLRB v. Top Manufacturing Co., Inc.*[92] an employer refused to reinstate striking employees after they offered to return to work. The employees struck when the employer ceased to recognize the union. The United States Court of Appeals for the Ninth Circuit affirmed the Board's decision that the employer's conduct constituted an unfair labor practice. The strikers, therefore, had the right to return to their jobs.[93] The court noted that when an economic strike becomes an unfair labor practice strike, the strikers become unfair labor practice strikers and the employer must reinstate the strikers unless he permanently replaced them before the status of the strike changed. The Board has adopted a similar position.[94]

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87. The Act provides: "The term 'employee' shall include . . . any individual whose work has ceased . . . because of any unfair practice. . . ." 29 U.S.C. § 152(3) (1976).

88. 350 U.S. 270 (1956).

89. *Id.* at 273.

90. *Id.* at 278. *See also* NLRB v. Laredo Coca Cola Bottling Co., 613 F.2d 1338 (5th Cir.), *cert. denied*, 499 U.S. 889 (1980) (finding of unfair labor practice entitled strikers to an unconditional right to reinstatement).

91. Stewart, *supra* note 65, at 1326.

92. 594 F.2d 223 (9th Cir. 1979).

93. *Id.* at 224.

94. *Id.* at 225. For example, in R.J. Oil & Ref. Co., 108 N.L.R.B. 641 (1954), the Board

III. *Belknap, Inc. v. Hale*

Although Supreme Court decisions have clarified the rights that strikers possess under the NLRA, the Court had not addressed the rights of discharged permanent replacement workers. In *Belknap, Inc. v. Hale*[95] the Court confronted the issue whether the NLRA permitted discharged permanent replacement workers to bring an action against their former employer in state court. In *Belknap* approximately 400 employees struck because the employer and the employees' union failed to reach a new contract agreement. The day the strike began the employer granted wage increases to union employees who remained on the job.[96] The employer then hired permanent replacement workers to fill the positions that the strikers vacated.[97] During the strike the union filed unfair labor practice charges with the NLRB because of the wage increases, and the employer countered with charges against the union. Meanwhile, the employer continued to assure the replacement workers that their positions were permanent.[98]

The NLRB filed a complaint against the employer on the ground that the wage increases constituted an unfair labor practice.[99] In an effort to resolve the dispute, the employer discharged the replacement workers and rehired the striking employees.[100] Twelve of the discharged replacement workers then sued the employer for misrepresentation and breach of contract.[101] The com-

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held that it would not require an employer to reinstate employees that he permanently replaced during an economic strike. Once the strike becomes an unfair labor practice strike, however, the employer must reinstate all employees that he fired after the conversion. *Id.* at 648; *see also* NLRB v. Guistina Bros. Lumber Co., 253 F.2d 371 (9th Cir. 1958) (employer must reinstate strikers when economic strike becomes an unfair labor practice strike and the employer has not hired replacement workers).

95. 103 S. Ct. 3172 (1983).

96. *Id.* at 3174.

97. A portion of the employer's advertisement for replacement workers read:

> PERMANENT EMPLOYEES WANTED. . . . OPENINGS AVAILABLE FOR QUALIFIED PERSONS LOOKING FOR EMPLOYMENT TO PERMANENTLY REPLACE STRIKING WAREHOUSE AND MAINTENANCE EMPLOYEES.

Id. at 3174 n.1.

98. *Id.* at 3175. In a letter to the replacement workers, the employer stated: "You will continue to be permanent employees so long as you conduct yourself in accordance with the policies and practices that are in effect here at Belknap." *Id.*

99. The NLRB alleged that the wage increases violated 29 U.S.C. §§ 158(a)(1), 158(a)(3), and 158(a)(5) (1976). *Belknap*, 103 S. Ct. at 3175.

100. *Belknap*, 103 S.Ct. at 3175-76.

101. The replacement workers' employment contract included the provision, "I . . . have been employed by Belknap, Inc. . . . as a regular full time permanent replacement. . . ." *Id.* at 3175.

plaint alleged that the employer hired the replacement workers knowing that their positions were not permanent and knowing that the replacement workers would rely on the offers of permanent employment. In addition, the complaint stated that by discharging the replacement workers, the employer breached their employment contracts.[102] Each replacement worker claimed $500,000 in damages.[103]

The Supreme Court first examined the employer's contention that the *Morton-Machinists* line of analysis should leave the conduct of the parties unregulated.[104] The employer argued that regulation would impair one of his primary economic weapons during a strike—the right to hire permanent replacement workers. Furthermore, the employer asserted that subjecting him to damages in state court for reinstating striking employees would interfere with the settlement of strikes.[105] The Court rejected these arguments by distinguishing the congressional intent to allow employers and unions to use economic weapons against each other, which the Court recoguized in *Morton* and *Machinists,* from a situation in which the unregulated use of economic weapons injures innocent third parties.[106] The Court refused to believe that Congress intended to promote the lawless use of economic weapons.[107]

The Court determined that awarding damages to discharged replacement workers would not affect an employer's economic position.[108] The Court believed that employers could insulate themselves from liability by making their offers for permanent employment conditional. Under a conditional contract, employment would be permanent absent a strike settlement requiring the employer to rehire the strikers or a finding that the strike was an unfair labor

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102. *Id.* at 3176.

103. The employees sought $250,000 in compensatory damages and $250,000 in punitive damages. *Id.* The trial court granted the employer's motion for summary judgment, holding that the NLRA preempted the state cause of action. *Id.* The Kentucky Court of Appeals reversed on two grounds and held that the NLRA did not apply. First, preemption was inappropriate because the employer did not commit an unfair labor practice. Second, tbe contract and misrepresentation claims were only of peripheral concern to the NLRA, but they were important matters of local law. *Id.* The Kentucky Supreme Court granted discretionary review, but later vacated its order. The United States Supreme Court then granted certiorari to hear the case. *Id.*

104. For a discussion of *Morton* and *Machinists,* see *supra* notes 48-63 and accompanying text.

105. *Belknap,* 103 S. Ct. at 3177.

106. *Id.* at 3178.

107. *Id.*

108. *Id.* at 3177.

practice strike.[109] In suggesting that employers make replacement contracts conditional, the Court altered the traditional perception of permanent replacement workers by stating that replacements who employers hire under conditional contracts would satisfy the *Mackay* permanency requirement.[110] The employer, then, would not be liable for discharging the replacement workers during or after an economic strike if he refused to reinstate the strikers.

The Court then turned to the replacement workers' misrepresentation and breach of contract claims. The Court first refuted the employer's argument that primary jurisdiction under *Garmon* preempted the misrepresentation claim because it related to conduct that was arguably an unfair labor practice.[111] According to the Court, *Sears* dictated that conduct which the NLRA arguably prohibits only falls under the exclusive jurisdiction of the NLRB when the issue before the state court would be identical to the issue before the Board.[112] The majority concluded, however, that the Board and the state court would address different issues in *Belknap*. The Board would focus on the rights of the strikers, while the state court would determine whether the employer deceived the replacement workers by executing contracts for permanent employment.[113] The Court felt that although the misrepresentation action was only of peripheral concern to the Board, the state had a substantial interest in protecting its citizens from misrepresentations. The NLRA, therefore, did not preempt the misrepresentation claim.[114]

In upholding the replacement workers' breach of contract claim, the Court noted that federal law does not give an employer the right to discharge replacement workers by breaching promises of permanent employment. Even if the employer discharges replacement workers pursuant to a Board order forcing him to reinstate strikers after a finding of an unfair labor practice, the NLRA does not preempt the replacement workers' breach of contract claim.[115] The Court viewed the interests of the Board and the NLRA as different from the state's interest in providing a remedy

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109. *Id.* at 3179-80.

110. *Id.* at 3178-79. *See supra* text accompanying notes 74-82 (discussion of *Mackay*).

111. 103 S. Ct. at 3183. See *supra* notes 25-30 and accompanying text for a discussion of *Garmon*.

112. *See supra* text accompanying note 36.

113. 103 S. Ct. at 3183.

114. *Id.*

115. *Id.* at 3184.

for a breach of contract claim.[116] The Court concluded that absent a conflict between the state's interest and the rights of the strikers or the employer, the replacement workers' breach of contract claim would not frustrate national labor policy.[117]

The dissent[118] concluded that the NLRA preempted the replacement workers' claims because they went to the core of federal labor policy.[119] The dissent argued that *Garmon* should preempt the breach of contract claim because of the potential for conflict between the NLRA and state law. Under the NLRA, the employer must reinstate strikers by discharging their replacements, even though the discharge breaches the replacement workers' employment contracts. The dissent found this conflict intolerable.[120] The dissent pointed out that allowing breach of contract claims also would make an employer less willing to rehire striking employees. The employer more likely would litigate an unfair labor practice claim than settle it, which would frustrate the federal interest in ending strikes and settling labor disputes.[121]

The dissent also argued that *Machinists* should preempt the misrepresentation claim.[122] The dissent contended that the majority's new definition of permanent replacements upsets the delicate balance between labor and management.[123] After *Belknap* an employer might decide not to hire permanent replacement workers or

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116. *Id.*

117. *Id.* Justice Blackmun filed a concurring opinion. He recognized the important economic weapon that an employer possesses in having the ability to hire permanent replacement workers, but he felt that the courts should not regulate promises of permanent employment. *Id.* at 3187. Blackmun, therefore, agreed with the majority that the NLRA did not preempt the replacement workers' state claims, but he disagreed with the majority's concept of a conditional offer of employment. Blackmun felt that the majority approach did not give proper deference to the Board's traditional definition of permanent replacements as workers who " 'were regarded by themselves and the [employer] as having received their jobs on a permanent basis.' " *Id.* at 3184 (quoting the Court at 3178 (quoting Georgia Highway Express, Inc., 165 N.L.R.B. 514, 516 (1967), *aff'd sub nom.*, Truck Drivers and Helpers Local 728 v. NLRB, 403 F.2d 921 (D.C. Cir.), *cert. denied*, 393 U.S. 935 (1968))). In addition, Blackmun believed that an employer making a conditional promise of permanent employment has almost no legitimate and substantial business justification for refusing to reinstate striking employees. *Id.* at 3187. Blackmun would have held that the federal government should regulate promises of permanent employment. This approach, according to Blackmun, would provide consistency in federal labor law. *Id.* at 3189.

118. Justice Brennan wrote the dissenting opinion, in which Justices Marshall and Powell joined.

119. *Id.* at 3190 (Brennan, J., dissenting).

120. *Id.* at 3193 (Brennan, J., dissenting).

121. *Id.* at 3194 (Brennan, J., dissenting).

122. *Id.* at 3196 (Brennan, J., dissenting).

123. *Id.* at 3197 (Brennan, J., dissenting).

only to hire them when the strike is clearly for economic reasons, because the employer may risk future liability if he discharges the replacements. According to the dissent, state law could inhibit the full use of an economic weapon that is available under federal law.[124] The dissent, therefore, would have held that the NLRA preempted the replacement workers' misrepresentation and breach of contract claims.

IV. IMPLICATIONS OF *Belknap*

A. *Federal Preemption*

Belknap is the Supreme Court's most recent attempt to articulate the appropriate boundaries of state labor regulation under the NLRA. Instead of clarifying the preemption issue, however, the decision merely illustrates the inefficiency of the Court's present method of analyzing labor preemption questions. First, the Court continues to acknowledge the *Garmon* rule as the starting point for its preemption analysis, despite the numerous exceptions that have diminished the rule's effectiveness.[125] Second, in failing to identify legitimate economic weapons in the *Morton-Machinists* line of preemption analysis, the Court continues to foster uncertainty.[126]

The Supreme Court in *Belknap* had the opportunity to establish a more workable preemption doctrine, yet failed to take any action. *Belknap*, however, does illustrate the Court's willingness to rely on the *Sears* analysis.[127] By recognizing *Sears* as the appropriate foundation for a preemption doctrine and eliminating the *Garmon* rule, the Court could have formulated a clearer preemption doctrine and eliminated the *Morton-Machinists* line of analysis. Under the *Sears* approach, the NLRA would preempt a state cause of action for any activity which the NLRA clearly protects or pro-

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124. *Id.* at 3197 (Brennan, J., dissenting).

125. *See supra* note 32; *see also* Recent Development, *Labor Law—Preemption—State Court May Exercise Jurisdiction to Restrain Peaceful Union Trespass Both Arguably Protected and Arguably Prohibited by National Labor Relations Act:* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 64 CORNELL L. REV., 595, 608 (1979). The author notes that state courts easily applied the original *Garmon* rule, and the rule's broad coverage made "erroneous state-court assumption of jurisdiction unlikely." *Id.* The many exceptions to the *Garmon* rule that courts later established, however, made it increasingly difficult to apply. State courts must now review all the rule's exceptions before deciding to apply the rule. *See* Hooton, *supra* note 32, at 63-65 (discussing the effects of the *Garmon* rule exceptions).

126. See *supra* notes 48-63 and accompanying text for an analysis of *Morton* and *Machinists*.

127. *See supra* text accompanying notes 112-13.

hibits. This approach is consistent with Congress' purpose in enacting the NLRA.[128] In all other cases the NLRA would preempt state action in only two circumstances. First, the NLRA would preempt a state cause of action when the controversies before the state court and the Board were identical. This rule would not apply, however, if a party could not invoke the Board's jurisdiction and the party's adversary refused to do so.[129] Second, the NLRA would preempt a state cause of action when a risk existed that state courts could interfere seriously with national labor policy.[130] This approach eliminates the inherent uncertainties confronting courts that must determine whether a labor activity arguably falls within the penumbral area of the NLRA or under a *Garmon* exception to the Act.

B. Hiring Permanent Replacement Workers

Despite widespread criticism of the *Mackay* doctrine,[131] the *Belknap* Court affirmed the right of an employer to hire permanent replacement workers. The limitations that *Belknap* imposes on the exercise of this right, however, may make the *Mackay* doctrine impossible for employers to apply. Before *Belknap, Mackay* gave employers an unqualified right to hire permanent replacement workers to continue business operations if the employer could demonstrate a legitimate and substantial business justification.[132] The *Belknap* Court never suggested that an employer was liable for discharging replacement workers as part of a strike settlement or in compliance with an NLRB order if the strike concerned an unfair labor practice. The Court, however, did alter the *Mackay* doctrine by specifically granting replacement workers a state cause of action against their employer. After *Belknap, Mackay* remains a viable doctrine for employers only when the employees strike for economic reasons. This approach is ineffective because the nature of a strike may change.[133]

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128. *See supra* notes 1-3 and accompanying text.
129. *See supra* text accompanying notes 36-37.
130. *See supra* text accompanying note 38.
131. *See supra* note 81.
132. *See supra* text accompanying notes 83-86.
133. *See supra* text accompanying notes 70-72.

The NLRB has the authority to issue advisory opinions on whether it has jurisdiction over a labor dispute. The Code of Federal Regulations provides:

> Whenever a party to a proceeding before any agency or court of any State or Territory is in doubt whether the Board would assert jurisdiction on the basis of its current jurisdictional standards, he may file a petition with the Board for an advisory opinion

The *Belknap* Court attempted to retain some vestiges of the economic power that *Mackay* granted employers. The Court concluded that conditional offers of permanent employment satisfy the *Mackay-Fleetwood* permanency requirement. Under the Court's new definition of permanency, a replacement worker is a permanent employee unless the employer discharges the worker because of a strike settlement or replaces him because the employer committed an unfair labor practice during the strike.[134] By making the replacement workers' jobs conditional, however, *Belknap* is detrimental to employers who are unable to hire temporary replacement workers. *Belknap's* conditional employment contract offers no more job security to a replacement worker than a temporary employment contract.

The nature of employment contracts for permanent replacement undoubtedly will change because of *Belknap*. Few employers will risk liability by making unconditional offers of permanent employment. For example, an employer who in good faith believes that a strike is for economic reasons may feel compelled to make unconditional offers of permanent employment to continue his business. If, years later, a court determines that the strike is an unfair labor strike, the employer is liable to the strikers for back pay from the date they requested reinstatement. In addition, under federal law the employer must reinstate the strikers. If the employer cannot absorb all the strikers and replacements workers, he may have to discharge the replacement workers. Under *Belknap*, the employer is then liable for damages to the replacement workers in state court.

State courts are likely to confront situations in which an employer has not made his replacement workers conditional offers of permanent employment. The *Belknap* decision provides state courts with little guidance. Instead, the Court merely enunciates a broad rule under which a replacement worker can sue in state

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on whether it would assert jurisdiction on the basis of its current standards. 29 C.F.R. § 102.98(a) (1983). For a discussion of the way to use Board opinions in labor disputes, see Come, *Preemption: The Future of* Garmon, 23 N.Y.U. CONF. LAB. 89, 98-99 (1971); Hooton, *supra* note 32, at 64-65. A Board opinion could help the employer determine whether the Board believes that the strike was an unfair labor practice strike, and therefore, under the Board's jurisdiction, or merely an economic strike. Advisory opinions, however, may not be helpful to an employer. The NLRB may take too long to issue its opinion, which may thereby injure the employer's business if he waits for the opinion before hiring replacement workers. In addition, the nature of the strike could change after the Board issues its opinion. *See* Note, *supra* note 32, at 240.

134. *See supra* text accompanying notes 109-10.

court for losing his job after receiving an offer of permanent employment. Although the Court reaches the just result, it fails to recognize that some employers may have a legitimate need to offer replacement workers permanent employment. The Court could deal better with this problem by instructing state courts to assume that a rebuttable presumption exists that the employer is liable for damages. The employer then would bear the burden of proving his need to hire permanent replacement workers.[135] State courts could award damages in proportion to the employer's ability to bear his burden of proof. The *Belknap* Court, however, assumes that employers are liable per se for offering replacement workers permanent employment.

One way to understand the *Belknap* Court's willingness to restrict *Mackay* is to recognize *Belknap* as evidence of the Court's intent to increase the rights of economic strikers who have lost their jobs permanently. Because *Mackay* did not address the rights of economic strikers, later judicial decisions attempted to resolve this issue. For example, the Court has held that employers must rehire economic strikers when vacancies exist at the end of a strike.[136] The NLRB and several circuit courts have adopted the *Laidlaw* doctrine, under which employers must reinstate economic strikers when replacement workers vacate their jobs.[137] Although the Supreme Court has not affirmed *Laidlaw, Belknap* illustrates the Court's desire to protect economic strikers.

The conditional employment contract that the *Belknap* Court advocates[138] undeniably protects economic strikers. Before *Belknap* at the conclusion of a strike an employer could choose to retain replacement workers or rehire economic strikers without fear of liability. An employer who makes a conditional employment contract with replacement workers after *Belknap* has little reason not to reinstate economic strikers because he will not be liable to the discharged replacement workers under the terms of the employment contract. A union probably would be successful in arguing that an employer's refusal to bargain with the strikers constitutes an unfair labor practice because no substantial and legitimate business justification exists for refusing to reinstate the

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135. *See* Note, *Reinstatement: Expanded Rights for Economic Strikers:* Laidlaw Corp. v. NLRB, 58 CALIF. L. REV. 511, 524 (1970).

136. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

137. *See supra* note 86 and accompanying text.

138. *See supra* text accompanying notes 109-10.

strikers.[139] The union could not make this argument unless the replacement workers had conditional contracts.

Although *Belknap* restricts the employer's bargaining position under *Mackay*, the Court's decision is statutorily sound. In labor preemption cases the Court has attempted to carry out the intent of Congress.[140] The NLRA specifically grants employees the right to strike[141] and classifies strikers as employees until they obtain "other regular and substantially equivalent employment."[142] Congress, however, did not choose to grant employers the right to hire permanent replacement workers. The Court developed this economic weapon with the *Mackay* doctrine.[143] When the *Belknap* Court had to choose between protecting the exercise of a federally granted economic right and restricting a judicial doctrine, the Court correctly upheld the intent of Congress.

C. *State Interpretations of "Permanent Employment"*

The Court's failure to define permanent employment in the context of labor contracts will result in inconsistent state interpretations of *Belknap*. The duration of a contract for permanent employment depends entirely on the meaning that the state court ascribes to the term.[144] For example, permanent employment may mean employment for a reasonable period, employment for life, employment for as long as the employee can perform the services, employment for as long as the employee's services are satisfactory, or employment for as long as employment is available.[145]

Some state courts continue to follow the common-law rule that a contract for permanent employment conveys no indication of duration and, therefore, is terminable at the will of either party.[146]

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139. Justice Blackmun expressed this concern in his concurrence. *See supra* note 117.

140. *See, e.g.*, Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 302, *reh'g denied*, 404 U.S. 874 (1971).

141. 29 U.S.C. § 163 (1976). *See supra* note 64 (text of provision).

142. 29 U.S.C. § 152(3) (1976). *See supra* note 73 (text of provision).

143. *See supra* note 66 and accompanying text.

144. *See* Bixby v. Wilson & Co., 196 F. Supp. 889, 902 (N.D. Iowa 1961).

145. *See id.* at 902.

146. *See, e.g.*, United Security Life Ins. Co. v. Gregory, 281 Ala. 264, 265-66, 201 So. 2d 853, 854-55 (1967); Roy Jorgensen Assoc., Inc., v. Deschenes, 409 So. 2d 1188, 1190 (Fla. Dist. Ct. App. 1982); Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 311 (Iowa 1971); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874-75 (Miss. 1981); Parker v. United Airlines, Inc., 32 Wash. App. 722, 724, 649 P.2d 181, 183 (1982); Shanholtz v. Monongahela Power Co., 270 S.E.2d 178, 182 (W. Va. 1980).

H.G. Wood formulated the common-law rule concerning terminable-at-will employment. According to Wood's Rule, "a general or indefinite hiring is *prima facie* a hiring at

One state court interpreting the meaning of terminable-at-will declared "the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract."[147] Many courts, however, now recognize exceptions to the terminable at will rule, and the rule gradually has fallen into disuse.[148] One reason that terminable-at-will employment contracts are less popular with the courts is that courts are reluctant to find that the parties intended to bind themselves indefinitely.[149]

Belknap will magnify the differences now existing among the various states' labor laws. The ability of an employer to hire permanent replacement workers and his strength during the bargain-

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will." H. WOOD, MASTER AND SERVANT § 134 (1877), *quoted in* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974). The *Restatement* also adopts this view:

> Promises by a principal to employ and by an agent to serve are interpreted as promises to employ and to serve at the agreed rate only so long as either party wishes, if no time is specified and no consideration for entering into the relation is given other than the promise in general terms to employ or to serve . . . .

RESTATEMENT (SECOND) OF AGENCY § 442 comment a (1958). Several states codified Wood's Rule. *See, e.g.*, CAL. LAB. CODE § 2922 (West 1971) ("An employment, having no specified term, may be terminated at the will of either party on notice to the other.").

Commentators have criticized terminable-at-will employment and have proposed several alternatives. *See, e.g.*, Comment, *Wrongful Termination of Employees at Will: The California Trend*, 78 NW. U.L. REV. 259, 280-85 (1983) (good faith covenant in permanent contracts); Note, *supra*, at 366-68 (dismissal for cause standard); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1836-44 (1980) (duty to terminate only in good faith). For a defense of Wood's Rule, see Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U.L.J. 881, 891-93 (1983) (Abolishing the rule presents employers with the prospect of litigation and the additional costs of discharging unwanted employees.).

147. Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874-75 (Miss. 1981).

148. C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS 115 (1983); *see, e.g.*, Weiner v. McGraw-Hill, Inc., 57 N.Y. 2d 458, 443 N.E. 2d 441, 457 N.Y.S. 2d 193 (1982) (at-will rule contains a rebuttable presumption that party can overcome); Smith v. Atlas Off-Shore Boat Serv., 653 F.2d 1057 (5th Cir. 1981) (seaman wrongfully discharged after exercising statutory right to file a personal injury action against employer); Peterman v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959) (statute or public policy considerations may limit employer's authority to terminate at-will employee). Professor Corbin feels that a terminable-at-will contract is not a contract. 1 A. CORBIN, CORBIN ON CONTRACTS § 96, at 418 (1963).

149. *See, e.g.*, Bixby v. Wilson & Co., 196 F. Supp. 889, (N.D. Iowa 1961). Courts focus on the intent of the parties and will not allow an employer to terminate a contract at will if it contains an express or implied condition to the contrary. Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169, 174 (1972). Contracts that violate public policy, C. BAKALY & J. GROSSMAN, *supra* note 148, at 116, or contain implied good faith convenants, *id.* at 131, also are not terminable at will. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discharge for refusing to commit a criminal act violated public policy); Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (court found an implied promise of employment from all the circumstances, including a good faith covenant).

ing process will become a function of the way in which a state court interprets the meaning of permanent employment. Thus, an employer in a state that continues to define contracts for permanent employment as terminable at will can circumvent state claims that *Belknap* allows discharged replacement workers. The employer can argue in state court that he merely terminated the contract at will. The replacement workers, then, cannot collect damages. The employer can afford to be flexible in settlement negotiations. He can retain the replacement workers or rehire the striking employees without fear of liability. Conversely, employers in states that do not have the terminable-at-will standard are in a much weaker bargaining position. These employers are liable for damages if a jury determines that a contract for permanent employment existed, and that the employer prematurely terminated the contract. An employer would be more reluctant to rehire the strikers if their discharged replacements could sue in state court. If the Court had defined permanent employment in the context of replacement worker contracts, it could have avoided the inconsistent state interpretations that are likely to result from *Belknap*.

V. CONCLUSION

Belknap highlights the need for federal legislation that defines the rights of permanent replacement workers and the appropriate scope of state authority under the NLRA. Congress has chosen not to act in these areas thus far,[150] yet the potential inconsistencies among states because of *Belknap* accelerate the need for congressional action. Although Congress has amended the NLRA only twice,[151] precedent does exist for a congressional response to a Supreme Court decision in the labor area.[152]

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150. *See* Note, *supra* note 32, at 238-39 (contending that Congress could solve preemption problems by clearly defining the limitations of state power in the field of labor relations).

151. Congress first amended the NLRA with the Taft-Hartley Act in 1947. The most significant portions of the Act characterized specific labor activities as unfair labor practices, reinstated the labor injunction, and provided for federal court jurisdiction over suits to enforce labor contracts. The Landrum-Griffin Act further amended the NLRA in 1959. Congress passed the Act primarily to solve the problems of corruption within union leadership and undemocratic conduct of internal union affairs. The Act required elaborate reporting by the unions and set forth a "bill of rights" for union members. The Act also imposed additional regulations on union activities by amending the unfair labor practice provisions of the NLRA. R. GORMAN, *supra*, note 13, at 5-6. *See* Note, *Union Trespass*, *supra* note 2, at 797.

152. *See* Note, *Labor Law—Invoking State Trespass Laws to Enjoin Peaceful Union Picketing*, 15 WAKE FOREST L. REV. 288, 305 (1979). In Guss v. Utah Labor Relations Bd., 353 U.S. 1, (1957), the Supreme Court determined that state courts did not have jurisdiction

Without congressional action, the only means of preventing inconsistent state treatment of permanent replacement workers is for the Court to reevaluate and clarify *Belknap*. First, the Court should adopt the *Sears* analysis as the foundation for a new preemption doctrine and eliminate the ineffective *Garmon* rule and the *Morton-Machinists* line of analysis. Second, the Court should provide the states with guidelines on the way to deal with an employer's need to offer replacement workers unconditional permanent employment. Last, the Court should define permanent employment in the context of hiring replacement workers. In this way, the Supreme Court will further Congress' intent in enacting the NLRA—to provide a uniform national labor policy.

STEPHANIE LEA STROMIRE

over labor disputes simply because the Board decided not to hear them. Congress responded by enacting § 164(c)(2), 29 U.S.C. § 164(c)(2) (1982), which gave state courts jurisdiction over labor disputes that the Board refused to hear.