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Institutional Signals and Implicit Bargains in the ULP Strike Doctrine: Empirical Evidence of Law as Equilibrium

by

MICHAEL H. LE ROY*

I. Introduction

Law is not simply a prediction that preexists the sequential, hierarchical, and purposive interaction of institutions. It is, instead, a product of that interaction—an equilibrium, that is, a balance of competing institutional pressures. It is a stable equilibrium when no implementing institution is able to interpose a new view without being overridden by another institution.¹

In a recent Harvard Law Review article, Professors William Eskridge and Philip P. Frickey offered a bold extension of legal process jurisprudence. Stripping away the pretense that “law is a closed system of objectively discoverable rules,”² they focused on the judiciary’s purposive political role as a coordinate branch of government:

[L]aw is an equilibrium, a state of balance among competing forces or institutions. Congress, the executive, and the courts engage in purposive behavior. Each branch seeks to promote its vision of the

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² Id. at 29.
public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs. To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of how other institutions would respond. We doubt that many readers will question our assumptions of institutional rationality and interdependence with respect to Congress, the President, and administrative agencies. To some lawyers, however, the notion that the Supreme Court engages in strategic behavior may be shocking.\(^3\)

Although an impressive vein of legal commentary cites this seminal article as though it states a definitive truth,\(^4\) Eskridge and Frickey were careful to characterize their work as incomplete.\(^5\) In particular, they conceded that their Article was a “thought experiment,” a tacit acknowledgment that it lacked the rigorous empiricism of their earlier scholarship.\(^6\)

This article joins two very different but complementary lines of scholarly inquiry. One examines the evolution of the declining right to strike in U.S. labor law.\(^7\) This literature broods over the Supreme

\(^3\) Id. at 28.


\(^5\) Eskridge & Frickey, *supra* note 1, at 95-96, stating: “No doubt even the reader who finds our self-styled ‘thought experiment’ useful also finds it incomplete .... [I]f we have raised more questions than we have answered, they strike us as important questions to be raised.”


Court’s role in creating the striker replacement doctrine, a policy that permits employers to blunt strikes by hiring permanent employees to replace striking workers.8

This scholarly literature is limited by its tendency to reach conclusions based on a textual reading of lead cases. Since this mode of analysis makes no use of empirical data to test conclusions, many of these articles offer only a plausible view that judicial and agency construction has constrained the right to strike. More fundamental, this method appears to miss the interactive effects of a judiciary with a long history of legislating labor policy and the National Labor Relations Board’s (“Board” or “NLRB”) tendency of limiting appellate court precedents that the Board finds repugnant to collective bargaining.

Eskridge and Frickey’s *Law as Equilibrium* provides the second line of inquiry—here, a view of dynamic lawmaking institutions, with judges and NLRB members whose values influence their decisions. And, at least on its face, *Law as Equilibrium* offers a powerful explanatory theory because it views judges and Board members as purposive actors whose decisions reflect precedents, but also project new policies. This framework, though appealing to intuition, needs

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8. See, e.g., Pollitt, *supra* note 7, at 306, stating that “the Mackay Radio doctrine is an increasingly effective tool with which employers can undermine employees’ efforts to organize themselves and to meaningfully bargain with their employer.”
empirical testing. My study examines one particular labor policy that is the unique creation of appellate court and agency interaction: the unfair labor practice (ULP) strike doctrine. This doctrine is critically important in labor disputes because it negates an employer's right to permanently replace strikers. Thus, when a strike is ruled to be a ULP strike, not only do replaced strikers enjoy a right of immediate reinstatement at the expense of their replacements, they also are entitled to backpay.

Congress played no role in creating this doctrine. This article provides textual evidence that federal courts and the NLRB engaged in the kind of institutional bargaining and signaling that Eskridge and Frickey hypothesized. But that is only part of the story related here.

My research identifies 467 NLRB rulings from 1938 to 1999 that a work stoppage was either a ULP or economic strike. Given the great change in ULP strike doctrine in this lengthy period, the percentage of work stoppages ruled by the Board to be ULP strikes should widely fluctuate. But my results show a paradox. This percentage has been remarkably stable, varying in a 10% range since the 1940s. Thus, using textual and statistical research methods, I find persuasive evidence of the Law as Equilibrium thesis.

A. The NLRA's Economic Weapons

The National Labor Relations Act (NLRA) is premised on the simple idea that an employer and labor union shall negotiate "wages, hours, and other terms and conditions of employment." The law does not require that these parties reach an agreement. Nevertheless, it encourages this outcome. The NLRA is also based

12. See Table 2, infra, at p. 71.
14. Id. (providing that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession").
15. See 29 U.S.C. §151 (1998) (providing that "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce... by encouraging the practice and procedure of collective bargaining... for the purpose of negotiating the terms and conditions of... employment").
on a realistic premise about what motivates recalcitrant parties to find common ground: avoidance of the other side’s use of lawful, and sometimes devastating, economic weapons.¹⁶

The strike is a union’s main economic weapon.¹⁷ The mere threat of a walkout hurts an employer’s business.¹⁸ Once a strike occurs, an employer often shuts down or curtails business operations.¹⁹ Strikes also have a lingering effect by causing once loyal customers to take their business to competitors.²⁰

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The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one’s terms—exist side by side.

¹⁷. The strike is protected by 29 U.S.C. §163 (1998), which provides that “[n]othing in this Act, 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.”

¹⁸. See *AMR Earnings Drop Slightly*, AVIATION WK. & SPACE TECH., Apr. 21, 1997, available in 1997 WL 8280630 (threatened strike by pilots caused many customers to rebook with competing carriers, thereby contributing to company’s $70 million strike costs); Peter Corbett, *Amwest Earnings to Exceed Forecasts Sickout by Rival’s Pilots Overcame Threat of Strike*, THE ARIZ. REPUBLIC, Apr. 1, 1999, at D1, available in 1999 WL 4162477 (America Air West Airlines lost ticket sales because its flight attendants threatened to walk out in a contract dispute); *Fedex Strike Would Have Major Impact on Mid-South*, THE COMM. AP., Nov. 21, 1998, at A11, available in 1998 WL 21180642 (mere threat of pilots strike perceived as a serious issue for competitors and for the entire Memphis economy because of the need for reliable service in the package delivery business); *Teamsters, Car Haulers Extend Talks Past Deadline; Threatened Strike Could Cut Into Sales*, CHI. TRIB., June 1, 1999, at 4, available in 1999 WL 2878952 (threat of car-transport strike has automakers worried about lost sales and lack of space to store newly made cars).


²⁰. See, e.g., *A Year After UPS Strike, Its Rivals Are Real Victors*, CHIC. TRIB., Aug. 2, 1998, at 1, available in 1998 WL 2881780. Reporting that one year after the Teamsters’ national strike against United Parcel Service, UPS business remained depressed. The strike resulted in a net reduction of 6 percent of UPS jobs. The article concluded that “the only people who’ve come out ahead seem to be UPS’ rivals, which seized on the shutdown of the dominant delivery company to snap up business and have managed to hold on to
Employers are not helpless, however, against this powerful weapon.\textsuperscript{21} \textit{NLRB v. Mackay Radio \\& Telegraph Co.}, a 1938 Supreme Court decision, permits employers to hire permanent striker replacements.\textsuperscript{22} Just as the strike causes prospective, present, and lingering injury, the striker replacement doctrine impairs the right to strike. An employer's threat to hire replacements is often enough to deter workers from striking.\textsuperscript{23} Once an employer hires permanent replacements, it is under no duty to reinstate strikers until they have offered to end their walkout unconditionally. Even then, the employer has no duty to reinstate a striker until a vacancy opens in her position.\textsuperscript{24} This employer response to strikes can be so effective that it harms a union for many years.\textsuperscript{25}
In theory, government is not permitted to alter the balance of economic weapons. Instead, the free play of market forces is to determine strike (and by extension, bargaining) outcomes. However, as the ULP strike doctrine shows, this theory is a fiction. When a union engages in a ULP strike, its members cannot be permanently replaced. Thus, strike costs to ULP strikers are much less than for permanently replaced strikers.

By interpreting the RLA as affording protection to striking employees only in the most unusual circumstances, the Court encourages employers to test the limits, knowing that the burden will fall on the employees to demonstrate that the employer's conduct has crossed an artificially high barrier of 'implied' tolerance for employer coercion. The Court thus needlessly creates incentives to undermine long-term labor stability and to expand labor conflicts beyond their natural bounds.

Id. at 456-57.

26. See Chamber of Commerce v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996), invalidating President Clinton's Executive Order that provided for debarment of federal contractors who hire permanent striker replacements: "[l]abor relations policy is different because of the NLRA and its broad field of pre-emption. No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be."

27. See also International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 146 (1976): "This weapon of self-help, permitted by federal law, formed an integral part of the [union's] effort to achieve its bargaining goals during negotiations with the [employer]. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community . . . . If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy."


29. In 1989, the United Mine Workers engaged in a bitter strike against Pittston Coal Corp. See Michael deCourcy Hinds, Bitter Strike May Be at End, But Ripples are Widely Felt, N.Y. TIMES, Dec. 23, 1989, at A27. Pittston hired replacements for approximately 1,700 striking members of the United Mine Workers, but due to an NLRB ruling that the strike was precipitated by the employer's unfair labor practices, the company eventually reinstated all but 13 strikers. Ratification of Pittston Contract Hailed by Union Leaders, Secretary Dole, DAILY LAB. REP. (BNA) No. 35, at A-7, A-10 (Feb. 21, 1990).

30. See United Steelworkers of Am. v. NLRB, 983 F.2d 240, 247 (D.C. Cir. 1993), summarizing this doctrinal difference: "Unfair labor practice strikers are entitled to
This Article provides the first empirical investigation of ULP strike trends from 1938 (when Mackay Radio was decided) to 1999. Thus, it adds to the recent research literature that critically assesses the striker replacement doctrine.\textsuperscript{31} More specifically, it provides an empirical assessment of a key aspect of the nation’s labor policies; that is, the relative degree to which strikers are either protected or unprotected by the ULP strike doctrine. This is important because unions\textsuperscript{32} and employers\textsuperscript{33} strenuously argued over this matter as immediate reinstatement to their former jobs upon their unconditional offer to return. Economic strikers have more limited rights; they are entitled to reinstatement upon their unconditional offer to return to their positions only when their former positions or comparable positions become available.”

\textsuperscript{31.} See, e.g., Charles B. Craver, \textit{The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy}, 34 ARIZ. L. REV. 397, 421 (1992) (“it is clear that the Mackay Radio decision severely undermined the statutorily protected right of employees to strike.”); Estreicher, \textit{supra} note 7, at 599 (1994) (“Whatever the causes of the decline in union density, under present conditions Mackay Radio threatens to unravel the statutory scheme.”); Getman & Marshall, \textit{supra} note 7, at 1877 (“The strike at Jay demonstrates that Mackay has helped to create a labor law system that permits the economic devastation of our best people.”); Kimmett, \textit{supra} note 7, at 814 (“The Reich court treated Mackay as if it were explicit statutory text and failed to acknowledge the limitations placed on it by Congress and the Supreme Court.”); Pollitt, \textit{supra} note 7, at 306 (“the Mackay Radio doctrine is an increasingly effective tool with which employers can undermine employees' efforts to organize themselves and to meaningfully bargain with their employer.”); Note, \textit{One Strike and You're Out? Creating An Efficient Permanent Replacement Doctrine}, 106 HARV. L. REV. 669, 674 (1993) (“Employers currently abuse the right of hiring permanent replacements in order to rid themselves of unions, thus destroying the benefits that unions provide.”).

\textsuperscript{32.} See \textit{Preventing Replacement of Economic Strikers: Hearing Before the Subcomm. on Labor of the Comm. on Labor and Human Resources, United States Senate, 101st Cong. 39} (1990). Senator Howard Metzenbaum (D. Ohio) and Thomas Donahue, Secretary-Treasurer of the AFL-CIO, had this exchange:

Senator Metzenbaum: How do you account for the fact that the Mackay decision, made about 50 years ago, that for about 40 years there were no problems, and employers went along and did not bring in permanent replacements? Then, starting about 10 years ago, we found this new movement to bring in permanent replacements . . . .

Mr. Donahue: I think there has been a sea change, Senator, in the whole climate of industrial relations in this country. I think the employers have been emboldened by President Reagan’s action in the PATCO strike—there simply is no question in my mind about that.

\textit{Id.}

\textsuperscript{33.} See \textit{Prohibiting Permanent Replacement of Striking Workers: Hearing on H.R. 5 Before the Subcommittee on Aviation of the House Committee on Public Works and Transportation}, 102d Cong. 209 (1991), testimony of Alliance to Keep America Working, explaining that “by forcing an employer to accept demands for higher wages . . . the bill would logically result in making American products too expensive to compete in Europe and Japan . . . or anywhere else in the world.”
Congress recently voted on legislation to alter the striker replacement doctrine.\textsuperscript{34}

B. Article Overview

Section II analyzes the origin of the ULP strike doctrine. In Section II(A), I show that the emerging striker replacement doctrine concerned leading appellate judges such as Learned Hand.\textsuperscript{35}

As the doctrine was informally developed by other circuit courts, these judges created a significant counter-balance when they stated the ULP striker doctrine in \textit{Remington Rand}. I discuss this development in Section II(B).\textsuperscript{36}

Section II(C) shows that by the time the Supreme Court decided \textit{Mackay Radio} in 1938,\textsuperscript{37} appeals courts were already conflicted over the rights of strikers and striker replacements.\textsuperscript{38} By ruling for the union on the merits of this case, but providing the striker replacement doctrine in important dictum, the Court attempted to accommodate conflicting views among lower courts.\textsuperscript{39}

By the 1950s, \textit{Mackay Radio}'s equilibrium in balancing the rights of strikers and striker replacements destabilized. By adopting the ULP doctrine in \textit{Mastro Plastics v. NLRB},\textsuperscript{40} the Court stated a clear and detailed rationale for protecting ULP strikers.\textsuperscript{41} Section II(D) also shows this decision corrected a growing imbalance of rights in favor of replacement workers resulting from pro-employer amendments to the NLRA in 1947.\textsuperscript{42}

In Section II(E), I apply Eskridge and Frickey's principles relating to institutional signals and bargains.\textsuperscript{43} In offering the striker replacement doctrine, the Court acted out a broader ideological strategy to lessen its isolation from the Congress and presidency concerning New Deal legislation.\textsuperscript{44} Thus, I conclude that the \textit{Mackay Radio} Court adroitly positioned itself to avert open conflict in the appellate courts on the treatment of strikers and replacements, while at the same time, advantageously ceding ground to a more potent

\textsuperscript{34} \textit{Infra} notes 321-325.
\textsuperscript{35} \textit{Infra} notes 71-81 and accompanying text.
\textsuperscript{36} \textit{Infra} notes 83-100 and accompanying text.
\textsuperscript{37} See \textit{NLRB v. Mackay Radio \\& Tel. Co.}, 304 U. S. 333 (1938).
\textsuperscript{38} \textit{Infra} note 107.
\textsuperscript{39} \textit{Infra} notes 108-115 and accompanying text.
\textsuperscript{40} 350 U.S. 270, 284 (1956).
\textsuperscript{41} \textit{Infra} notes 127-133 and accompanying text.
\textsuperscript{42} \textit{Infra} notes 125-126 and accompanying text.
\textsuperscript{43} \textit{Infra} notes 134-144 and accompanying text.
\textsuperscript{44} \textit{Infra} notes 140-144 and accompanying text.
Congress and President.

Section II(E) also explains how the Mastro Plastics Court counter-balanced Republican amendments to the NLRA that were immoderate even for a conservative president, Dwight Eisenhower. His surprise attempt to reach a middle-ground labor policy failed, but several years later, the Mastro Plastics Court provided the judiciary a doctrinal tool to fulfill Eisenhower's policy goal.

Section III(A) presents evidence of another emerging conflict among the appellate courts concerning the extension of the ULP strike doctrine. Mastro Plastics dealt with an infrequent situation, a strike in protest of an employer’s unlawful treatment of a union member. Appellate courts were divided about a more common situation, unlawful employer behavior during an economic strike. By extending the ULP strike doctrine to these situations, this policy reached its apogee in NLRB v. Erie Resistor.

By the 1970s and 1980s, the American labor movement was in decline. Section III(B) analyzes how the Court began to reflect this change. Section III(B)(1) examines the most important decision to curb the ULP strike doctrine, TWA v. Independent Federation of Flight Attendants. In Section III(B)(2), I explore a concurrent development in several appellate decisions that further narrowed the ULP strike doctrine. By minimizing an employer’s duty to provide financial information during contract negotiations, these precedents diminished grounds for a ULP strike ruling.

Section III(C) applies Eskridge and Frickey's concept of institutional signals and implicit bargains to the now-contracting ULP strike doctrine. This policy shift was part of the Court's broader retreat in the 1980s from securing collective bargaining rights. Belknap v. Hale and Pattern Makers League v. NLRB discussed in Section III(C)(1) and Section III(C)(2) signaled this retraction. I then discuss how a bloc of justices strategically moved the Court to reflect anti-union values emerging in the executive branch.

45. Infra notes 146-149 and accompanying text.
46. Infra notes 150-153 and accompanying text.
47. Infra note 160.
50. Infra notes 206-225.
52. 473 U.S. 95 (1985).
53. Infra notes 229-241 and accompanying text.
54. Infra notes 242-261 and accompanying text.
55. Infra notes 262-266.
Although this shift harmonized the Court with two Republican administrations, it opened a bitter dispute within the Court's ranks.\textsuperscript{56}

My empirical research is presented in Section IV. In Section IV(A),\textsuperscript{57} I explain why ULP strikes are an appropriate unit of analysis to test the \textit{Law as Equilibrium} thesis, and in Section IV(B) I discuss my research methods.\textsuperscript{58} Section IV(C), which is highlighted by Table 2, sets forth my research results and conclusions.\textsuperscript{59} My results show that NLRB rulings for ULP strikes varied within a narrow 10\% range for the 1940s through 1990s.

In Section V, I conclude that these results are remarkable evidence of decisional consistency. This is astonishing given the sea-change in strike activity over the past sixty years,\textsuperscript{60} and more central to \textit{Law as Equilibrium}, is an enduring example of the continuing policy balance that the Supreme Court and NLRB have struck through signals and implicit bargains since 1938.

\section*{II. Judicial Origins of the Unfair Labor Practice Doctrine}

\subsection*{A. Federal Judges Developed Striker Replacement Doctrines}

Federal courts play a key role in determining American labor law. Congress never legislated the ULP strike doctrine. It considered the doctrine only sporadically.\textsuperscript{61} This policy was stated in a 1938 Second Circuit decision, \textit{NLRB v. Remington Rand, Inc.}\textsuperscript{62}

The timing of this decision was uncanny. This was the same year that federal courts produced the seminal striker-replacement case, \textit{Mackay Radio}.\textsuperscript{63} Thus, with these two decisions, the judiciary regulated striker replacement issues more than Congress.\textsuperscript{64}

This development was not novel. American courts had been refereeing replacement-worker strikes for nearly fifty years.\textsuperscript{65} The

\begin{itemize}
\item \textsuperscript{56} Infra notes 267-279 and accompanying text. Also see Table 1 at p. 61.
\item \textsuperscript{57} Infra notes 284-299 and accompanying text.
\item \textsuperscript{58} Infra notes 300-303 and accompanying text.
\item \textsuperscript{59} Infra notes 304-305 and Table 2 at p. 52.
\item \textsuperscript{60} Infra notes 312-320 and accompanying text.
\item \textsuperscript{61} See infra indented text and bottom paragraph of supra note 321-323
\item \textsuperscript{62} 94 F.2d 862 (2d Cir. 1938), \textit{cert. denied}, 304 U.S. 576 (1938).
\item \textsuperscript{63} \textit{Remington Rand} was decided February 14, 1938 and \textit{Mackay Radio} was decided May 16, 1938.
\item \textsuperscript{64} See supra note 17. This void was created by an incredibly cryptic treatment of the right to strike.
\item \textsuperscript{65} In fact, there is good evidence that the American judiciary was steadily influenced by legal developments in England. By an accretion of common law decisions, state and federal courts in the U.S. transplanted the English prohibition against striker \textit{molestation}.
dominant tendency in these decisions, reflected in *Mackay Radio*, was conservative and aimed at criminalizing the means and ends of strikes.66

The timing of *Remington Rand* signified, therefore, the return of federal courts as labor policy makers. When earlier courts dominated this substantive law, they usually wielded injunctive power to end strikes and punish strikers.67 These courts were so one-sided that

or obstruction of replacement workers. *Springhead Spinning Co. v. Riley*, Law Reports, 6 Eq. 551 (1868) was especially influential. Two officers of the Cotton Spinners Union were charged with damaging their employer’s property simply by publishing this appeal to potential striker replacements in the *Manchester Guardian*: “Wanted, all well-wishers to the Operative Cotton Spinners’ Association not to trouble or cause any annoyance at the Springhead Spinning Company, Lees, by knocking at the door of their office, until the dispute between them and the self-acting minders is finally terminated.” The court viewed this as a polite form of intimidation resulting in economic injury when it concluded: “This Court will interfere to prevent any acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property.” As the sheer number of cases suggest, American courts played a prominent role in regulating labor disputes, reflecting the absence of any legislative scheme. State decisions include *State v. Stockford*, 58 A. 769 (Conn. 1904); *Jones v. E. Van Winkle Gin & Mach. Works*, 62 S.E. 236 (Ga. 1908); *A.R. Barnes & Co. v. Chicago Typographical Union*, 83 N.E. 940 (Ill. 1908); *O’Brien v. People of Illinois*, 75 N.E. 108 (Ill. 1905); *Franklin Union v. People*, 77 N.E. 176 (Ill. 1906); *Underhill v. Murphy*, 78 S.W. 482 (Ky. 1904); *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900); *Vegelahn v. Gunther*, 44 N.E. 1077 (Mass. 1896); *Enterprise Foundry Co. v. Iron Moulders Union*, 112 N.W. 685 (Mich. 1907); *Hamilton-Brown Shoe Co. v. Saxey*, 32 S.W. 1106 (Mo. 1895); *Branson v. Industrial Workers of the World*, 95 P. 354 (Nev. 1908); *Connett v. United Hatters of N. Am.*, 74 A. 188 (N.J. Ch. 1909); *Typothetae of City of New York v. Typographical Union No. 6*, 122 N.Y.S. 975 (N.Y. App. Div. 1910); *Jones v. Maher*, 116 N.Y.S. 180 (N.Y. Sup. Ct. 1909); *O’Neil v. Behanna*, 37 A. 843 (Pa. 1897); *Wick China Co. v. Brown*, 30 A. 261 (Pa. 1894); *Cote v. Murphy*, 28 A. 190 (Pa. 1894); *Murdock v. Walker*, 25 A. 492 (Pa. 1893); *Crump v. Commonwealth*, 6 S.E. 620 (Va. 1888). Federal courts, although somewhat less active, still played a key role. See *C’oeur D’Alene Consol. & Mining Co. v. Miners Union of Wardner*, 51 F. 260 (C.C.D. Idaho 1892); *Consolidated Steel & Wire Co. v. Murray*, 80 F. 811 (C.C.N.D. Ohio 1897); *American Steel & Wire Co. v. Wire Drawers’ & Die Makers Union*, 90 F. 608 (C.C.N.D. Ohio 1898).

66. An 1887 American treatise on criminal law showed the extent to which courts were regulating labor disputes:

> Workmen may combine lawfully for their own protection and common benefit; for the advancement of their own interests; for the development of skill in their trade or to prevent overcrowding therein, or to encourage those belonging to their trade to enter their guild; for the purpose of raising their wages ... The moment, however, that they proceed by threats, intimidation, violence, obstruction, or molestation, in order to secure their ends ... to encourage strikes or breaches of contract among others ... they render themselves liable to indictment.

WRIGHT, CRIMINAL CONSPIRACIES at 187, (Carson’s Appendix to American Ed. 1887).

scholars and Congress sharply rebuked them.

Remington Rand and Mackay Radio set forth the yin and yang of striker replacement policy. Remington Rand protected strikers, and by extension, their unions. Mackay Radio protected employers. Thus, in one sense, these courts served as Democratic and Republican proxies on a critical labor issue that Congress avoided when enacting the NLRA.

These decisions also presaged ideological cleavage that would occasionally divide federal judges for decades. Even today, the Remington Rand and Mackay Radio fault-line produces tremors.

In addition, Remington Rand highlights the role that influential federal judges have played in striker replacement cases. Certainly, this law reflects a vacuum left by Congress; however, it also reveals

(1898), regarding the role that courts played in late nineteenth century labor disputes:

The injunctions issued by the federal courts ... have been of especial importance in the controversies arising out of strikes and labor difficulties. The courts rest jurisdiction on various grounds, but mainly under three heads: First, on their right to protect receivers appointed by them in the possession and management of the property entrusted to them. Secondly, on their general right to protect suitors, entitled to come into their forum, from irreparable injury to property and multiplicity of suits. Thirdly, under federal statutes protecting some function confided to national control, as the United States mail or interstate commerce, and often providing especially for injunction as a means of enforcing the law.

68. See FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 13-24 (1930). For example, Frankfurter and Greene claimed: "The eagerness of employers to be heard by a federal court is clearly revealed by the devices to which they resort in order to present an alignment of parties that meets the requisite diversity of citizenship .... The courts are indifferent to this collusion for obtaining the benefit of the law as applied by the federal courts." Id. at 13-15.

69. In 1932, three years before providing workers the right to strike in the NLRA, Congress took a different tack in protecting strikes from employer-friendly courts. By enacting the Norris-LaGuardia Act, Congress exercised its constitutional authority to divest federal courts of jurisdiction to issue injunctions in most labor disputes. Norris LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1994)). Rep. Fiorello LaGuardia, the bill's author, put forth this justification:

Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges. If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now. If the courts had not emasculated and purposely misconstrued the Clayton Act, we would not today be discussing an anti-injunction bill.


70. See infra notes 267-279 and accompanying text.
judicial ego and ambition.\textsuperscript{71}

Remington Rand was decided by an all-star line-up of judges. Due partly to its repeated litigation,\textsuperscript{72} this case was decided by two Judge Hands—Learned, and his cousin, Augustus.\textsuperscript{73}

While Augustus was notable in his own right,\textsuperscript{74} his reputation was eclipsed by Learned, who is still regarded as the most influential jurist never to sit on the U.S. Supreme Court.\textsuperscript{75} Having recently authored other seminal labor law decisions,\textsuperscript{76} Learned was the first judge to apply principles of tort causation to an employer's role in provoking a strike.\textsuperscript{77} Judge Jerome Frank, who advanced the ULP strike doctrine in Remington Rand's second round before the Second Circuit,\textsuperscript{78} was a


\textsuperscript{72} See NLRB v. Remington Rand, Inc., 94 F.2d 862, 871 (2d Cir. 1938) (Hand, J.), cert. denied, 304 U.S. 576 (1938). Later, as a result of the NLRB's petition to the Second Circuit to modify a Special Master's interim report concerning implementation of the court's 1938 enforcement order, the Second Circuit revisited the case in NLRB v. Remington Rand, Inc., 130 F.2d 919 (2d Cir. 1942) (authored by Judge Jerome Frank and joined by Judge Augustus Hand).

\textsuperscript{73} Both judges sat simultaneously on the Second Circuit's U.S. Court of Appeals.

\textsuperscript{74} See, e.g., Charles Wyzanski, On Augustus Hand, 61 HARV. L. REV. 573 (1948).

\textsuperscript{75} This view is so widely held that it scarcely needs substantiation. See generally GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994). Harvard Law School recognized Learned Hand's status as the premier legal authority of his time when he was asked to deliver the Oliver Wendell Holmes, Jr. Lectures in 1958 (published in LEARNED HAND, THE BILL OF RIGHTS 653 (1958)).

\textsuperscript{76} See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942), providing that "[w]hen all the other workmen in a shop make common cause with a fellow worker over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome." This labor law theory continues to prompt important commentary. See, e.g., Marion Crain, Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech, 82 GEO. L. J. 1903,2001 n.223 (1994). See also NLRB v. Federbush Co. Inc., 121 F.2d 954, 957 (2d Cir. 1941), where Judge Hand poignantly wrote: "Words are not pebbles in alien juxtaposition; they have only a communal existence... [and] the relation between the speaker and the hearer is perhaps the most important [factor in determining meaning]."

\textsuperscript{77} He concluded that the employer's "refusal [to bargain] was at least one cause of the strike, and was a tort... it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune." NLRB v. Remington Rand, Inc., 94 F.2d 862, 872 (2d. Cir. 1938). A decade later, Judge Learned Hand, in an opinion joined by Judge Jerome Frank, set forth the influential legal formula for negligence in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (defining negligence as a failure to take precautions that are less expensive than the cost of an accident multiplied by its probability).

\textsuperscript{78} In fact, Judge Frank was the first judge to use the term "unfair labor practice strike," in NLRB v. Remington Rand, Inc., 130 F.2d 919, 928 n.8 (2d Cir. 1942).
widely influential scholar79 and judge.80 Judge Charles Clark, also an influential judge,81 joined in Frank's decision.

Identifying these judges is important because the Court and commentators have focused exclusively on Learned Hand, thereby obscuring the judiciary's more systematic role in forming the ULP doctrine.82

B. The ULP Striker Replacement Doctrine Originated in Remington Rand

The Remington Rand Corp. was a high-tech firm with worldwide operations.83 By 1934, its employees at six manufacturing plants in New York, Connecticut, and Ohio were organized into various labor

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79. See JEROME FRANK, LAW AND THE MODERN MIND (1930) (contending that a judge's social and psychological biases lay behind decisions); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

80. For example, he played a great role in helping to refine federal rules for summary judgment. See Patricia M. Wald, Summary Judgment at Sixty, 76 Tex. L. Rev. 1897 (1998).

81. See Kenneth L. Port, Learned Hand's Trademark Jurisprudence: Legal Positivism and the Myth of the Prophet, 27 Pac. L.J. 221, 257-58 (1996)(assessing Judge Clark's impact on trademark law); Wald, supra, note 48 at 1898 (discussing the intellectual battle between Judge Clark and Judge Frank).

82. Justice William Brennan inadvertently contributed to this by appearing to single out Learned Hand's role in leading the charge against the Mackay Radio doctrine. See Belknap v. Hale, 463 U.S. 491 (1983):

I share the Court's concern over the plight of workers hired to replace striking employees. Contrary to the Court's suggestion, however, strikes are, to some extent, 'war' . . . . As Judge Learned Hand stated more than forty years ago in a case involving the reinstatement of strikers:

It is of course true that the consequences are harsh to those who have taken the strikers' places; strikes are always harsh; it might have been better to forbid them in quarrels over union recognition. But with that we have nothing to do; as between those who have used a lawful weapon and those whose protection will limit its use, the second must yield; and indeed, it is probably true today that most men taking jobs so made vacant, realize from the outset how tenuous is their hold (citation omitted).

Scholars have picked up on and perpetuated this attribution. See Estreicher, supra note 7, at 906; Daniel J. Gifford, Redefining the Antitrust Labor Exemption, 72 Minn. L. Rev. 1379, 1384 (1988); Michael H. LeRoy, Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA, 28 U.C. Davis L. Rev. 1019, 1086 n.103 (1996); and Note, One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine, 106 Harv. L. Rev. 669, 686 n.35 (1993).

83. See NLRB v. Remington Rand, Inc., 94 F.2d 862, 865 (2d Cir. 1938) (explaining that the company manufactured typewriters and general office equipment at 'plants scattered all over the world').
unions that combined into a district council. Late in 1935, news articles reported that the company was secretly building a plant in Elmira, New York to produce a new machine, dubbed the "Madame X." Concerned that these rumors were true and meant that the company planned to take work from existing plants, union officers requested meetings with the company president but were rebuffed. This led to a strike vote on May 10 at all plants. When the company conducted its own poll of workers on May 21, union officials interfered by dissuading co-workers from voting or by leading a work stoppage. The Company discharged these officers without reason. Within a week the union went on strike.

According to the Second Circuit, "[t]he strike was vigorously contested on both sides, the respondent engaged the services of well-known strike-breaking agencies, between whom and the strikers the usual collisions took place with mutual recrimination." By late 1935, the strike failed and was ended. The company abandoned one plant and reduced work at two others while it opened the Elmira plant.

To appreciate the controversy that surrounded the Second Circuit’s decision, it is important to note that the Board ordered the company to reinstate all the replaced strikers. Since this decision involved several thousand replaced workers, and occurred two years after the strike failed, the court was in a position to order sweeping personnel changes and impose a huge backpay judgment. The company vehemently objected to these possibilities, arguing "against the hardship imposed upon [the replacement workers] by this provision." It concluded that "to turn them out and put in the old men after the strike had been lost is actively to intervene in an industrial dispute."

In rejecting the company’s argument, and ordering permanently
replaced strikers to their jobs, the Second Circuit stated a principle that sharply conflicted with the Court’s *Mackay* decision, rendered a few months later:

It is of course true that the consequences are harsh to those who have taken the strikers’ places; strikes are always harsh; it might have been better to forbid them in quarrels over union recognition. But with that we have nothing to do; as between those who have used a lawful weapon and those whose protection will limit its use, the second man must yield; and indeed, it is probably true today that most men taking jobs so made vacant, realize from the outset how tenuous is their hold.\(^9\)

In justifying its view that these strikers could not be permanently replaced, the court examined the cause of the strike:

We have assumed . . . that the strike here in question was only for the purpose of enforcing the union’s power to negotiate for all the men. That is not true; there had been a wage dispute, and, the men’s inability to get at the truth of the Elmira business was another cause.

Judge Learned Hand’s decision continued with a tort analysis:

It is of course possible that the parties might have split over wages, or over the Elmira plant, even if the respondent had negotiated with the Joint Board. But since the refusal was at least one cause of the strike, and was a tort . . . it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune.\(^8\)

It is important to note that Judge Hand did not foreclose the possibility that an employer could lawfully hire permanent striker replacements.\(^9\) In his view, however, the law was to provide a presumption against permanent replacement, unless the employer could prove business necessity.\(^10\)

\(^9\) *Id.* at 872.

\(^8\) *Id.*

\(^9\) See *id.*, stating:

Since [the company] cannot show that the negotiations, if undertaken, would have broken down, it cannot say that the loss of the [striker’s] jobs was due to a controversy which the act does not affect to regulate. There may be cases where an employer can show this; if he can, it would indeed load the scales in an industrial dispute to give back their jobs to the strikers; but the respondent did not try to show that further negotiation would have been fruitless.

\(^10\) See *id.*, stating:

Nevertheless, it seems to us certain that some at least of the old employees would have been taken over; seasoned men are better than green hands, and we are not to impute to the respondent the unlawful purpose of discriminating against union men. The respondent could indeed have shown that there were good reasons—
C. Mackay Radio Balanced the ULP Strike Doctrine

Scholarly commentary on Mackay Radio's role in shaping striker replacement policy errs in two respects.

First, there is a mistaken idea that Mackay Radio is the original source of striker replacement doctrine, and that the ULP striker replacement doctrine evolved as a response to Mackay Radio's treatment of economic strikers.\textsuperscript{101} Recent Supreme Court decisions may have contributed to this mistaken impression.\textsuperscript{102} While it is true that the Supreme Court did not approve the ULP strike doctrine until 1956, when it decided \textit{Mastro Plastics Corp. v. NLRB},\textsuperscript{103} the current understanding overlooks the circuit courts' early and serious divisions in fashioning this policy.

Second, the current view makes too much of the fact that the Mackay Radio doctrine was given in the form of dictum.\textsuperscript{104} Commentators make the point that the Court was legislating in a statutory vacuum.\textsuperscript{105} This is true but overlooks the Court's mediating role in harmonizing the appellate courts' sharply conflicting views concerning striker replacements.\textsuperscript{106} Closer examination shows that

aside from the effort to rid itself of the union—for not taking some of its workmen to Elmira; but those reasons lay exclusively within its own knowledge. That being true, it is surely reasonable to raise a presumption against it, even though the burden remained upon the Board.

101. See, e.g., Kimmett, \textit{supra} note 7, at 825 ("In \textit{Mastro Plastics Corp. v. NLRB}, the Court created a distinction between unfair labor practice strikes... and economic strikes... "). \textit{See also} Pollitt, \textit{supra} note 7, at 300.

102. See \textit{NLRB v. International Van Lines}, 409 U.S. 48, 51-52 (1972), stating, or at least strongly implying, that the ULP strike doctrine originated in the Court's 1956 \textit{Mastro Plastics} decision:

The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between [the] economic-striker-reinstatement rule (Mackay Radio & Telegraph) and the unfair-labor-practice-striker-reinstatement rule (Mastro Plastics) in cases like this one (citations omitted).


104. The most thoughtful treatment of this commentary appears in Estreicher, \textit{supra} note 7, at 583-85, labeling this as the "Aberrational Dictum" Thesis. For more recent examples of this thesis, see Kimmett, \textit{supra} note 7, at 813-16, and William Feldesman, \textit{Dictum Carried to Extremes: Mackay Radio Revisited}, 12 LAB. LAW. 197, 203-04 (1996).

105. \textit{See} Matthew W. Finkin, \textit{Labor Policy and the Enervation of the Economic Strike}, 1990 U. ILL. L. REV. 547, 548 (1990) ("In its 1938 opinion in \textit{Mackay Radio}... the United States Supreme Court, in dictum, defined the statutory right to engage in an economic strike as a privilege of the employee to be replaced permanently for having exercised it. The dictum fast became a rule.").

106. This commentary focuses on the fact that Mackay Radio stated striker replacement doctrine in dictum. The clear implication, therefore, is that the Court was reaching to
the Mackay Radio Court steered a middle ground between the Second Circuit's pro-union presumption, prohibiting employers from hiring permanent striker replacements, and the Ninth Circuit's opposing view.107

In NLRB v. Mackay Radio & Telegraph Co.,108 employees struck to support their union's bargaining proposals. Their strike lasted only a few days and ended when they recognized that their cause was lost.109 The employer broke the strike by quickly hiring striker replacements. This changed the issue in negotiations from economic terms to reinstatement of strikers.110 The company agreed to reinstate everyone except poorly performing employees and strike organizers, who, notwithstanding their union activities, "were concededly very efficient in the performance of their duties."111

The Board, finding that the company unlawfully discriminated against the union officers, ordered the company to reinstate them.112 This order treated the replacements as temporary hires. In reversing this order,113 the Ninth Circuit expounded a theory on striker replacements that Remington Rand implicitly rejected a year later.

The Mackay court accepted the company's assertion that it denied reinstatement to the union officers because it "had guaranteed to these new employees the privilege of remaining in its employ if and when the strike was settled, provided they desired so to do."114 Thus, the Ninth Circuit suggested that as long as an employer decided to hire permanent striker replacements, there could be no inference of unlawful discrimination. Explaining this view, the court said:

Can the Board, under the act, require the respondent to breach its contract with these employees who have assisted it in defeating the strike and also compel it to employ individuals who have struck and thus abandoned their work, notwithstanding the choice of the company in preferring the former over the latter? This question, so stated, answers itself. Such a disregard of the right of individuals to enter into and observe contracts that they have made, protected as it is by fundamental constitutional guarantees, cannot be thus interfered with.115

decide an issue that had not been placed before it.

107. See NLRB v. Mackay Radio & Telegraph Co., 87 F.2d 611, 628 (9th Cir. 1937).
108. See id. at 627.
109. See id.
110. See id.
111. See id.
112. See id. at 628.
113. Id. at 631.
114. Id. at 628.
115. Id.
By May 16, 1938, when the Supreme Court decided *NLRB v. Mackay Radio*, the Ninth and Second Circuit courts had taken polar positions on the matter of striker replacements. Finding a middle ground, the Court split these differences. It reversed the Ninth Circuit when it determined that the Board's findings of anti-union discrimination were supported by evidence. This ruling rejected the Ninth Circuit's extreme view that the NLRB had no constitutional authority to interfere with an employer's contract of permanent employment with striker replacements.

On the other hand, the Court implicitly distinguished this case from *Remington Rand* when it noted that "the record fails to disclose what caused these negotiations to fail or to show that the respondent was in any wise in fault in failing to comply with the union's demands; and, therefore, for all that appears, the strike was not called by reason of fault of the respondent." In its oft-cited passage, the Court made the following pronouncement concerning economic strikes:

Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And 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.

D. *Mastro Plastics* Advanced the ULP Strike Doctrine

In *Mastro Plastics Corp. v. NLRB*, the Supreme Court approved the ULP strike doctrine by holding that strikers who protest their employer's unfair labor practice cannot be permanently replaced. The employer, fearing that workers would switch their

116. 304 U. S. 333.
117. See id. at 351.
118. Id. at 344.
119. Id. at 345-46.
120. 350 U. S. 270 (1956).
union membership to a rival union that the company thought was under Communist influence, tried to force its employees to join another union.121

When the local president, also an employee, continued to support the objectionable union, the company fired him.122 Seventy-six workers spontaneously walked off the job to protest this action on November 10, 1950, and no production occurred for a month.123 The company began to hire permanent replacements.124

Mastro Plastics involved an issue of statutory interpretation that arose in 1947, well after Remington Rand was decided. Section 8(d) of the NLRA was amended to require a sixty-day notice period before striking. The company contended that a spontaneous strike, without notice, was unprotected, and therefore strikers could be fired.125 By this view, section 8(d) applied "not only to strikes for economic benefits but to any and all strikes occurring during the waiting period, including strikes solely against unfair labor practices of the employer."126

In rejecting this contention, however, the Court expressly adopted the ULP strike doctrine. Moreover, the majority implicitly endorsed Judge Learned Hand’s tort-analysis when it held the company responsible for causing the strike: "In the absence of some contractual or statutory provision to the contrary, petitioners' unfair labor practices provide adequate ground for the orderly strike that occurred here."127

Mastro Plastics was anything but a neutral sounding decision. In several passages the Court based its reasoning on a sympathetic identification with the replaced strikers.128 Moreover, the Court

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121. See id. at 272.
122. See id. at 273.
123. See id. at 274.
124. See id. This is evidenced by the fact that strikers offered to return to work on March 9, 1951 but were not reinstated as of the Supreme Court's decision on June 11, 1956.
125. See id. at 277.
126. Id.
127. Id. at 278. The Court stated: "Under those circumstances, the striking employees do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made." Id. The Court also noted that "[f]ailure of the Board to enjoin petitioners' illegal conduct or failure of the Board to sustain the right to strike against that conduct would seriously undermine the primary objectives of the Labor Act." Id.
128. Consider the Court's strong and seemingly partisan assessment: Apart from the issues raised by petitioners' affirmative defenses, the proceedings reflect a flagrant example of interference by the employers with the expressly
appeared to identify unions' institutional interest in conducting a strike when it stated that the company's interpretation of section 8(d)'s notice requirement:

would deprive them of their most effective weapon at a time when their need for it is obvious.... This would relegate the employees to filing charges under a procedure too slow to be effective. The result would unduly favor the employers and handicap the employees during negotiation periods contrary to the purpose of the Act. There also is inherent inequity in any interpretation that penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer.\textsuperscript{129}

In an especially revealing passage, the Court also appeared to close a key ambiguity left open by the 1947 amendments that imposed procedural limitations on strikes. The Senate Minority Report, reflecting union interests, worried that the sixty-day notice requirement of section 8(d) was "silent as to the Board's authority to accommodate conflicting issues such as provocation on the part of the employer."\textsuperscript{130} Alarmed Democrats wondered whether "an employer desirous of ridding himself either of the employees or their representative can engage in the most provocative conduct without fear of redress except by a lengthy hearing before the Board and a subsequent admonition to 'cease-and-desist.'"\textsuperscript{131} As if anticipating the facts in \textit{Mastro Plastics}, the Report continued:

\textit{[E]mployees unwilling to idly countenance abuse, who resort to self-help under the circumstances, are removed from the protection of the statute and lose "employee" status. An employer is at liberty under such circumstances freely to replace any employee bold enough to insist upon justice.}\textsuperscript{132}

Answering this concern, the Court appeared to bring closure to incomplete congressional negotiations:

The record shows that the supporters of the bill were aware of the protected right of their employees to select their own bargaining representative. The findings disclose vigorous efforts by the employers to influence and even to coerce their employees to abandon the Carpenters as their bargaining representatives and to substitute Local 318.

\textit{Id.}

\textsuperscript{129} \textit{Id.} at 286-87.


established practice which distinguished between the effect on employees of engaging in economic strikes and that of engaging in unfair practice strikes. If Congress had wanted to modify that practice, it could readily have done so by specific provision.135

E. ULP Strike Doctrine Was Formed by Institutional Signals and Implicit Bargains

The foregoing analysis shows that the judicial development of the ULP strike doctrine was more conflicted than the striker replacement literature represents. This policy formed as part of a broader evolution of American labor law that was striving toward equilibrium. This balancing process was driven by competing views within the judiciary, and similar ideological impulses stirring in Congress and the executive branch.

*Mackay Radio* exemplifies *Law as Equilibrium*’s theory of institutional signaling and bargaining. The Court’s pronouncement of striker replacement doctrine in dictum is consistent with signaling theory:

Lawmaking institutions routinely send “signals” to one another—expressions of preference that have no traditionally understood legal “authority.” Nonetheless, a signal may have legal consequences, and these consequences may have been precisely the reason for the signal. For example, “dictum” in a Supreme Court opinion is not law in a formal sense and has no binding stare decisis value. Yet what the Court says in its opinions, whether it is essential to the holding or not, is often treated as “law” by other legal actors, especially lower courts.134

Although commentators treat *Mackay Radio*’s dictum as though it is stray and unintentional,135 this view overlooks the Court’s constitutional crisis in 1938. Thirteen months before deciding *Mackay Radio*, the Court upheld the constitutionality of the NLRA in

133. *Mastro Plastics*, 350 U.S. at 270. Adding support to this conclusion, the Court noted:

Senator Ball proposed an amendment, to the definition of “employee” in § 2(3) of the Act, which unintentionally might have abrogated the distinction which favored the employees’ right to engage in unfair practice strikes as against economic strikes, but at once withdrew the amendment as going “too far,” when this possible effect of it was brought to his attention.

*Id.* at 289 n.24 (citing 93 Cong. Rec. 1827-28).


135. This passage from Kimmet, *supra* note 7, at 815-16, is typical: “The NLRA... does not explicitly address an employer’s use of permanent replacements; instead, the right to replace workers permanently is derived from dicta contained in the *Mackay* decision of 1938.”
NLRB v. Jones & Laughlin Steel Corp.\textsuperscript{136} That decision was pivotal in the "switch in time that saved nine"—that is, the Court's dramatic change in course to rule New Deal legislation constitutional.\textsuperscript{137} Exploring the Court's paradigm-shift, Prof. Michael Ariens' historical evidence supports Eskridge and Frickey's theory of institutional signaling.

The main pivot in this switch was Justice Owen Roberts, who, according to Ariens' research into Justice Felix Frankfurter's personal letters, behaved more as a politician than a justice during 1937:

And now, with the shift by Roberts, even a blind man ought to see that the Court is in politics, and understand how the Constitution is "judicially" construed. It is a deep object lesson—a lurid demonstration—of the relation of men to the "meaning" of the Constitution.\textsuperscript{138}

As for the Jones & Laughlin Court itself, Frankfurter wrote the day after its publication: "To me it is all painful beyond words, the poignant grief of one whose life has been dedicated to faith in the disinterestedness of a tribunal and its freedom from responsiveness to the most obvious immediacies of politics."\textsuperscript{139}

Seen in this historical light, Mackay Radio reflected the Supreme Court's attempt to forge a compromise within its splitting ranks.\textsuperscript{140} By upholding the NLRB's theory of anti-union discrimination, the Court resigned itself to that agency's ascendancy as the paramount arbiter of labor disputes. Clearly, this vindicated lower courts that held a similar view of the NLRB's powers.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{136} 301 U.S. 1 (1937).
\item \textsuperscript{137} See Michael Ariens, \textit{A Thrice-Told Tale, or Felix the Cat}, 107 HARV. L. REV. 620, 623 n.11 (1994) (detailing a variety of possible origins for this amusing epigram).
\item \textsuperscript{138} Id. at 629 (citing a letter from Felix Frankfurter to Franklin D. Roosevelt (Mar. 30, 1937) in FRANKLIN D. ROOSEVELT, ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-45, at 392) (Max Freedman, ed., 1967)).
\item \textsuperscript{139} MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 272 (1982) (quoting letter from Felix Frankfurter to Charles Wyzanski, April 13, 1937).
\item \textsuperscript{140} Given the 5-4 split in Jones & Laughlin, it seems remarkable that the Mackay Radio decision was unanimous. (Justices Cardozo and Reed did not participate in the decision, however.)
\item \textsuperscript{141} See, e.g., Jeffery-DeWitt Insulator Co. v. NLRB, 91 F.2d 134 (4th Cir. 1937) (cited in Mackay Radio, 304 U.S. at 336 n.3). The sharp divide in the federal judiciary over appropriate strike policies was evident in this split decision. In dissent, Judge Northcott subjectively mixed his notions of fairness with his statement of what the law should be:
\begin{quote}
It cannot be the law that strikes will be regarded as settled only when the strikers admit that they are settled or that no action by an employer will terminate a strike no matter how definite or positive such action may have been. Such a holding is unfair to the employer and cannot, in my opinion, be justified.
\end{quote}
\end{itemize}
At the same time, however, Mackay Radio’s striker replacement dictum must have played well to conservative justices who clearly understood that they were on the losing side of constitutional history, and also to judges who were philosophically opposed to the NLRB’s regulation of strikes.\textsuperscript{142} \textsuperscript{144}

In sum, Mackay Radio’s dictum served a strategic purpose, delineated in Eskridge and Frickey’s theory:

\begin{quote}
[Consistent with those signals can be a way that interdependent institutions create implicit bargains. Institutions have differing priorities as well as preferences about public law issues. Their differing preferences create risks of conflict, but their differing priorities offer ways to minimize or to avoid conflict. By a series of signals and actions, the coordinate institutions can indicate their priorities and their willingness to reach deals whereby each institution defers to the most important preferences of the others.\textsuperscript{143}]
\end{quote}

Thus, the striker replacement doctrine resulted in the kind of lawmaking efficiency that \textit{Law as Equilibrium} theorizes: “This kind of signalling among lawmaking institutions has the systemic advantage of resolving most institutional disputes without open, mutually destructive conflict.”\textsuperscript{144}

Just as Mackay Radio served to bargain and signal within the judiciary, Mastro Plastics extended those functions to both coordinate branches. Read in isolation,\textsuperscript{145} that decision fails to disclose the likely

\textit{Id.} at 140 (Northcott, J., dissenting).

142. This view emerged in the Ninth Circuit’s adjudication of Mackay Radio. Judge Wilbur did little to disguise his contempt for the NLRB’s role in these disputes:

\begin{quote}
The Board has predicated its conclusion upon the inference arising from the refusal of the respondent to re-employ these individuals solely from the fact that they were union employees who had been engaged actively in an unsuccessful strike and who desired and were refused re-employment. The difficulty does not end here, because the order of the Board in effect requires the discharge of these men with whom respondent has entered into a binding contract and to whom it has pledged its faith that the settlement of the strike would not interfere with their right to continue in the employment of the company at San Francisco. Can the Board, under the act, require the respondent to breach its contract with these employees who have assisted it in defeating the strike and also compel it to employ individuals who have struck and thus abandoned their work, notwithstanding the choice of the company in preferring the former over the latter? This question, so stated, answers itself. Such a disregard of the right of individuals to enter into and observe contracts that they have made, protected as it is by fundamental constitutional guarantees, cannot be thus interfered with.
\end{quote}

\textit{Mackay Radio}, 87 F.2d at 628 (citations omitted).

143. Eskridge & Frickey, \textit{supra} note 1, at 40-41.

144. \textit{Id.} at 40.

145. A typical example occurs in Rodney B. Sorensen, \textit{Crossing the Picket Line in...
stimulus for the Supreme Court's sympathetic treatment of replaced strikers. The Court seemed alarmed by Congress' extreme labor policy reforms in the Taft-Hartley Act.

By way of background, Mackay Radio's striker replacement doctrine was in an unsettled state in the 1940s and 1950s, not because some courts rejected it (none did), but because Congress reasserted its labor policy making. The 80th Congress' enactment of far-reaching labor law reforms in the 1947 Taft-Hartley Act appeared to stunt the labor movement, and yet, a decade later the law's impact was judged by many to be more muted than expected.

This period, bounded by 1947 and 1959, when Congress again amended the NLRA, was a time of unusual flux in American labor policy. Two developments energized the Congress and presidency in this period. From 1951-1953, organized labor turned away from its goal of repealing the colossal Taft-Hartley Act by focusing on targeted reforms. This produced more serious congressional effort to temper Taft-Hartley's harshest provisions.

At the same time, President Eisenhower was uncharacteristically sensitive to labor's concerns, to the point of appointing a unionist, Martin Durkin, as his Secretary of Labor. Eisenhower's tilt forced Republican Senator Taft to move a comprehensive package of


146. See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS at 665 (1950) (stating that "[t]he emphasis upon protecting the interests of those who prefer individual bargaining, as against the desires of those who see concerted activity as the means to effective protection of the rights of individuals, threw the weight of the law at critical points against collective bargaining").


After ten years of experience with the Taft-Hartley Act, this controversial piece of legislation can be viewed with considerably less emotion than in the summer of 1947. Small wonder, therefore, that organized labor rarely refers to the Act as a "Slave Labor Law," whatever labor's objections to the Act may otherwise be. While management representatives are still favorably inclined to the general spirit of the statute, they have nevertheless found more than one fault with it. Even the so-called "impartial observers" have discovered quite a few instances where the predictions about the impact of the law have proven inaccurate.

148. See infra note 157.

149. See Benjamin Aaron, Amending the Taft-Hartley: A Decade of Frustration, 11 INDUS. & LABOR REL. REV. 327, 331 (1958) (observing that by 1953, labor's "tactics shifted from insistence upon outright repeal to emphasis upon specific, limited amendments").

150. See id. at 334.
reforms aimed at softening the most severe elements of his 1947 legislation.\textsuperscript{151}

By 1953, policy makers who represented labor and management interests were therefore moving toward an uncommon compromise. Their efforts were undermined, however, by Sen. Taft’s stunning death in late July.\textsuperscript{152} Days later, when shocked employers learned about the conciliatory scope of his secretly negotiated proposals, these reforms stalled.\textsuperscript{153}

This history is relevant to the ULP strike doctrine because among Taft-Hartley’s draconian amendments, one provided that a permanently replaced economic striker was ineligible to vote in an election to decertify a union.\textsuperscript{154} Throughout the late 1940s,\textsuperscript{155} and

\textsuperscript{151} See id.
\textsuperscript{152} See id.
\textsuperscript{153} See id. Aaron’s detailed assessment provides this illuminating perspective:

Apparently, Durkin almost won the first round. A preliminary draft of the Labor Department’s amendments, embodying many of Taft’s proposals, was on the President’s desk and reportedly on the point of being sent to Congress when news of the Senator’s death reached Washington on July 30. The presidential message was never sent, but on August 3 the contents were published in the Wall Street Journal. The disclosure shocked conservative business leaders and the right wing of the Republican party. The President had been on the verge of submitting a nineteen-point proposal, embodying a number of important amendments favorable to labor.

\textit{Id.}

\textsuperscript{154} When the Senate amended H.R. 3020, it included within the newly defined procedures for decertifying a union a broad disqualification of strikers in such elections: Only unfair labor practice strikers were made eligible to vote. See S. 1126, 80th Cong., § 9(c)(3) (1947), \textit{reprinted in Legislative History of the Labor Management Relations Act}, 1947 at 99, 119 (1974). The Senate bill provided:

No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote unless such strike involves an unfair labor practice on the part of the employer.

\textit{Id.} (emphasis added).

Thus, section 9(c)(3) permanently replaced strikers who were completely disenfranchised, from the first day that their replacement was employed. If this proposal had any semblance of fairness, it implicitly adopted the ULP doctrine by tacitly acknowledging the distinction between economic and ULP strikers. The Senate passed S. 1126, which contained this provision, by a 68-24 margin on May 13, 1947 (93 Cong.Rec 3954 (1947), \textit{reprinted in Legislative History of the Labor Management Relations Act}, 1947 at 99 at 1013 (1974)). Legislative treatment of ULP strikers changed again, however, when the bill returned from conference, because the final language passed by the Congress stripped even this protection afforded to ULP strikers. See 2 \textit{Labor Management Relations Act History}, at 1522.

\textsuperscript{155} Democrats in the 80th Congress strongly objected to section 9(c)(3). Portraying
lasting until the late 1950s, Democrats viewed this provision, codified in section 9(c)(3), as pernicious to collective bargaining. It discouraged employers from bargaining with unions, provided them an incentive to provoke economic strikes, and rewarded them by offering a union decertification election in which only permanent replacements had the right to vote. In short, this policy seemed to abuse Mackay Radio's assumption that the hiring of permanent replacements was needed to maintain the employer's business. Congress tempered this only slightly in 1959, when it amended Section 9(c)(3) to make replaced strikers ineligible to vote in

the depth of this law's injury, Senator Pepper reflected on the following scenario:

Let us take, for example, a corporation of the State of West Virginia, we will say a coal mine. If the workers of that mine strike because they are dissatisfied with the wages they receive, the employer can recruit labor in West Virginia and put it in the mine. Then he can notify the National Labor Relations Board that he wants another election, and if there has not been an election in a year, he can get an election, under the bill, and the only ones who can vote in the election are the new employees, the strikebreakers, as it were. Of course, they will vote the old union out and vote the new representation in, and the old union will be effectively disposed of. So, under the bill all an employer has to do is to provoke his workers to strike, recruit replacements, and put them in permanent status, and call for an election..., and his new strikebreakers would elect new representatives, and the old union would be effectively disposed of altogether.


The unfairness of the rule can be demonstrated by many hypothetical examples. But one recent dramatic instance is that involving the O'Sullivan Rubber Corp.'s Winchester, Va., plant. In April 1956 the United Rubber Workers AFL-CIO was certified to represent the production employees after a Board-conducted election in which the union polled a majority 343 to 2. Thereafter O'Sullivan and the union commenced negotiations. After more than a month of fruitless negotiations, the union called a strike and all but 8 of the 420 employees in the plant failed to report for work. Thereafter while some number of strikers returned to work, the company undertook to recruit replacements. By July the company had a total of 345 employees on the job, of whom 265 were new employees and 72 returned strikers. Under these circumstances, normal production was resumed. Picketing continued and so did fruitless negotiations; the union indeed was in no position to exert any bargaining strength since the plant was in full production. On April 27, 1957, approximately 1 year after the first election the company filed for a new election. This election was held in October 1957 and the results showed that 288 votes were cast against the union and but 5 in its favor. The strikers were not permitted to vote pursuant to the rule under section 9(c)(3).

decertification elections after the first anniversary of their strike.157

III. Judicial Role in The Apogee and Decline of the Unfair Labor Practice Doctrine

A. The ULP Strike Doctrine at its Apogee

By adopting the ULP strike doctrine, the Mastro Plastics Court signaled its disagreement with Taft-Hartley’s policy that encouraged employers to permanently break relations with unions by disenfranchising replaced strikers through decertification elections. The period 1947-1963 marked the apogee of the ULP strike doctrine. The law reached its full extension in the Supreme Court’s 1963 decision, NLRB v. Erie Resistor,158 which further insulated strikers from permanent replacement.

In contrast to Mastro Plastics, Erie Resistor involved more typical bargaining over a new labor agreement, where no worker protest occurred.159 When the company and union reached impasse, all 478 employees went on strike and the company tried to continue operations by hiring permanent replacements.160 After this failed, the company tried to induce strikers to cross the picket line and return to work.161 Appealing to strikers was not per se unlawful, but the NLRB deemed it a discriminatory practice when the company offered twenty years of “super-seniority” only to returning strikers (also called crossovers) and striker replacements.162 Continuing strikers were not provided this benefit,163 and consequently, crossovers were more protected against layoffs that were determined by seniority.164

This labor dispute exposed another rift among courts and the

159. See id. at 222.
160. See id. at 222-23.
161. See id. at 223.
162. See id. at 225.
163. See id. at 223. As a result, the union was under “great pressure” and “offered to give up some of its contract demands if the company would abandon super-seniority.” Id. at 224.
164. See id. at 223 n.3 (explaining that the company arrived at the 20-year figure by projecting what its work force would be following the strike). At the time the strike began, 450 employees were laid off, apart from the active work force that went on strike. See id. at 222 n.2.
NLRB in their treatment of striker-replacements and crossovers. In adjudicating this case, the NLRB viewed the company's right to hire permanent replacements as a sufficient counter-measure to employees' right to strike.\textsuperscript{165} So, according to the Board, the economic strike converted to a ULP strike when the company offered preferential benefits only to replacements and crossovers.\textsuperscript{166}

The Third Circuit Court of Appeals took a completely different view when it denied enforcement to the Board's order.\textsuperscript{167} The court was persuaded that the company had a legitimate business justification to offer replacements and cross-overs super-seniority.\textsuperscript{168} This difference extended to other circuit courts.\textsuperscript{169}

B. The Judiciary Erodes the ULP Strike Doctrine in the 1980s

Throughout the 1980s, the American labor movement was in a full-scale retreat. Its influence in national politics waned, as the percentage of union members in the workforce continued to plummet.\textsuperscript{170} By 1980, the AFL-CIO appeared out of touch with its

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\textsuperscript{165} See id. at 225 (summarizing the Board's view that an employer's right to hire permanent replacements under Mackay Radio could not be extended by also granting employers the right to extend preferential benefits to replacements).

\textsuperscript{166} Id. at 226 n.5.


\textsuperscript{168} See id. at 364, stating:

We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer.

\textsuperscript{169} The Third Circuit's treatment of Erie Resistor was consistent with NLRB v. Potlatch Forests, Inc., 189 F.2d 82 (9th Cir. 1951) and NLRB v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir. 1960). This approach contrasted, however, with Ballas Egg Prods. v. NLRB, 283 F.2d 871 (6th Cir. 1960), NLRB v. California Date Growers Ass'n, 259 F.2d 587 (9th Cir. 1958), Olin Mathieson Chem. Corp. v. NLRB, 232 F.2d 158 (4th Cir. 1956), and Swarco v. NLRB, 303 F.2d 668 (6th Cir. 1962). The Olin Mathieson majority offered this representative rationale for finding super-seniority plans discriminatory:

With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacement save upon a promise of permanent tenure, to promise such tenure to the replacements. But when the strike is over, when the plant is in operation, then the imposition of the superseniority policy in favor of the replacements and against the strikers quite a different matter.

232 F.2d at 161-2.

\textsuperscript{170} See Gary N. Chaison & Dileep G. Dhavale, A Note on the Severity of the Decline in Union Organizing Activity, 43 INDUS. & LAB. REL. REV. 366, 369 tbl. 1, col. 2 (1990) (Union Organizing Activity and Success in NLRB Representation Elections, 1975-87, Number of Elections in New Units). Union representation elections for new units fell

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These factors contributed to the election of President Ronald Reagan, who hired permanent replacements to break a strike by 11,000 air traffic controllers. Eventually, the NLRB and the federal courts, swelled by a growing number of Reagan-appointees, took a harder line against unions.

The stage was set for two changes in the ULP doctrine. The most direct and significant change resulted from the Supreme Court's ruling in *TWA v. Independent Federation of Flight Attendants*. By ruling that an employer does not unlawfully discriminate against strikers when it offers job-related perks only to strike crossovers, the Supreme Court appeared to reverse *Erie Resistor*.

The other change occurred in the circuit courts. In the late 1980s, these courts narrowed an employer's duty to provide financial information when unions requested this to verify a demand for...
concessions. These cases appeared to involve employer provocation of a strike, with the apparent intent of providing an opportunity to hire permanent replacements. By constricting an employer's disclosure duty, thus reducing the possibility of finding that a ULP caused a strike, courts were able to rule that these strikes were economic.

(1) TWA v. Independent Federation of Flight Attendants

The flight attendants union and TWA bargained for two years over a new labor agreement before reaching impasse in 1986. TWA responded by hiring 2,350 new attendants as permanent replacements. Since there were about 5,000 strikers, this hiring was insufficient to maintain the airline's normal operations.

To run a normal schedule during the strike, the company asked strikers to abandon their walkout and return to work. Strikers were told that job vacancies would be filled by applying the seniority bidding system to all working flight attendants. To increase the appeal of this offer, job and domicile assignments based on this bidding order would remain effective after the strike ended.

TWA's plan created an incentive for low-seniority (also called "junior") employees to return immediately to work. They could leapfrog over more senior flight attendants to acquire better flights and domiciles. They would also be more protected from layoffs.

At the same time, TWA's plan induced senior attendants to return to work, to protect their place in the bid system from junior crossovers. This was insidious because this arrangement remained in effect after the strike ended. Thus, "at the conclusion of the strike, senior full-term strikers would not be permitted to displace permanent replacements or junior nonstriking flight attendants and could be left without an opportunity to return to work."

On the surface, this plan differed from Erie Resistor's super-

176. See id. at 429.
177. See id.
178. See id. at 430.
179. See id.
180. See id.
181. See id.
182. See id.
183. See id. at 429.
184. See id. at 430.
185. See id. at 430.
186. See id.
187. Id.
seniority offer because TWA allowed seniority to accrue for full-term strikers and never granted crossovers an artificial number of years to count toward seniority. But, by allowing junior crossovers a one-time opportunity to leapfrog permanently over senior co-workers who remained on strike, TWA’s plan had the effect of *Erie Resistor*.

Having lost the strike, the Union made an unconditional offer on May 17 to return to work. By then, the airline operated by employing approximately 1,280 nonstriking flight attendants and hiring approximately 2,350 new flight attendants. When the strike started, the union represented 5,000 flight attendants, but lost about half of those positions to the replacements.

When strike ended, the union sought immediate reinstatement of 2,967 strikers who were permanently replaced or displaced by junior crossovers. After two years TWA reinstated only 1,100 additional full-term strikers. Thus, the union relied on *Mastro Plastics* in contending that TWA’s discrimination against full-term strikers converted this economic strike to a ULP strike.

By a 6-3 vote, the Supreme Court rejected this argument. In the majority opinion, Justice O’Connor said the union was arguing for an impermissible expansion of *Erie Resistor*. In analyzing the ULP strike issue, the *Erie Resistor* Court focused on whether the employer’s grant of super-seniority to crossovers was necessary to run its business. Breaking from this inquiry, Justice O’Connor focused on the allocation of risks and strike costs between strikers and crossovers:

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187. See id.
188. See id.
189. See id.
190. See id.
192. See id. at 431.
193. See id. at 430.
194. See id. at 428. (Justice O’Connor’s opinion was joined by Justices Rehnquist, White, Stevens, Scalia, and Kennedy. Justices Brennan’s dissent was joined by Justice Marshall. Justice Blackmun’s dissent was joined by Justice Brennan.)
195. See id. at 436.

We have no intention of questioning the continuing vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here. To do so would require us to set aside the Board’s considered judgment that the Act and its underlying policy require, in the present context, giving more weight to the harm wrought by super-seniority than to the interest of the employer in operating its plant during the strike by utilizing this particular means of attracting replacements.
To distinguish crossovers from new hires in the manner (the union) proposes would have the effect of penalizing those who decided not to strike in order to benefit those who did. Because permanent replacements need not be discharged at the conclusion of a strike in which the union has been unsuccessful, a certain number of prestrike employees will find themselves without work. We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful.197

In short, by focusing on the individual employee's decision to strike or work, Justice O'Connor ignored how TWA's plan would stir resentment among workers years after the strike ended. Justice Brennan's dissent was acutely sensitive to this, however. Post-strike tensions, already high because TWA's workforce was composed of striker replacements and some reinstated strikers, would grow as antagonisms renewed between strikers and the crossovers who personally benefitted by taking the strikers' seniority-related benefits.198

The majority's ruling also undermined the inherent fairness in rewarding length of service.199 And in a passage that reflected the generation gap between Brennan and O'Connor, the senior Justice expressed a passé policy preference: "I would favor—and I believe Congress has provided for—the rule that errs on the side of preferring solidarity . . . ."200

The potential impact of the majority opinion on collective bargaining was immediately evident.201 The decision meant that full-term TWA strikers were ineligible for immediate reinstatement

197. TWA, 489 U.S. at 438.
198. See id. at 448.
199. Justice Brennan observed:

The principle of seniority is based on the notion that it is those employees who have worked longest in an enterprise and therefore have most at stake whose jobs should be most protected. Permitting the employer to give preference to crossovers . . . will mean that an employee of only six months' experience, who abandoned the strike one day before it ended, could displace a 20-year veteran who chose to remain faithful to the decision made collectively with her fellow workers until the group as a whole decided to end the strike.

Id. at 451.

200. See Michael A. Verespej, Striking Out; Unions' Most Powerful Weapon Could Frequently Blow up in Their Faces, Thanks to a Supreme Court Ruling, INDUS. WK., March 20, 1989, at 72. Prominent management attorney, G. John Tysse, commented, "There is no way you can sugarcoat the Supreme Court's decision. It clearly affects the strike as an economic weapon." Id. Stephen Schlossberg of the International Labor Organization noted, "Unions will clearly have to think about alternative strategies to bring pressure against companies . . . ." Id.
because of the *Mackay Radio* doctrine. In Justice O'Connor's terms, they paid dearly for their lost gamble by remaining out of work for several years.\(^2\) Meanwhile, TWA avoided backpay valued at $55 million.\(^3\) More generally, other large employers who experienced strikes applied the lessons of TWA.\(^4\) Finally, in ensuing replacement strikes, the work force was more conflicted than usual because post-strike work forces divided into three warring groups: permanent replacements, crossovers, and full-term strikers who were eventually reinstated.\(^5\)

(2) *Curtailment of Truitt's Information-Disclosure Requirement*

Throughout the 1980s, unions were besieged by employer demands for concessions.\(^6\) Frequently, they resisted. If a union

\(^2\) See, e.g., Tom Incantalupo, *Rescue Plan: Will it Fly?* NEWSDAY, Nov. 23, 1992, at 23. Incantalupo reported that a full-term, replaced striker, Barry Schimmel, was not reinstated for three years; "To be out on the street with a wife and two kids—one of which was a six-month old infant... [i]t took me a while to get back on my feet again and find a job." *Id.* Another replaced flight attendant reported that she was nearly evicted twice from her apartment while she was out of work with TWA. *See id.*


\(^5\) See Anne Scott, *And the Bitterness Goes On,* BUS. REC. (IOWA), Jan. 29, 1997, at 8 (reporting that even after a bitter strike was settled, tensions continued to simmer). To illustrate, before the strike, there were 1,350 union members in Bridgestone's Des Moines plant and only two non-member employees. *See id.* As a result of hiring permanent replacements and attracting crossovers, only 650 strikers employees remained union members. *See id.* The article implies that the plant's 350 crossovers and 450 replacement workers are not members. *See id.* As evidence of the tension in union-management relations, one union leader summed it this way, "Before the strike... management had an open door policy, and union and management regularly met to discuss issues and problems. Those discussions aren't happening now. Right now, the only time we deal with them is on disciplinary stuff." *Id.*

granted concessions to one large employer in an industry with significant union representation, it was vulnerable to similar cost-saving demands from other employers.\(^\text{207}\) Even if union leaders understood an employer’s need for relief, a proposal might be so harsh that a union representative would be imperiled by presenting it to the membership.\(^\text{208}\) This context is necessary to understand how the federal courts’ reinterpretation of \textit{Truitt} disclosure requirements also curtailed the ULP strike doctrine.\(^\text{209}\)

\textit{United Steelworkers, Local Union 14534 v. NLRB}\(^\text{210}\) is a case in point. In negotiations for a new contract, the employer proposed a 30% reduction in wages and a 50% reduction in medical insurance and vacations.\(^\text{211}\) The union was willing to consider these extreme concessions, but only if the company could justify them by demonstrating need.\(^\text{212}\) Thus, the union requested that the employer disclose its finances.\(^\text{213}\) The company refused this request, terminated negotiations after four meetings with the union, and unilaterally implemented its offer.\(^\text{214}\) The union went on strike when the agreement expired on March 21, 1987.\(^\text{215}\) The company immediately

\begin{footnotesize}
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\item 207. Dana Priest, \textit{Striking Coal Miners Fear End Of Union, Way of Life in Va.}, \textit{THE WASHINGTON POST}, July 6, 1989, at C1, (The author summarized this phenomenon in the coal industry: “In recent years the union has given concessions—nonconforming agreements—to some coal companies in an effort to keep them as signatories to the national agreement. Some industry analysts say this opened the door for companies to demand even more concessions from the union.”).
\item 208. In the midst of negotiating over an employer proposal to reduce jobs in a bargaining unit at International Paper, a local union leader said, “[D]o you think that we are going to give up 280 jobs? We want to stay alive. You’re going to get us killed.” International Paper, 319 N.L.R.B. 1257 (1995).
\item 209. In \textit{NLRB v. Truitt Manufacturing Co.}, 351 U.S. 149 (1956), a union requested some form of financial substantiation for the company’s claim that it could not afford the union’s proposed pay increase. In denying the union’s request for this information, the company said “the information . . . is not pertinent to this discussion and the company declines to give you such information; [y]ou have no legal right to such.” \textit{Id.} at 150-51. The Court agreed with the NLRB that “a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.” \textit{Id.}
\item 210. 983 F.2d 240 (D.C. Cir. 1993).
\item 211. \textit{See id.} at 242.
\item 212. \textit{See id.}
\item 213. \textit{See id.}
\item 214. \textit{See id.}
\item 215. \textit{See id.}
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countered by hiring permanent replacements.\textsuperscript{216}

The importance of the ULP-economic strike distinction is plainly evident in this case. As of April 8, 1993, when the appeals court issued its amended decision, strikers had not been reinstated even though they offered unconditionally to return to work on July 30, 1987.\textsuperscript{217} Due to a change in how the courts interpreted \textit{Truitt} disclosure requirements, the D.C. Circuit Court of Appeals ruled that a company's claim of "competitive disadvantage" during contract negotiations is legally different from a claim of "inability to pay."\textsuperscript{218} Thus, the company did not breach its duty to bargain by refusing to provide the union this information.\textsuperscript{219} The court, therefore, rejected the union's contention that this was a ULP strike,\textsuperscript{220} and ruled that the strike was economic.\textsuperscript{221}

This policy change was a potentially significant development in collective bargaining because it linked employer demands for difficult concessions, and a narrower duty to disclose financial information, to a reduced basis for finding that a strike is caused by an employer's ULP. Moreover, the potential impact for change was widespread. In addition to the D.C. Circuit, the Fourth,\textsuperscript{222} Seventh\textsuperscript{223} and Tenth\textsuperscript{224} circuits adopted this approach. Eventually, NLRB decisions followed these precedents.\textsuperscript{225}

\textsuperscript{216} See id. at 242-43.
\textsuperscript{217} See id. at 247.
\textsuperscript{218} See id. at 244-45.
\textsuperscript{219} See id. at 245.
\textsuperscript{220} See id. at 246 (observing that in an earlier proceeding, an administrative law judge had ruled in favor of the union's contention "that the strike was a 'direct result' of the Company's unlawful refusal to provide the requested cost data and its overall failure to bargain in good faith").
\textsuperscript{221} See id. at 247 (concluding that "the employees were economic rather than unfair labor practice strikers").
\textsuperscript{222} See Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1338-39 (4th Cir. 1986).
\textsuperscript{223} See Graphic Communications Int'l Union, Local 508 v. NLRB, 977 F.2d 1168 (7th Cir. 1992) (employer had no duty to share cost information with union, and therefore had right to hire permanent striker replacements). The Seventh Circuit reinterpreted \textit{Truitt} in \textit{NLRB v. Harvstone Manufacturing Corp.} See 785 F.2d 1333, 1338-39 (7th Cir. 1986).
\textsuperscript{224} See \textit{Facet Enterprises, Inc. v. NLRB, 907 F.2d 963 (10th Cir. 1990)}.
C. Institutional Signaling and Implicit Bargains as the ULP Strike Doctrine Narrowed

In three key decisions during the 1980s, the Supreme Court strongly signaled its desire to curb the right to strike. These decisions exemplify Eskridge and Frickey’s assessment that the Rehnquist Court has a “dominant ideology...in labor cases [that] reveals tight fists around management obligations to workers.” More generally, these cases support Eskridge and Frickey’s central thesis that the “decisions are only comprehensible if viewed as a complex amalgam of rule-of-law and substantive values applied selectively by a strategic Court.” These cases also show that the Court strategically avoids conflict with the other branches.

(1) The First Signal: Belknap v. Hale

TWA had the most direct impact on the ULP strike doctrine, but it was the last in this series. Belknap v. Hale, a 1983 decision, concerned a strike in which the employer ran a typical newspaper ad to attract permanent replacements. Successful applicants signed a document stating: “I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. at its Louisville, Kentucky, facility as a regular full time permanent replacement to permanently replace _____ in the job classification of _____.”

Pressured, however, by the NLRB to settle the strike, Belknap eventually reinstated the strikers and fired replacements. Twelve former replacement workers sued Belknap for $500,000 in damages,...
claiming breach of contract for permanent employment. The majority opinion, authored by Justice White, ruled that the NLRA did not preempt the replacement workers’ breach-of-contract claims.

Justice Brennan’s lengthy dissent attacked this novel ruling because it would likely undermine the strike-settlement process. He believed the ruling created a strong financial disincentive to dismiss replacements in order to reinstate strikers. In Brennan’s view, these replacement workers’ breach-of-contract claims “go to the core of federal labor policy. If respondents are allowed to pursue their claims in state court, employers will be subject to potentially conflicting state and federal regulation of their activities. . . .” This, in turn, would undermine “the efficient administration of the National Labor Relations Act” and disrupt “the structure of the economic weapons Congress has provided to parties to a labor dispute.” In short, the ruling created intolerable potential for conflicting state and federal regulation of the right to strike.

Nothing would accentuate this possibility more than the ULP strike doctrine, because if the NLRB later ruled that Belknap’s unfair labor practice caused the strike, Belknap would be ordered to reinstate the strikers. Brennan quoted Judge Learned Hand at

233. Id. at 496-97.
234. See id. at 512.
235. In a concurrence, Justice Blackmun stated a similar view:

   The Court’s conditional promise achieves only one thing: it permits an employer, during settlement negotiations with the union, to threaten to retain permanent employees in preference to returning strikers despite the fact that the employer has not promised to do so. The naked interest in making such a threat, silently endorsed in the Court’s opinion, could not be less legitimate under the NLRA. From the employer’s point of view, one benefit of offering strike replacements permanent employment is that strikers become fearful that they will lose their jobs. But it is clear that creating this fear, which discourages union membership and concerted activities, is a deleterious side-effect of, rather than a legitimate business justification for, the power to hire permanent strike replacements.

Id. at 516 (Blackmun, J., concurring in the judgment).
236. Id. at 518 (Brennan, J., dissenting).
237. Id.
238. See id. at 530.
239. Id. at 541-42, stating:

   The real problem in this case, and another factor that supports preemption, is that the words “permanent replacement” have a special meaning within the context of federal labor law . . . . Workers hired to replace striking employees on a permanent basis are non-permanent to the extent that a strike may be determined to have been an unfair labor practice strike and that an employer may be ordered to reinstate strikers.

Brennan added: “They are also non-permanent to the extent that a union may ‘win’ a
length to underscore the ruling’s harm to this settled doctrine.\textsuperscript{240} Without any explanation, the majority brushed off this concern, stating that “had the strike been adjudicated an unfair labor practice strike Belknap would have been required to reinstate the strikers....”\textsuperscript{241}

(2) The Second Signal: Pattern Makers League v. NLRB

Two years later, the Supreme Court continued its assault on strikes in \textit{Pattern Makers League v. NLRB}.\textsuperscript{242} Here, a union conducted an economic strike against an employer association for several months.\textsuperscript{243} When its membership voted to reject a proposed contract settlement, eleven members tendered their resignations from the union and crossed-over to return to work.\textsuperscript{244} However, union bylaws prohibited members from resigning during a strike.\textsuperscript{245} Consequently, the union fined these crossovers an amount equal to their wages for working during part of the strike.\textsuperscript{246}

The employer association filed a charge with the Board claiming that the union’s fines violated the crossovers’ Section 8(b)(1)(A) rights.\textsuperscript{247} The Board upheld these charges, and the Court affirmed the Seventh Circuit’s enforcement of the Board’s ruling.\textsuperscript{248}

Writing for the majority, Justice Powell reasoned that the prohibition in Section 8(b)(1)(A) against union restraint or coercion is purely an extension of the NLRA’s Section 7 guarantee of an employee’s right to refrain from union activities: “When employee members of a union refuse to support a strike (whether or not a rule prohibits returning to work during a strike), they are refraining from ‘concerted activity.’ Therefore, imposing fines on these employees for returning to work ‘restrain(s)’ the exercise of their section 7

\textsuperscript{240} See \textit{id}. at 543, (quoting \textit{Remington Rand}, 94 F.2d 862, 871 (2nd Cir. 1938)).
\textsuperscript{241} \textit{Id}. at 511.
\textsuperscript{242} 473 U. S. 95 (1985).
\textsuperscript{243} See \textit{id}. at 97.
\textsuperscript{244} See \textit{id}. at 95.
\textsuperscript{245} See \textit{id}. at 96.
\textsuperscript{246} See \textit{id}. at 98.
\textsuperscript{247} \textit{Id}. Section 8(b)(1)(A) states that “it shall be an unfair labor practice for a labor organization... to restrain or coerce employees in the exercise of the rights guaranteed in section (7)....” Importantly, the section continues: “Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein....” 29 U.S.C. § 158(b)(1)(A).
\textsuperscript{248} See \textit{Pattern Makers League}, 473 U.S. at 100.
rights." Powell also wrote that "fining employees to enforce compliance with any union rule or policy would violate the Act." This was careless because he failed to give any effect to the exemption in Section 8(b)(1)(A) for internal union discipline.251

Justice Blackmun's dissent was alert to this key oversight, observing that the majority opinion proscribed all discipline, "no matter how limited and no matter how reasonable." He reasoned that effective collective bargaining depended to some degree on a union's ability to impose discipline on its members during duress: "Unless internal rules can be enforced, the union's status as bargaining representative will be eroded, and the rights of members to act collectively will be jeopardized." This reasoning acknowledged that a strike imposes at least short term costs on members that the union hopes will be recouped. Thus, high-minded notions of solidarity are likely to be undercut as individual strikers feel pinched to return to work:

Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in the "pact" (citation omitted).

Blackmun also sharply criticized the majority's failure to account for the legislative history of Section 8(b)(1)(A). When Congress enacted the Taft-Hartley amendments to the NLRA, it expressly distinguished permissible and impermissible forms of union discipline of members. When Congress amended Section 7 to provide employees a right to refrain from union activities, it meant to prohibit unions and their supporters from coercing nonmember employees into joining.

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249. Id. at 101.
250. Id. (emphasis added).
251. The section continues: "Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A).
253. Id. at 118.
254. Id. at 118-19 (Blackmun, J., dissenting) (quoting NLRB v. Textile Workers, 409 U.S. 213, 221 (1972)).
255. See id. at 121-22.
256. See id. at 122 (Blackmun, J., dissenting) (quoting H.R. Rep't. No. 245, 80th Cong., 1st Sess. 30 (1947)).
257. See id.
Blackmun correctly observed, however, that "[t]here is no suggestion that the House considered the right to refrain to include the right to abandon an agreed-upon undertaking at will . . . ." In a separate provision, the House attempted to regulate a union's internal membership rules, but Blackmun noted that the Senate specifically rejected this part of the Hartley bill. In fact, Sen. Taft stated that the "Senate conferees refused to agree to the inclusion . . . since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated without further study of the structure of unions."

Applying this clear legislative history to the Pattern Makers' fine of strike crossovers, Blackmun concluded that Congress never intended that Section 8(b)(1) would prohibit unions from imposing reasonable restrictions against member resignations during strikes.

(3) The Court's 1980s Strike Decisions Fit Eskridge and Frickey's "Strategic" Actor Theory

The Supreme Court's recasting of the right to strike, including its makeover of the ULP strike doctrine in TWA, fits the theoretical model of Law as Equilibrium. This theory realistically accounts for the fact that Supreme Court justices "ordinarily include at least some politically well-connected insiders who reflect the ideology of the current governing coalition." When justices embrace "ideologies (that) conflict with the current governing coalition" they tend to be "fearful of overrides and other forms of discipline from other

258. Id.
259. See id. at 122-23 ("It is critical to an understanding of the Taft-Hartley bill, therefore, to recognize that the Senate explicitly rejected the House bill's §§ 7(b) and 8(c) . . . [because] it decided that 'the formulation of a code of rights for individual members of trade unions . . . should receive more extended study by a special joint congressional committee.'") (quoting S.Rep. No. 105, 80th Cong., 1st Sess., 2 (1947)).
260. Id. at 123 (quoting Sen. Taft at 93 Cong. Rec. 6443 (1947)).
261. Blackmun noted that under section 7 of the NLRA, the crossovers were not compelled to join this union; but when they joined voluntarily, they agreed to this restriction against resignation. See id. at 122. Thus, the rule "stands for the proposition that to become a union member one must be willing to incur a certain obligation upon which others may rely . . . ." Id. at 120-21. Blackmun also took care in pointing out this non-coercive element of the union's bylaws: "League Law 13 does not in any way affect the relationship between the employee and the employer. An employee who violates the rule does not risk losing his job, and the union cannot seek an employer's coercive assistance in collecting any fine that is imposed." Id. at 121.
262. Eskridge, supra note 1, at 53.
As the following analysis shows, the majority bloc that reinterpreted the right to strike was attuned to a changing ideological tide that elevated individual rights over collective rights.

Table 1 summarizes voting blocs among justices who participated in all of these decisions. Ideological cleavage is evident in Justice O'Connor and Rehnquist's consistent recasting of the right to strike, and in Brennan and Marshall's steady opposition. Justice White actually belongs in the O'Connor-Rehnquist bloc because he varied only in his Pattern Makers concurrence. This was philosophically consistent, however, with the majority opinion. In similar fashion, Justice Blackmun belongs in the Brennan-Marshall bloc because he left only once, in an oddly equivocal concurrence in Belknap.

While the appearance of bloc-voting in Table 1 suggests ideological cleavage, this is proof is only preliminary. But this impression is strengthened by textual evidence of ideological tension and personal in-fighting. The caustic nature of the following dissents indicate the Court's destabilizing consensus on striker replacement policy.

263. Id.
264. See Pattern Makers League, 473 U.S. at 115. White began his short concurrence by saying, "I agree with the Court that the Board's construction of §§ 7 and 8(b)(1)(A) is a permissible one and should be upheld." Id. at 116.
265. See Belknap v. Hale, 463 U.S. 491, 522 (1983). Blackmun believed that if "federal law recognizes that the employer voluntarily has undertaken an obligation to the replacements, the fact that the employer commits an unfair labor practice making it impossible for him to fulfill that obligation should not shield the employer from compensating the replacement employees." Id. He waffled, however, when he continued:
I fully recognize that this view may appear to put the employer between Scylla and Charybdis. Neither the Court's approach, nor the dissent's, however, provides the employer with a safer harbor.
Although I cannot believe that Congress has reconciled the conflict between the striker's right to reinstatement and the employer's right to operate its business during a strike by requiring lies and broken promises to strike replacements to go unredressed, Congress certainly is free to prove me wrong. Congress also is free to resolve the great tensions inherent in this complex three-way struggle entirely within the framework of federal law.
Id.
266. However, for a similar analysis involving this bloc's role in curbing Title VII of the 1964 Civil Rights Act, see William P. Murphy, Supreme Court Review, 5 LAB. LAW. 679, 679-80 (1989) ("Retreat is now being sounded by a new Supreme Court majority of five Justices based on three Reagan appointees. In the absence of any congressional amendments, and in disregard of its own precedents, the Court... reached out to cripple major legal tools for eliminating discrimination and its effects.")
Table 1
Supreme Court Voting Blocs:
Justices Who Participated in Belknap, Pattern Makers, and TWA
(* Denotes Author of Majority Opinion)

<table>
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<tbody>
<tr>
<td>Majority</td>
<td>White*, O'Connor, Rehnquist, Stevens</td>
<td>O'Connor, Rehnquist</td>
<td>O'Connor*, Rehnquist, Stevens, White</td>
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<td>Concurrence</td>
<td>Blackmun</td>
<td>White</td>
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</tr>
<tr>
<td>Dissent</td>
<td>Brennan (Marshall)</td>
<td>Blackmun (Brennan, Marshall), Stevens</td>
<td>Brennan (Marshall), Blackmun (Brennan), Marshall</td>
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Excerpts from Belknap

The Court’s change in the law of permanency weakens the rights of strikers and undermines the protection afforded those rights by the Act. Such adjustments in the balance of power between labor and management are for Congress, not this Court.267

It might be a better world if strike replacements were afforded greater protection. But if accomplishing this end requires an alteration of the balance of power between labor and management or an erosion of the right to strike, this Court should not pursue it. This Court’s notions of what would constitute a more “fair” system are irrelevant to determining whether certain state law claims must be preempted because they interfere with the system of labor-management relations established by Congress.268

Excerpts from Pattern Makers

Today the Court supinely defers to a divided-vote determination by the National Labor Relations Board that a union commits an unfair labor practice when it enforces a worker’s promise to his fellow workers not to resign from his union and return to work during a strike, even though the worker freely made the decision to join the union and freely made the promise not to resign at such a time, and

268. Id. at 543.
even though union members democratically made the decision to strike in full awareness of that promise.\textsuperscript{269}

In the face of this substantial legislative history indicating that the House provisions were rejected on the merits, the Court’s treatment of that history \ldots is both inaccurate and inadequate.\textsuperscript{270}

The Court, however, again ignores the distinction between internal and external rules fashioned in its prior cases, and so misunderstands the concept “voluntary unionism” implicated by the Act.\textsuperscript{271}

[The Court] reaches this conclusion by giving the proviso a cramped reading \ldots ignoring in the process both the plain meaning and the legislative history of the proviso. Further, the Court never addresses the fact that the rule is a prerequisite of union membership much like any other internal union rule. Indeed, the Court entirely fails to explain why League Law 13 is not a rule “with respect to the acquisition or retention of membership,” even given its own enervating understanding of the proviso.\textsuperscript{272}

The Court’s reasoning is obviously circular: enforcement of a union rule prohibiting resignation during a strike is different from enforcement of other union rules because it violates policies of voluntary unionism. It violates those policies because it works an infringement on employment rights. It works an infringement on employment rights because it imposes fines. And these fines are impermissible while fines for violation of other union rules are appropriate because the rule here violates voluntary unionism.\textsuperscript{273}

In sum, the Court defers to the Board although the Board’s position cannot fairly be said to rest on any principled application of the policies of our national labor laws.\textsuperscript{274}

By focusing exclusively on the right to refrain from collective action, by assuming an arid and artificial conception of the proviso circumscribing that right, and by ignoring Congress’ intentions in promulgating the NLRA in the first instance, the Board and the Court abandon their proper role as mediators between any conflicting interests protected by the labor laws.\textsuperscript{275}

The conclusion that freedom under the NLRA means freedom to break a freely made promise to one’s fellow workers after they have relied on that promise to their detriment is not only a notion at odds with the structure and purpose of our labor law, but is an

\textsuperscript{269} Pattern Makers League, 473 U.S. at 117 (Blackmun, J., dissenting).
\textsuperscript{270} Id. at 123.
\textsuperscript{271} Id. at 126.
\textsuperscript{272} Id. at 121.
\textsuperscript{273} Id. at 127 n.3.
\textsuperscript{274} Id. at 130.
\textsuperscript{275} Id. at 133.
affront to the autonomy of the American worker.276

Excerpts from TWA

More fundamental, I fear, is the legal mistake inherent in the Court’s objection to “penalizing those who decided not to strike in order to benefit those who did.” The Court, of course, does precisely the opposite: it allows TWA to single out for penalty precisely those employees who were faithful to the strike until the end, in order to benefit those who abandoned it. What is unarticulated is the Court’s basis for choosing one position over the other. If indeed one group or the other is to be “penalized,” what basis does the Court have for determining that it should be those who remained on strike rather than those who returned to work? I see none, unless it is perhaps an unarticulated hostility toward strikes.277

Whatever may have been the “primary” purpose of § 2 Fourth, it is too late in the day to suggest that this provision, at least when read in the context of the entire RLA, does not prohibit employer coercion of the right to strike. The Court compounds its error in regard to the reach of § 2 Fourth with a more fundamental mistake when it appears to assume that the employer’s action in this case is sanctioned by the mere fact that it occurred during the “self-help” stage of the dispute.278

While of course the National Labor Relations Act cannot be imported wholesale into the railway labor arena, we have frequently referred to the NLRA for assistance in construing the Railway Labor Act. Given the paucity of RLA precedent on the specific issue before us, the Court quite properly looks to the NLRA for guidance. It arrives at an incorrect conclusion, however, because it mischaracterizes the employer’s action and because it appears unwilling to take seriously the protection Congress has seen fit to afford to the right to strike.279

These excerpts mark the passing of a retiring generation of justices whose values were shaped by laws such as the NLRA. Labor felt this decline several years before the Court, when its 1977 and 1978 legislative initiatives were stunningly defeated.280 This

276. Id.
278. Id. at 444.
279. Id. at 446 (citations omitted).
280. See Paul Starobin, Unions Turn to Grass Roots To Rebuild Hill Clout, 47 CONG. Q. WEEKLY REP’T (1989) 2249 (reporting that the House, in 1977, surprisingly rejected a bill to broaden union picketing rights at construction sites). In that vote, 37 of 68 House freshmen voted against the bill, including 13 who received election help from the AFL-CIO. In 1978, a filibuster defeated a bill that would have made organizing easier for
inexorable trend became clear in the 1980 elections, when union members deserted the AFL-CIO in amazing numbers\textsuperscript{281} and a sea change in the presidential and congressional politics\textsuperscript{282} paved the way for a more conservative judiciary.

_Belknap, Pattern Makers,_ and _TWA_ were mileposts in this climatic change, as the Court evolved to fulfill a more conformist role as a coordinate branch. On this road to change, the Court was deeply conflicted, as the foregoing evidence shows; but then, so was the Congress, as it came very close to enacting legislation to repeal _Mackay Radio_ and _TWA_.\textsuperscript{283} In sum, the evolution of the ULP strike doctrine through the 1980s was part of the Court's broader strategic movement toward a new equilibrium which increasingly marginalized union interests.

**IV. The Frequency of ULP Strikes, 1938–1999: Statistical Evidence of Law as Equilibrium**

**A. The ULP Strike as a Unit of Analysis to Test the “Law as Equilibrium” Thesis**

Law is the product of complex interactions among the coordinate branches of government. The Supreme Court tries to balance its conflicting roles as a neutral arbiter that must "preserve the integrity of its institutional character, as well as its special position in American society,"\textsuperscript{284} while indulging its natural inclination to read "the Constitution, statutes, and common law precedents in light of its own specific policy preferences or its general network of beliefs and attitudes."\textsuperscript{285}

Eskridge and Frickey attribute a precise meaning to equilibrium in this framework. Law is a distillate, a rule or policy that is

\textsuperscript{281} _The American Labor Movement Faces a Real Time of Reckoning_, THE ARKANSAS GAZETTE, Feb. 7, 1985, located at 1985 WL 4412982 (reporting that Walter Mondale received only 55 per cent of the vote in union households even though the AFL-CIO denounced President Reagan as a champion of "scab-herders and union-busters").

\textsuperscript{282} See Taylor E. Dark, _Organized Labor and the Congressional Democrats: Reconsidering the 1980s_, 111 POL. SCI. Q. 83, 85-86 (1996) (summarizing these changes as "the thorough political repudiation of the previous Democratic administration, a major Republican victory in the presidential election, Republican control over the Senate for the first time since 1954, the defeat of prominent liberal Democratic senators, and a gain of thirty-five Republican seats in the House").

\textsuperscript{283} See infra notes 321-329.

\textsuperscript{284} Eskridge & Frickey, _supra_ note 1, at 34.

\textsuperscript{285} Id.
constantly filtered, refined, recast, and refiltered by interactions involving the coordinate branches. When Eskridge and Frickey say that "law is an equilibrium," they mean it is "a state of balance among competing forces or institutions."  

Eskridge and Frickey's idea that the Court acts strategically because of its interdependence with Congress and agencies flows naturally from the checks-and-balances structure that the constitutional framers intended. They see agencies as "the most reliable barometers of political equilibria" and explain that the Court usually defers to agencies because they are "knowledgeable about and responsive to presidential and congressional preferences."  

Also, because agencies are the first government organ to address most interpretive issues, "they are usually able to anticipate the responses of other national institutions accurately enough to avoid overrides." In short, agencies provide efficient and low-cost information to the Court about any given policy risk that "carries with it an increased risk of a political rebuke." This conception of equilibrium can be empirically tested. ULP strikes provide an ideal measurement. First, the classification of a strike as either economic or ULP is purely legal. This classification never occurs unless there is litigation before an administrative law judge, the NLRB or appellate courts and these arbiters label a strike as one or the other. 

Second, this classification is inherently subjective since the

286. In short succession, Eskridge and Frickey use mixed metaphors to reach a positive evaluation of the quality of law that is produced by this interaction. The first legal metaphor states: "Just as a cable with three interwoven threads is stronger than a single-threaded string, so a decision supported by three different institutional purposes is stronger than a decision supported by a single one." Id. at 350. The second metaphor states: "Three heads might be better than one, especially if, as legal process theory posits, each head brings a special expertise and satisfies different requirements the citizenry expects from its government." Id.

287. Id. at 28.
288. Id. at 29.
289. Id. at 71-72.
290. Id. at 72.
291. Id.
292. See Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1080 (1st Cir. 1981), noting: Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice.
The legal test is whether an employer’s unfair labor practice caused or contributed to a strike. The Board may also rule that an economic strike converts to a ULP strike, or that a ULP strike converts to an economic strike. The research value in this subjectivity is that it reflects an adjudicator’s substantive values, a core part of Eskridge and Frickey’s theory.

Third, this classification of strikes has real consequences for unions and employers. A ruling that a strike is economic reinforces the raw balance of economic power at the time of the strike. A ULP strike ruling has the effect, however, of re-balancing economic power. This decision inevitably benefits strikers who, in Justice O’Connor’s terms, lose their gamble.

Fourth, because NLRB rulings reflect the Board Members’ substantive values, and these rulings occur in a political setting, this agency serves as the kind of sensitive barometer that Eskridge and Frickey describe. This sensitivity is underscored by the fact that few agencies incur more congressional wrath than the NLRB. While never threatening it with extinction, Congress has tried to cut the Board’s budget by 30%, threatened to filibuster appointment of its

293. See C-Line Express, 292 N.L.R.B. 638, 638 (1989) (The Board’s “General Counsel must establish that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage”).


296. The Court has repeatedly stated that the NLRB is not to expand or contract economic weapons available to employers and unions. See Insurance Agents Int’l, 361 U.S. at 497 (holding that the Board generally may not act “as an arbiter of the sort of economic weapons the parties can use”). But this view is naive. The more accurate and sophisticated view appears in Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 416-17 (1982):

The Board also rests on this Court’s admonition that the Board should balance “conflicting legitimate interests” rather than economic weapons and bargaining strength .... We think the Board has confined itself within the zone of discretion entrusted to it by Congress. The balance it has struck is not inconsistent with the terms or purposes of the Act, and its decision should therefore be enforced. Where, as in Bonanno, the Court rules that an employer is not free to sever its tie with a multiemployer bargaining group, or finds that a ULP caused a strike, or expands permissible lockouts, the Board acts as an arbiter of economic weapons, albeit indirectly.

members, \textsuperscript{298} and filed amicus briefs to "signal" the Board in key cases. \textsuperscript{299} Thus, the Board meets Eskridge and Frickey's functional definition of a coordinate part of government that informs justices about the risks in particular interpretations of statutory law.

B. Research Hypothesis and Methodology

It is reasonable to expect that the narrowing of the ULP strike doctrine during the 1980s should result in a lower percentage of ULP strikes observed in the 1990s. However, \textit{Law as Equilibrium} suggests a counter-intuitive hypothesis when it specifically defines "equilibrium" as "a state of balance among competing forces or institutions." This means that the percentage of ULP strikes ruled by the NLRB should be constant.

This counter-intuitive idea might not seem so strange to Board Members. Indeed, when John Raudabaugh, a Republican appointed by President George Bush, assessed the prospect of being replaced on the Board by President Bill Clinton's more liberal appointees, he observed that the agency's enforcement statistics are remarkably consistent, without regard to what party holds power. \textsuperscript{300} In other words, he said that the Board's rulings are stable over time.

To test my hypothesis, I analyzed 530 NLRB cases involving employer hiring of permanent striker replacements from 1938 to 1999. I created this database by using a variety of appropriate keyword searches in WESTLAW's electronic database (e.g., "MACKAY RADIO" & STRIKE!). I read complete cases to ensure that they involved employer hiring of permanent striker replacements, and then coded information about these strikes. Later, I analyzed selected variables, for example, duration of replacement

\footnotesize{298. See Senate and White House Continue Talks on Filling Vacancies at Labor Board, DAILY LAB. REP. (BNA) No. 5, at D4 (Jan. 7, 1994) (reporting on a threatened Republican filibuster of William Gould's appointment as Chairman of the NLRB unless President Clinton also nominated an acceptable management attorney to fill another Board vacancy).


300. See Raudabaugh Defends Republican Role in Seeking Disclosure of All NLRB Nominees, DAILY LAB. REP. (BNA) No. 225, at D3 (Nov. 24, 1993). Even though the atmosphere in Congress concerning the Board's performance was highly charged, Raudabaugh discounted as "mischievous criticism" the prevailing criticism that the "playing field at the agency is skewed and needs to be corrected." \textit{Id.}
strikes, or severance of bargaining relationship, or employer treatment of strikers. In this study, I examined two variables: type of strike (economic or ULP), and year of ruling that resulted in this classification.

C. Results and Conclusions

Table 2 (infra) summarizes my data analysis. Most of the strikes in my sample (467 out of 530) were classified as either economic or ULP. I sorted strikes by their NLRB decision year, rather than the year a strike began, because the latter often lagged by several years.

This detail is important to testing my hypothesis. To illustrate, the 1989 TWA decision narrowed ULP strike doctrine; but for a strike in my sample that began in 1985 and was adjudicated after TWA, the ruling year is what matters because it accounts for the then-current state of the ULP strike doctrine.

The most remarkable feature of these results is the narrow fluctuation of ULP strike rulings from the 1940s through the 1990s. The 1950s and 1960s had identical ULP strike rates (47%), as did the 1940s and 1980s (39%). The 1990s rate was nearly identical (37%).

Table 2
Economic and ULP Strikes by Year of Board or Court Ruling: 1930s–1990s

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<thead>
<tr>
<th></th>
<th>1930s</th>
<th>1940s</th>
<th>1950s</th>
<th>1960s</th>
<th>1970s</th>
<th>1980s</th>
<th>1990s</th>
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<tr>
<td>Economic Strikes</td>
<td>5</td>
<td>30</td>
<td>27</td>
<td>23</td>
<td>60</td>
<td>75</td>
<td>57</td>
<td>277</td>
</tr>
<tr>
<td>ULP Strikes</td>
<td>5</td>
<td>19</td>
<td>24</td>
<td>20</td>
<td>41</td>
<td>48</td>
<td>33</td>
<td>190</td>
</tr>
<tr>
<td>• ULP Strike from Inception</td>
<td>(5)</td>
<td>(11)</td>
<td>(15)</td>
<td>(12)</td>
<td>(19)</td>
<td>(25)</td>
<td>(21)</td>
<td>(108)</td>
</tr>
<tr>
<td>• Economic Strike Converted to ULP Strike</td>
<td>(0)</td>
<td>(8)</td>
<td>(9)</td>
<td>(8)</td>
<td>(22)</td>
<td>(23)</td>
<td>(12)</td>
<td>(82)</td>
</tr>
<tr>
<td>Total Economic and ULP Strikes</td>
<td>10</td>
<td>49</td>
<td>51</td>
<td>43</td>
<td>101</td>
<td>123</td>
<td>90</td>
<td>467</td>
</tr>
<tr>
<td>Percentage ULP Strikes</td>
<td>50%</td>
<td>39%</td>
<td>47%</td>
<td>47%</td>
<td>41%</td>
<td>39%</td>
<td>37%</td>
<td>41%</td>
</tr>
</tbody>
</table>

Source: NLRB Decisions

Conclusions

The stable rate of ULP strike rulings is phenomenal when viewed against the backdrop of the changing tides in labor-management relations. These relations changed from accommodative in the 1950s to more confrontational by the late 1960s. Amazingly, however, as the ULP strike doctrine expanded in these decades, the

306. Professor Robert Dubin provided this typical assessment:
As collective bargaining becomes an established feature of our society both sides come to recognize that each conflict created disorder is inevitably succeeded by a reestablished order and that permanently disruptive disorder may materially impede the resolution of the conflict. Thus collective bargaining tends to produce self-limiting boundaries that distinguish permissible from subversive industrial disorder.


307. See Robert W. Gordon, Corporate Law Practice as a Public Calling, 49 MD. L. REV. 255, 261 (1990). In his article, Gordon explains that today's conflictual labor relations began in the 1960s:
Management lawyers might claim they simply are responding to the de facto revision of the conventional ground rules of capital-labor conflict, which has been going on since the late 1960s. Even in traditionally organized sectors, employers no longer accept unions as a necessary evil, but treat them as obstructions to be moved away from, subcontracted around, or simply broken through aggressive resistance or decertification.

Id.
rate of ULP strike rulings remained unchanged.

This decisional stability held throughout the 1970s, even as employers accelerated their confrontation by hiring "union-avoidance" consultants. This trend had practical implications for ULP strikes. More employers strategically violated the NLRA because the benefits of noncompliance outweighed the costs. Combined with employers' growing provocation of strikes for strategic union avoidance purposes, this pattern of misconduct should have produced a higher proportion of ULP strikes in the 1980s and 1990s—but these rates remained essentially at earlier levels.

The stable rate is also remarkable considering how much union bargaining power changed since Mackay Radio was decided in 1938. Even though Executive Orders negated scores of strikes, including those with striker replacements, by seizing struck plants and


In what seems to be an increasingly common scenario, an employer either forces or takes advantage of a strike to secure deunionization. In a protracted strike in which the employer holds fast to its position, discord is apt to build among the striking employees, leading some to return to work; the employer may also hire permanent replacements for the strikers. This then sets the stage for a decertification effort... an RM petition, or withdrawal of recognition.

imposing settlements on unions and employers, the ULP strike rate

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for the 1940s was about the same as for any other decade. Following the war, when the Bureau of Labor Statistics began to compile statistics on large strikes, annual strike activity was high and steadily grew until it peaked in the 1970s; thereafter, it plummeted.\textsuperscript{314} This dramatic trend is particularly relevant because more employers seem to be relying on the \textit{Mackay Radio} doctrine to curb this activity.\textsuperscript{315} Yet through all these changes, the ULP strike rate remained stable.

In short, this phenomenon cannot be explained by conventional labor law or industrial relations theories. \textit{Law as Equilibrium} provides robust explanations, however. Congress' vague treatment of the right to strike in the original Wagner Act\textsuperscript{316} left the door open to the judiciary for rule-type precedents. When early courts were sharply divided on replacement strikes,\textsuperscript{317} the \textit{Mackay Radio} Court responded in Solomonic fashion by finding a middle ground doctrine.\textsuperscript{318} This doctrine's political ingenuity is reflected by the fact that Congress did not begin to challenge it until 1989.\textsuperscript{319} When the Court perceived that Congress was undercutting collective bargaining by permitting employers to exploit strikes to sever bargaining relationships with unions,\textsuperscript{320} the \textit{Mastro Plastics} Court settled this matter. Even though this decision lacked the compromise quality of \textit{Mackay Radio}, it never provoked a congressional response. In short,


\textsuperscript{314} \textit{See BUREAU OF LABOR STATISTICS, U.S. Dep't of Labor, Work Stoppage Data: Number of Work Stoppages Idling 1,000 Workers}, visited on May 29, 1999, \texttt{<http://146.142.4.24/cgi-bin/surveymost>}; strike activity per year: 1947 (270); 1948 (245); 1949 (262); 1950 (424); 1951 (415); 1952 (470); 1953 (437); 1954 (265); 1955 (363); 1956 (287); 1957 (279); 1958 (332); 1959 (243); 1960 (222); 1961 (195); 1962 (211); 1963 (181); 1964 (246); 1965 (268); 1966 (321); 1967 (381); 1968 (392); 1969 (412); 1970 (381); 1971 (298); 1972 (250); 1973 (317); 1974 (424); 1975 (235); 1976 (231); 1977 (298); 1978 (219); 1979 (235); 1980 (187); 1981 (145); 1982 (96); 1983 (81); 1984 (62); 1985 (54); 1986 (69); 1987 (46); 1988 (40); 1989 (51); 1990 (44); 1991 (40); 1992 (35); 1993 (35); 1994 (45); 1995 (35); 1996 (37); 1997 (29); 1998 (34).

\textsuperscript{315} \textit{See, e.g.,} testimony of Thomas Donohue, \textit{supra} note 32.

\textsuperscript{316} \textit{See 29 U.S.C.} § 163. Ironically, by using "construed" in defining how this right is enforced, Congress appeared to admonish the federal courts—an institution with a history for intervening in strikes in favor of employers—to preserve this statutory right. \textit{See id.}

\textsuperscript{317} \textit{See supra} note 107.

\textsuperscript{318} \textit{See NLRB v. Mackay Radio & Tel. Co.}, 304 U.S. 333, 345-46 (1938).

\textsuperscript{319} \textit{See infra} note 290.

\textsuperscript{320} \textit{See 1 LABOR MANAGEMENT RELATIONS ACT HISTORY, supra}, note 153; 2 LABOR MANAGEMENT RELATIONS ACT HISTORY, \textit{supra}, note 154.
it adjusted striker replacement policy without provoking conflict with Congress. Hence, the striker-replacement and ULP doctrines had enough pliability to allow the NLRB, federal courts, and Congress to bring their substantive values to bear on particular labor disputes. These doctrines were also so elastic in their application that Congress accepted them until recently.\textsuperscript{321}

The ability of \textit{Law as Equilibrium} to explain the stable rate of ULP strikes in the 1980s and 1990s is especially impressive. As unions faced the prospect of collapse in this period,\textsuperscript{322} institutional consensus for the striker-replacement and ULP strike doctrines broke down. The Workplace Fairness Act, a bill to repeal \textit{Mackay Radio} and \textit{TWA},\textsuperscript{323} was narrowly defeated in the 102nd\textsuperscript{324} and 103rd\textsuperscript{325}

\begin{itemize}
  \item \textsuperscript{322} See Craver, \textit{supra} note 309, at 35.
  \item \textsuperscript{323} See H.R. 5, 102d Cong., 1st Sess. (1992). This bill had two provisions. See \textit{id}. The first part proposed to make it unlawful for an employer "to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute." \textit{id}. This would have repealed \textit{Mackay Radio}'s striker replacement dictum. The second part of the bill proposed to make it unlawful for an employer:

  \begin{itemize}
    \item to otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who—
    \begin{itemize}
      \item (A) was an employee of the employer at the commencement of the dispute;
      \item (B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and
      \item (C) is working for, or has unconditionally offered to return to work for, the employer.
    \end{itemize}
  \end{itemize}

  \textit{id}. In effect, this provision proposed to repeal \textit{TWA}. The text of the bill appears in http://thomas.loc.gov/cgi-bin/query/D?c102:1:/temp/~c102IT4gYp: (Congress's Internet site, visited on May 16, 1999).

  \item \textsuperscript{324} The House passed the bill on a recorded vote, 247-182, on July 17, 1991, but was sidetracked by a threatened filibuster. See Striker Replacement Bill Faces Uncertain Future in Senate, \textit{DAILY LAB. REP.} (BNA) No. 143, at A-17 (July 25, 1991). Thus, the bill was not brought before the full Senate until nearly a year later. President Bush dampened prospects for passing the bill when he threatened to veto it. See \textit{Administration Policy Statement on S 55 Workplace Fairness Act, June 9, 1992}, \textit{DAILY LAB. REP.} (BNA) No. 112, at F-1 (June 10, 1992). Bush said the bill "would destroy a prime component of the economic balance between labor and management in collective bargaining." \textit{id}. As the bill was being readied for Senate debate, Sen. Robert Packwood offered a compromise version that would have limited an employer's right to hire permanent replacements if a union refused to submit its dispute to an advisory fact-finding panel and went out on
Congress.

But even as Congress failed to alter these doctrines, leaving the judiciary's constricted interpretations in place, the NLRB strongly signaled its unwillingness to accept the emerging status quo. In deference to labor's role in the 1992 elections, President Clinton appointed William Gould IV, the first NLRB Chairman to have direct experience as a union lawyer. Departing at times from a Board Member's reserved form of expressing a point of view, Chairman Gould signaled his rejection of Pattern Makers in unusually blunt language. He was just as frank in questioning the Court's interpretation of an employer's duty to bargain. In several key cases, he joined a majority that


325. The bill failed on a Senate vote to cutoff a threatened filibuster. See Senate Vote to End Filibuster on Striker Replacement Fails 53-47, DAILY LAB. REP. (BNA) No. 132, at AA-1 (July 13, 1994); Defeat of Striker Replacement Bill a Victory for Business Coalition, DAILY LAB. REP. (BNA) No. 133, at D4 (July 14, 1994).


328. See Monson Trucking, 324 N.L.R.B. 933, 939 (1997). In a concurrence, Chairman Gould said:

In my view, Pattern Makers is inconsistent with the Act's objectives and, under certain circumstances, I believe unions may impose sanctions in the interest of solidarity. What was at stake in Pattern Makers was the proper balance between the competing principles of employees' right to engage in concerted activity favored by Federal labor policy... and the right to refrain from such activity. In Pattern Makers, first the Board and then, by relying on the Board's expertise, the Court gave focus solely to the right to refrain from concerted activity. The result has been an erosion of the core Section 7 right to engage in concerted activities which, coupled with the employer's right to permanently replace economic strikers upheld in NLRB v. Mackay Radio & Telegraph Co., has in many circumstances made exercise of the right to strike protected by Section 13 difficult if not well nigh impossible. Accordingly, I am of the view that the Board can and should change its mind on this matter and reject the Pattern Makers rationale.

Id.


By giving labor costs a dominant role in the interpretation of First National Maintenance... the Board absolves the employer of the obligation to bargain once that employer asserts that labor costs are not a consideration in its decision. The result is a clear invitation to posturing, game playing, and obfuscation in an
distinguished an employer's attempted use of TWA's strategy to induce strikers to cross over, thus depriving these employers of the beneficial use of that precedent. In one case, albeit in a footnote, a Board majority that included Gould openly disregarded TWA.

In addition, Gould was part of a majority that established an important new Board presumption that an employer hires only temporary striker replacements, unless the employer expressly states that such hiring is permanent. This new presumption forced employers to choose between exposing themselves to Belknap-type lawsuits or foregoing the Mackay Radio doctrine. Thus, an attempt to conceal and deceive. The possibility of deception is further aided by the limited amount of information that unions have access to as part of the bargaining process. Ultimately, under the Board's current standard, the answer to the question of whether the employer's decision implicates labor costs will be learned only after time consuming, lengthy litigation. Equally important, in the bargaining which precedes litigation, there will be an incentive not to share information which might establish the wrong motivation in ensuing NLRB proceedings.

Id.

330. See Caterpillar, Inc., 321 N.L.R.B. 1130, 1130 (1996) ("[W]e emphasize that this is not the same type of situation as in TWA v. Flight Attendants. In TWA, the Supreme Court held that an employer is not required to lay off junior crossover employees in order to reinstate more senior full-term strikers at the conclusion of a strike. Our unfair labor practice finding here does not conflict with that decision.").

331. See Medite of New Mexico, Inc., 314 N.L.R.B. 1145, 1148 n.12 (1994). In an ending footnote, the Board quietly signaled its unwillingness to follow TWA:

Because the positions put up for bid are vacant positions, a striker's successful bid for the position does not result in displacing any of the strike replacements or earlier returned strikers. Therefore, our ruling here is not inconsistent with the principles underlying NLRB v. Mackay Radio & Telegraph Co. Cf. TWA v. Flight Attendants, (holding that an employer is not obligated to permit strikers to use their seniority to displace less senior strike "crossovers") (citations omitted) (emphasis added).

Id. The italicized text signifies the factual connection to TWA.

332. See O.E. Butterfield, Inc. 319 N.L.R.B. 1004 (1995). "[B]ecause an employer is the party with superior access to the relevant information, the burden should logically be placed on it to show that it had a mutual understanding with the replacements that they are permanent . . . . It is therefore incumbent on the employer, which has control over employees' status, to communicate clearly with employees as to whether they have been hired on a permanent or temporary basis." Id. at 1006.

333. See Foreman v. AS Mid-America, 586 N.W.2d 290 (Neb. 1998). The Nebraska Supreme Court ruled that the employer made an enforceable promise to striker replacements that they would be free from harassment and intimidation by reinstated strikers. See id. at 301. The court concluded that "appellants relied on these representations and were damaged as a result." Id. at 305. Relying on Belknap, the court ruled that the striker replacements' "claims state a cause of action for fraudulent misrepresentation and the claim is not preempted by federal labor law." Id.
precedent that unions perceive as harmful was turned on its head.334
As a practical matter, this ruling mooted the doctrinal significance of Mackay Radio and Mastro Plastics by treating employer hiring of striker replacements as only temporary. In these cases, the Board ignored ALJ rulings that an economic strike converted to a ULP strike, and ruled that since the replacements were only temporary, the employer must immediately reinstate strikers.335

Looking back on sixty years of the economic and ULP strike doctrines, the theoretical principles of Law as Equilibrium are clearly in evidence. The main progenitors of these doctrines, the NLRB and Supreme Court, took "actions that serve their preferences or goals, and that, in pursuing such goals, institutional actors act in light of the knowledge that they are interdependent."336 In the most recent interaction between the Gould Board and the Supreme Court, these institutions "behave[ed] strategically, anticipating the responses of [each] other... and signaling the nature and intensity of their preferences to... [each] other."337

Taking a much longer view, Law as Equilibrium explains the oddly congruent positions of the two main architects of national labor policy, Sen. Robert Wagner and Sen. Robert Taft. The former, in proposing and leading the way toward enactment of the pro-union NLRA in 1935, sought "equality of bargaining power" between workers and their employers through collective bargaining.338 His Republican counterpart used virtually the same language to promote

334. See Selected Statements on Striker Replacement Legislation (HR 5) Delivered Before House Education and Labor Subcommittee on Labor-Management Relations, DAILY LAB. REP. (BNA) NO. 45 at D-1, D5 (March 7, 1991) (reporting testimony of Lane Kirkland, President of AFL-CIO). "H.R. 5 would overturn the judicially created 'permanent strike replacement' doctrine first stated in Labor Board v. Mackay Co., 304 U.S. 333 (1938) and more recently amplified in such decisions as Belknap v. Hale" (citations omitted).

335. See e.g., Target Rock Corp., 324 N.L.R.B. 373 (1997) (concluding that "the replacements did not understand that they were hired as permanent employees and that the Respondent did not intend for them to be so." This effectively negated the ALJ's ruling that the company's conduct prolonged the strike and converted an economic strike into an unfair labor practice strike.) Id. See also U.S. Serv. Indus., 315 N.L.R.B. 285, 286-87 (1994) (concluding that economic strikers were entitled to reinstatement because employer had not made offer of permanent employment to striker replacements).

336. Eskridge & Frickey, supra note 1, at 33.

337. Id.

By the convention of two Court-approved doctrines, one permitting replacements to permanently replace strikers, and another to permit ULP strikers to be immediately reinstated at the expense of replacements, the contrasting interests of these legislative architects have been balanced. In the process, the law’s tempering influences have abated the harshest aspects of labor disputes. Thus, the NLRA, although an aging statute, has evolved to bring into equilibrium not only the law of striker replacements, but also, the opposing interests of unions and employers and the conflicting policy preferences of the coordinate branches.340


It seems to me that our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels that it can make an unreasonable demand and get away with it.... If there is reasonable equality at the bargaining table, I believe that there is much more hope for labor peace.

340. But see Brudney, A Famous Victory, supra note 9, at 1035 (opining that appellate courts are altering settled interpretations of the NLRA; thus, this law is an aging statute “being applied in legal and social circumstances unknown to its original authors and proponents”).