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Michael H. LeRoy*

I. INTRODUCTION

Minnesota recently passed the Picket Line Peace Act, making it illegal for an employer to hire permanent replacements for striking workers. The Act is notable in part because, in 1992, Congress came close to enacting nearly identical federal legislation, failing to do so despite strong support from labor organizations such as the AFL-CIO. The Minnesota law is also notable on its own terms for three reasons.

First, the Picket Line Peace Act addresses the balance of bargaining power between workers and employers. A growing number of employers with union-represented employees are hiring or threatening to hire permanent replacements when

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2. See S. 55, 102d Cong., 1st Sess. (1991) and H.R. 5, 102d Cong., 1st Sess. (1991), both proposing to make it an unfair labor practice for an employer “to offer, or to grant, the status of permanent replacement employee to an individual performing bargaining unit work for the employer during a labor dispute.” Although the bill passed in the House, it was defeated when Senator Orin Hatch threatened a filibuster and supporters fell three votes short to invoke cloture. Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements, Daily Lab. Rep. (BNA) No. 117, at A-9 (June 17, 1992) [hereinafter Senate Vote Kills Bill].

their employees strike. This departs from the previous employer practice of hiring temporary replacements to work only through a strike. An employer does not dismiss permanent striker replacements once a strike is ended. Strikers whose positions are filled by permanent replacements, therefore, do not automatically return to their jobs. Instead, they are placed on a reinstatement list, and years may pass before they return to work, if they do so at all. Thus, by hiring permanent striker replacements, increasing numbers of employers have turned strikes, intended by Congress as the workers' "weapon" of self-help for furthering collective bargaining, into their own "weapon." As a result, unions today are less likely to strike, and because they have lost an essential bargaining lever, their labor agreements have provided union workers weak gains or even "give-backs" to employers.

Minnesota's Picket Line Peace Act appears to restore the balance of bargaining power between workers and employers.

Second, the title and legislative history of the Act emphasize public safety. The hiring of permanent striker replacements often causes extreme tension in communities affected by strikes, and sometimes leads to violence. Employers may seek to hire people in the community as permanent replacements, causing strikers, who already perceive themselves to be making a large financial sacrifice, to lash out with vengeance at the people who cross their picket line to take their jobs. In Austin, Minnesota, this situation occurred during the 1985-86 United Food & Commercial Workers' strike against Geo. A. Hormel & Co., the nation's largest meatpacker. The strike provoked such violence that Minnesota's Governor, Rudy Perpich, called out the National Guard to restore public order. The strike has left a continuing legacy of unrest and disquiet in Austin. The Minnesota Picket Line Peace Act, passed in the aftermath of the Hormel strike, has a significant public safety dimension

4. See infra notes 45-46 and accompanying text.
8. See infra notes 61-65 and accompanying text.
10. See infra text accompanying notes 66-89.
11. See infra note 71.
12. See infra text accompanying notes 86-89.
in addition to its labor policy dimension.\textsuperscript{13}

Third, the Minnesota statute has the potential to reshape federal labor law. The U.S. Supreme Court stated in dictum in \textit{NLRB v. Mackay Radio & Telegraph Co.}\textsuperscript{14} that employers have a right to hire permanent striker replacements.\textsuperscript{15} The Court failed to provide any basis for its newly announced doctrine and seemingly contradicted an express statutory prohibition against diminishing or interfering with a worker's right to strike.\textsuperscript{16} \textit{Mackay Radio} remains, however, valid precedent. In the 1980s, three Supreme Court decisions built on \textit{Mackay Radio}, each having serious, negative consequences for a worker's right to strike.\textsuperscript{17} The Minnesota Picket Line Peace Act may now bring \textit{Mackay Radio} into question.

The Minnesota Picket Line Peace Act highlights the paradoxes created by \textit{Mackay Radio} and its progeny. No one doubts the precedential value of \textit{Mackay Radio}; because the permanent replacement doctrine is rooted in dictum rather than law, however, it is fair to ask whether that doctrine should preempt a state law embodying a conflicting policy. The question becomes particularly pointed given the growing tendency under the Burger-Rehnquist Court to construe statutes literally.\textsuperscript{18} Since the National Labor Relations Act ("NLRA") expressly prohibits any judicial construction that interferes with, impedes, or diminishes in any way the right to strike, should \textit{Mackay Radio}'s contrary dictum survive the protective construction demanded by the federal statute? Also, the Supreme Court ruled in \textit{Belknap, Inc. v. Hale}\textsuperscript{19} that permanent replacements who were dismissed by their employer could maintain state lawsuits for breach of contract and misrepresentation, thereby subjecting employers to conflicting and potentially costly state and federal labor regulation.\textsuperscript{20} If the Court is willing to permit state common law claims for breach of contract and misrepresent-
sentation to share the field of strike settlement with the NLRA, should the Court deny the Minnesota Legislature authority to enact the Picket Line Peace Act—especially when Minnesota's statute, unlike the Kentucky state claims in Belknap, is a traditional exercise of the state's police power to protect public safety? The Picket Line Peace Act is therefore significant not only for its potential impact on collective bargaining but also for its potential to compel the Court either to articulate a rationale for Mackay Radio's policy of permanent striker replacements—which it failed to do in 1938—or to repudiate that policy altogether.

This Article examines the policies underlying both the hiring of permanent striker replacements and the enactment of the Minnesota Picket Line Peace Act. It concludes that Mackay Radio provided no rationale for ignoring the NLRA's express prohibition against diminishing the right to strike, and consequently has upset the balance of bargaining power created by Congress between employers and employees in favor of the employers. The Picket Line Peace Act, in addition to serving important public safety concerns, helps to correct that imbalance.

II. THE NATIONAL PUBLIC POLICY OF PERMANENT STRIKER REPLACEMENTS

The NLRA established a federal policy permitting most private sector employees to organize and to bargain collectively over wages, hours and other terms and conditions of employment with their employer. The public policy rationale for the law was two-fold. Prior to enactment of the law, the Supreme Court had interpreted the Due Process Clause to curtail state power in legislating minimum employment standards. Moreover, as a result of immigrants flooding the


22. The Labor-Management Relations Act of 1947 ("LMRA") amended the NLRA; among the changes it made, the LMRA defined collective bargaining as "the performance of the mutual obligation of the employer and the representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(d), 61 Stat. 136, 142 (1947) (codified at 29 U.S.C. § 158(d) (1988)).

23. See Lochner v. New York, 198 U.S. 45 (1905) (invalidating a New York law prohibiting the employment of bakery employees in excess of 10 hours a day or 60 hours a week); see also Adkins v. Children's Hospital, 261 U.S. 525
nation during the height of the industrial period, labor supply exceeded demand. As a consequence, the bargaining power of employees vis-a-vis their employers was extremely low. One explicit rationale for permitting employees to bargain collectively, therefore, was to equalize their bargaining power with employers. Furthermore, the NLRA envisioned that more equal bargaining power would redistribute wealth to workers and improve their purchasing power, thereby benefitting the depressed economy.

To make collective bargaining effective for workers, the NLRA legitimized certain economic pressures that workers could muster in the course of negotiating with employers. The most effective bargaining lever provided to workers was the right to engage in concerted activity, specifically the right to strike. Congress regarded the right to strike as so fundamental to collective bargaining that it safeguarded this right, providing that "[n]othing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike." The right to strike increased the likelihood that employers would experience disruptions in their production and provision of services, and by implication, incur at least some loss of business, profits, and goodwill. The strike thus

(1923) (invalidating a District of Columbia minimum wage law for women). But see Bunting v. Oregon, 243 U.S. 426 (1917) (upholding a maximum hour restriction on manufacturing employment); Muller v. Oregon, 208 U.S. 412 (1908) (upholding a law prohibiting women from working in laundries more than 10 hours a day).

24. See Don D. Lescohier, Working Conditions, in History of Labor in the United States, 1896-1932, at 3, 19 (John R. Commons ed., 1935). Lescohier observed that "[t]he enormous immigration of 1880-84 facilitated the efforts of employers to obtain immigrants as strikebreakers and wage levelers." Id. Moreover, "[e]mployers, during the period of industrial development after 1898, wanted labor—abundant labor, cheap labor, and always docile labor. The wage earners . . . wanted protection against labor that would undercut wages, flood the labor market, and be difficult to organize." Id. at 25. Notwithstanding various regulations restricting immigration, from 1891 to 1900 3,678,564 immigrants entered the United States. Id. at 15 (table). Between 1901 and 1910, 8,695,386 immigrants entered the country; 5,735,811 immigrants entered between 1911 and 1920; and 3,399,120 entered between 1921 and 1931.

25. See 29 U.S.C. § 151 (1988) (asserting the desirability of redressing the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers").

26. Id. (stating that the inequality of bargaining power "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries").

27. See supra note 21 and accompanying text.

served as a significant inducement for employers to engage in collective bargaining.

Shortly after the law was enacted, however, the Supreme Court substantially curtailed the right to strike. In *NLRB v. Mackay Radio & Telegraph Co.*, national officers for the American Radio Telegraphists union called a strike to begin on October 4, 1935, against the employer's San Francisco operations. Mackay Radio countered by hiring within three days a sufficient number of replacement workers to render the strike ineffective. Significantly, Mackay Radio induced its replacement workers to come to San Francisco to work by promising them an opportunity to "remain if they so desired," which meant that "the supervisor would have to handle the return of the striking employees in such fashion as not to displace any of the new men who desired to continue in San Francisco." Thus, at the conclusion of the strike, Mackay Radio required eleven strikers seeking to return to work to reapply for their positions. Eventually, the employer reinstated all but five strikers. These five were notable because they "were prominent in the activities of the union and in connection with the strike." In the resulting unfair labor practice proceedings, the National Labor Relations Board ("NLRB" or "Board") found that Mackay Radio had unlawfully discriminated against these five workers on the basis of their union membership. On appeal, the Supreme Court affirmed the Board's anti-discrimination ruling.

The Court's decision contained dictum, however, that went well beyond the issue presented on appeal. The Court went on to express the principle that employers may hire permanent replacements for striking employees. The Court explained that "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his

29. 304 U.S. 333 (1938).
30. *Id.* at 337.
31. *Id.*
32. *Id.* at 338.
33. *Id.*
34. *Id.*
35. *Id.* at 338-39.
36. *Id.* at 339.
37. *Id.* at 340.
38. *Id.* at 343.
business by supplying places left vacant by strikers." Amazingly, the Court stated this principle while at the same time identifying language in the act requiring that courts not construe the NLRA "so as to 'interfere with or impede or diminish in any way the right to strike.' "

Mackay Radio’s approval of the hiring of permanent striker replacements is plainly at odds with the NLRA’s prohibition against judicial construction that diminishes the right to strike. Unfortunately, the Court announced this policy without making any distinction between permanent and temporary striker replacements. In theory, it should be more difficult for employers to attract replacements for strikers if they promise only temporary employment (i.e., employment only through the strike). Replacements who cross a striking union’s picket line are generally subjected to verbal abuse and, occasionally, physical violence. Thus, working through a strike may be unappealing to prospective replacements, unless the employer can offer something more, such as permanent employment. In that case, prospective replacements might find it worthwhile to suffer the inconvenience, taunts, and pangs of conscience entailed in crossing the strikers’ picket line. The diminished number of strikes in the 1980s and 1990s, when employers have been increasingly willing to hire permanent striker replacements, strongly suggests that the Mackay Radio doctrine has indeed impaired, diminished, and interfered with the right to strike.

40. Mackay Radio, 304 U.S. at 345.
42. See infra notes 69-89 and accompanying text.
43. See infra note 44, documenting the sharp decline in strike frequency, and notes 49-58, documenting the numerous uses of the permanent replacement strategy. In the 1980s, the Supreme Court built on the Mackay Radio doctrine in several cases that involved permanent striker replacement issues. In Belknap, Inc. v. Hale, 463 U.S. 491 (1983), the Court ruled that striker replacements who were promised permanent employment, but were later dismissed as part of a strike settlement, could sue their employer for breach of contract and misrepresentation. Id. at 512; see infra notes 151-59 and accompanying text. Thus, the Court exposed employers to additional liability in the form of separate claims from dismissed replacement workers if the employers chose to settle strikes by returning strikers to their jobs.

In Pattern Makers’ League v. NLRB, 473 U.S. 95 (1985), 11 strikers resigned their membership and returned to work after their union rejected the employer association’s settlement offer; the union fined these 11 members pursuant to its bylaws. 473 U.S. at 97-98. The NLRB ruled that the union committed an unfair labor practice by refusing to accept the members’ resignations, and the Supreme Court affirmed the Board’s ruling. Id. at 98-
III. IMPACT OF THE DIMINISHED RIGHT TO STRIKE

Since 1980, there has been both a sharp drop in the number of work stoppages\textsuperscript{44} and an increase in the expressed willingness of employers to hire permanent replacements for strikers.\textsuperscript{45} Roughly two-thirds of unions reported that employers were much more likely to use the permanent replacement strategy during the late 1980s than they were during the late 1970s.\textsuperscript{46} Although no study has established a relationship between growing employer willingness to hire permanent replacements and the sharply diminished number of strikes,

100. Thus the unions lost their limited power to maintain solidarity by sanctioning members who acted to break the strike.

In Trans World Airlines v. Independent Federation of Flight Attendants, 5,000 flight attendants went out on strike after their contract expired. TWA responded by hiring permanent replacements. 489 U.S. 426, 428-29 (1989). The airline, still short-handed, appealed to strikers to abandon the picket line and "crossover" to work; it offered the inducement of permanent basing in domiciles vacated by continuing strikers. \textit{Id}. at 429-30. Therefore, even though continuing strikers might not have been permanently replaced, a crossover from their bargaining unit might displace them from their domicile indefinitely. \textit{Id}. In short, the strategy pitted low-seniority strikers who could instantly achieve a domicile placement that would otherwise take years to get through the seniority system, against high-seniority strikers. \textit{Id}. at 430. The Court found that TWA did not commit an unfair labor practice in employing this crossover strategy. \textit{Id}. at 442. The decision especially crippled the right to strike, for in addition to endorsing the hiring of permanent replacements, it allowed an employer to divide a union's membership by giving special treatment to workers who broke ranks with their fellow strikers.

44. During the 1970s, major work stoppages, including both strikes and lockouts, were much more numerous. In 1970, there were 381 work stoppages involving 1,000 or more workers; in 1971, 298; in 1972, 250; in 1973, 317; in 1974, 424; in 1975, 235; in 1976, 231; in 1977, 298; in 1978, 219; and in 1979, 235. \textit{Id}. Bureau of Labor Statistics, U.S. Department of Labor, Compensation and Working Conditions 61 (table D-1) (1992). In 1980, however, there were only 187 such work stoppages; in 1981, 145; in 1982, 96; in 1983, 81; in 1984, 62; in 1985, 54; in 1986, 69; in 1987, 46; in 1988, 40; in 1989, 51; in 1990, 44; in 1991, 40; and through May of 1992, 18. \textit{Id}.\textsuperscript{45}


46. See Government Accounting Office, supra note 45, app. III, at 20. In comparing employer use of the permanent replacement strategy in the late 1970s with the late 1980s, 63% of union respondents answered that the practice was \textit{much less prevalent} in the late 1970s, and 13% answered that the practice was \textit{somewhat less prevalent}. \textit{Id}.
the impact that the replacement strategy has had on union decision making during the 1980s suggests such a relationship.

In part, the increased use of permanent replacements can be attributed to their apparent effectiveness in dealing with a number of highly visible strikes during the 1980s. The most notable of these, perhaps, was the air traffic controllers' strike of 1981. In response to the strike, then-President Reagan fired more than 11,000 air traffic controllers, hiring permanent replacements.\(^{47}\) Another prominent use of the permanent replacement strategy occurred during the 1985-86 strike at the Hormel plant in Austin, Minnesota.\(^{48}\) Other strikes in which employers hired or threatened to hire permanent striker replacements involved airlines,\(^{49}\) a major bus operator,\(^{50}\) coal\(^{51}\) and copper\(^{52}\) producers, paper mills,\(^{53}\) professional sports


\(^{48}\) See infra notes 66-89 and accompanying text.


\(^{50}\) In March of 1990, approximately 9,000 members of the Amalgamated Transit Union struck Greyhound Lines, Inc. President of Striking Union Criticizes Greyhound for Seeking Bankruptcy Protection, Daily Lab. Rep. (BNA) No. 109, at A-15 (June 6, 1990). Greyhound continued to operate during the strike by hiring more than 2,450 replacement drivers. Id. When the strikers offered unconditionally to return to work on May 22, the company denied them reinstatement. Id.

\(^{51}\) During the 1989 strike by United Mine Workers against the Pittston Coal Group, the company used replacements to continue its mining operations. Michael deCourcy Hinds, Bitter Coal Strike May Be at End, N.Y. TIMES, Dec. 23, 1989, § 1, at 17.


\(^{53}\) In March 1987, International Paper locked out workers at its Mobile,
teams and umpires, newspapers, a heavy equipment manufacturer, and a major gun manufacturer. Unions and employers watched these and other strikes during the past decade.


55. All but two of 52 major league umpires went on strike at the beginning of the 1979 baseball season. Umpires Call "Strike"—A Different Kind, U.S. NEWS & WORLD REP., Apr. 16, 1979, at 8. The two major leagues drew replacement umpires from the amateur, minor and semiprofessional leagues. Id.


to assess the effectiveness of striking when an employer threatens to hire, or actually hires, permanent replacements; they have seen that, on balance, the unions lost these strikes decisively.\textsuperscript{59} Furthermore unions have seen that employers are more willing to hire permanent replacements and, accordingly, that their members are more likely to lose their jobs.\textsuperscript{60}

It is difficult to pinpoint the economic effect of the diminished right to strike. Between 1982 and 1991, the U.S. Department of Labor’s consumer price index rose 45.5%'\textsuperscript{61} while average wage and benefit gains under collective bargaining agreements rose only 31.75%.\textsuperscript{62} In addition, a recent study found that since 1983, “nonunion wage increases have consistently exceeded those for union workers. By September 1989, the union-nonunion differential in wage rates was smaller than it had been in 1975."\textsuperscript{63} These disparities provide prima facie evidence of the diminished bargaining power of unions in the 1980s and 1990s. It is difficult to determine, however, to what extent employers’ increased use of the permanent replacement strategy caused this diminished bargaining power. Other factors, such as declining union density in particular industries\textsuperscript{64} and increased wage competition from foreign producers\textsuperscript{65} may also be responsible for diminishing union bargaining power.

\textsuperscript{59} When a struck employer hires permanent replacements, the union effectively loses its ability to pressure collective bargaining, although the strike may never technically end. See \textit{supra} notes 49-50, 52-53, & 57 and accompanying text for examples of such strikes.

\textsuperscript{60} Finkin, \textit{supra} note 39, at 548 n.12.

\textsuperscript{61} \textit{BUREAU OF LABOR STATISTICS}, U.S. DEPARTMENT OF LABOR, CPI DETAILED REPORT, Jan. 1992, at 81 (table 24). The CPI for January 1982 was 94.3; the CPI for December 1991 was 136.2. \textit{Id}.

\textsuperscript{62} Mean wages and benefits under collective bargaining agreements covering 5,000 or more workers increased 2.8% in 1982; 3.0% in 1983; 2.8% in 1984; 2.7% in 1985; 1.6% in 1986; 2.6% in 1987; 2.5% in 1988; 3.4% in 1989; 3.2% in 1990; and 3.4% in 1991. \textit{BUREAU OF LABOR STATISTICS}, U.S. DEPARTMENT OF LABOR, COMPENSATION AND WORKING CONDITIONS, Mar. 1992, at 123 (table B-23).

\textsuperscript{63} Kay E. Anderson et al., \textit{Measuring Union-Nonunion Earnings Differences}, \textit{MONTHLY LAB. REV.}, June 1990, at 26, 34 (citation omitted).


IV. IMPACT OF PERMANENT STRIKER REPLACEMENTS IN MINNESOTA: THE 1985-86 HORMEL STRIKE

The United Food and Commercial Workers' Local P-9 strike against Geo. A. Hormel & Co. in Austin, Minnesota, provides a case study of a contemporary strike involving the hiring of permanent replacements. It reveals the problems permanent replacements can cause and the policies behind the Minnesota Picket Line Peace Act that the strike helped to engender.

In 1982, workers at Hormel's Austin plant agreed to a three-year contract that included a no-strike clause in exchange for Hormel's commitment to make substantial investments in its Austin plant.66 Just one year later, Hormel, grappling with an industry-wide slump, pressed workers to accept a wage cut to remain competitive.67 The workers refused to accept any wage cut and, in 1984, the company unilaterally lowered wages, precipitating a strike by 1,400 workers in August 1985.68 By January 1986, Hormel was hiring replacement workers.69

The events that unfolded after Hormel announced it would hire permanent replacements show how such a strategy, executed on a large scale, raises public safety concerns for a community. In late January, Hormel announced that it would reopen the struck plant, that over 2,000 people had applied for permanent replacement positions, and that seventy-five strikers already had returned to work.70 On January 22, Hormel reopened its plant—but only after 800 National Guard troops and local police cordoned off streets from a freeway that led to the plant to enable replacements and crossovers to enter without obstruction.71 Meanwhile, the conflict spread; over 100 farmers joined the strikers' picket line, and Local P-9 sent out "roving pickets" to Hormel plants in Iowa and Wisconsin.72 Eventually, the roving pickets spread to Hormel plants in Fremont, Nebraska and Dallas, Texas. Hundreds of union-represented

67. Id.
68. Id.
69. Id.
72. Id.
workers honored these picket lines, refusing to go to work.\textsuperscript{73} Hormel responded by firing 350 workers at its Ottumwa plant, sixty at its Fremont plant, and an undetermined number at its Dallas plant.\textsuperscript{74}

At the same time, immense economic and psychological pressures were building on the strikers, who had been on strike for six months at that point. For example, one striker, Elmer Elsberry, faced strong urging from his wife, who had lost her office job at Hormel due to the strike, and from his family to return to work.\textsuperscript{75} He finally returned on January 13, but he received twenty calls that same evening from union members who urged him to return to the picket line.\textsuperscript{76} Elsberry finally chose to return to the picket line, noting, "There's 200 people inside telling you how great you are and 1,400 outside telling you what a scum you are."\textsuperscript{77}

In late January, Governor Perpich withdrew the National Guard, and before long a near-riot broke out at the plant.\textsuperscript{78} Indeed, on January 31, strikers forced the plant to close. They barricaded all plant entrances and littered the freeway exit to the plant with tire-puncturing spikes.\textsuperscript{79} The county sheriff described the incident as "mob rule."\textsuperscript{80} In early February, Minnesota officials investigated reports that Hormel food in Minneapolis stores had been sabotaged.\textsuperscript{81} During this period, police arrested two dozen strikers for blocking plant entrances.\textsuperscript{82}

Nonetheless, within one month of reopening its Austin plant, Hormel rendered the strike meaningless. They hired 1,025 replacement workers, a sufficient number to achieve full production.\textsuperscript{83} In September, the strike was going so poorly that the international union put Local P-9 in trusteeship and negoti-

\textsuperscript{74}. Id.
\textsuperscript{76}. Id.
\textsuperscript{77}. Id.
\textsuperscript{80}. Id.
\textsuperscript{83}. Hiring Completed, supra note 73, at 16.
ated a strike settlement agreement that failed to provide for the immediate reinstatement of strikers.84 By December, the composition of Hormel's Austin workforce included 461 strike crossovers, 594 permanent replacements, and 666 permanently replaced strikers whom Hormel had placed on reinstatement lists.85

Austin, a community of 22,000, remained deeply affected by the strike long after Hormel returned to normal production in early 1986. On April 11, 1986, a rally for replaced strikers erupted in violence. Police arrested seventeen union sympathizers, and eight police officers were hospitalized after being pelted with chunks of asphalt and sprayed with a chemical irritant.86 By late December, 1986, Police Chief Donald Hoffman reported that 275 incidents of strike-related vandalism had occurred in the town.87 Contrasting comments made by those on opposite sides of the dispute reflect the divisive nature of Hormel's strategy. Jo Ellen Spear, a permanent replacement who had been on welfare until she took a job at Hormel, observed: "Even if they [Hormel] cut the benefits in half, I'll still have more than I ever had."88 In contrast, Cindi Bellrichard, whose husband continued to strike, stated: "We have relatives that went into that plant I don't ever intend to speak to again. If I see them on the street, they're going to be called scab."89

V. MINNESOTA'S LABOR LAW AND THE PICKET LINE PEACE ACT

Minnesota law defines sets of private-sector employer and worker unfair labor practices that parallel unfair labor practices under the NLRA.90 The state need not, however, interpret its law in conformity with the NLRA.91 Under state law, for example, workers cannot strike while a collective bargain-

85. Id.
87. Bitter Aftermath, supra note 84, at 17.
89. Id.
91. See Willmar Poultry Co. v. Jones, 430 F. Supp. 573 (D. Minn. 1977) (ruling that Minnesota was not obligated to interpret its statutory exclusion of agricultural workers as if the NLRA's exclusion of such workers applied).
ing agreement that bars striking is in effect;\textsuperscript{92} nor can they strike unless a majority of the bargaining unit votes to do so by secret ballot.\textsuperscript{93} These two restrictions on the right to strike do not appear in the NLRA. Thus, although a strike in violation of a contract that is not open to renegotiation does not violate the NLRA, such a strike does violate Minnesota law.\textsuperscript{94}

Minnesota law also regulates employer conduct during strikes. It is an unfair labor practice for an employer to blacklist union members from work because they strike,\textsuperscript{95} or to subcontract a union member's bargaining unit work for lower wages than agreed upon in a labor contract,\textsuperscript{96} or to utilize pro-

\textsuperscript{92}MINN. STAT. § 179.11(1) (1992) (making it an unfair labor practice "[f]or any employee or labor organization to institute a strike if such strike is a violation of any valid collective agreement between any employer and his employees or labor organization and the employer is, at the time, in good faith complying with the provisions of the agreement . . . .").

\textsuperscript{93}MINN. STAT. § 179.11(8) (1992) (making it an unfair labor practice "for any person or labor organization to cooperate in engaging in, promoting or inducing a strike" unless, upon a vote, the majority "of the voting employees in a collective bargaining unit of the employees of an employer or association of employers against whom such strike is primarily directed" approve the strike). The statute provides that "[s]uch vote shall be taken by secret ballot at an election called by the collective bargaining agent for the unit, and reasonable notice shall be given to all employees in the collective bargaining unit of the time and place of election." \textit{Id}.

\textsuperscript{94}McLean Distribution Co. v. Brewery & Beverage Drivers Union Local 993, 94 N.W.2d 514, 521 (Minn.), cert. denied, 360 U.S. 917 (1959).

\textsuperscript{95}MINN. STAT. § 179.12(6) (1992) (making it an unfair labor practice for an employer "[t]o distribute or circulate a blacklist of individuals exercising a legal right or of members of a labor organization for the purpose of preventing individuals who are blacklisted from obtaining or retaining employment" (emphasis added)). The "retaining employment" provision could potentially prevent an employer from reinstating a striker if the striker were blacklisted for striking. Minnesota law, however, limits the right of private-sector workers to strike in a way that the NLRA does not. Under federal law, it is not an unfair labor practice for union members to strike when their contract is not open to renegotiation, but under section 179.11 of the Minnesota Statutes, this is an unfair labor practice. \textit{See McLean Distribution Co., 94 N.W.2d at 521; see also supra note 92.}

\textsuperscript{96}Section 179.12(7) makes it an unfair labor practice for an employer \textit{[t]o engage or contract for the services of a person who is an employee of another if the employee is paid a wage that is less than the wage to be paid by the contractor or contracting employer under an existing union contract for work of the same grade or classification. MINN. STAT. § 179.12(7) (1992). The legislature apparently directed this language at the common employer practice of subcontracting or outsourcing a union's bargaining unit work, usually done in the absence of a strike. Plainly, the purpose of the law is to remove any cost-saving to an employer in substituting subcontracted labor for the bargaining unit. However, the language could also be construed to limit an employer's use of a subcontractor during a
fessional strikebreakers. In 1991, the Minnesota Legislature added to these employer prohibitions by passing the Picket Line Peace Act. The Act, modeled on legislation then pending in the U.S. Congress, makes it an unfair labor practice for a private-sector employer "[t]o grant or offer to grant the status of permanent replacement employee to a person for performing bargaining unit work for an employer during a lockout of employees in a labor organization or during a strike of employees in a labor organization authorized by a representative of employees." An almost identical provision applies to public sector employers.

On May 31, 1991, Minnesota's Republican Governor, Arne Carlson, vetoed the Act. The Chief Clerk of the Democrat-controlled House of Representatives, however, contended that the Governor's veto violated the state constitution and delivered the bill to the Secretary of State for certification. The district court declared the veto invalid and the bill became strike unless an employer paid wages equal to those under the labor contract to employees of the subcontractor.

97. MINN. STAT. § 179.12(8) (1992) (making it an unfair labor practice for an employer "[w]ilfully and knowingly to utilize a professional strikebreaker to replace an employee or employees involved in a strike... at a place of business located within this state"). This provision limits an employer's use of replacement workers during a strike. Its reference to "professional strikebreaker," however, clearly suggests that an employer could distinguish a permanent striker replacement from a transient worker employed periodically as a strikebreaker. Thus, this provision probably provides strikers little or no actual protection against an employer's hiring of permanent striker replacements.

98. See supra note 2 (discussing the then-pending federal legislation).


102. The Governor failed to return the veto within the mandated time period. Id., slip op. at 15. The relevant constitutional provision states:

Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor... If he vetoes a bill, he shall return it with his objections to the house in which it originated... Any bill not returned by the governor within three days (Sundays excepted) after it is presented to him becomes a law as if he had signed it, unless the legislature by adjournment within that time prevents its return.

MINN. CONST. art. IV, § 23


104. Id., slip op. at 20, 28. The legislature originally petitioned the Minnesota Supreme Court to exercise its original jurisdiction over the veto contro-
On its face, the new law appeared to conflict directly with the *Mackay Radio* doctrine permitting employers to hire permanent striker replacements. It was first challenged on these grounds in *Midwest Motor Express v. Local 120, International Brotherhood of Teamsters*. In upholding the constitutionality of the Minnesota law, the district court rejected Midwest Motor's argument that the legislature's real intent was to negate the *Mackay Radio* doctrine permitting the hiring of permanent replacements, rather than to maintain picket line safety. The court concluded that the legislature's dominant intent was to prevent picket line violence during strikes involving permanent replacements, not to promote equality of bargaining power.

The Act met a different fate in federal court. In *Employers Ass'n, Inc. v. United Steelworkers of America*, Judge Rosenbaum concluded that the Act:

> does not selectively address the right of an employee, an employer, or the State to redress picket line violence. Instead, the State's blanket prohibition of hiring permanent striker replacements directly interferes with an employer's federally protected right to do so. The State's attempt to avoid picket line violence by a blunderbuss prohibition of a practice which has been protected by over fifty years of

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106. See supra text accompanying note 99 (quoting the Act).

108. *Id.* at 2566. Referring to the Picket Line Peace Act, the court observed that "[i]n Minnesota the public policy issue is prevention of violence on the picket line and during a strike situation. Its concern is one of public safety." *Id.*

109. *Id.* at 2565. The court observed: "The subject of violence on the picket line and in a strike situation was advanced before legislative committees in strong words . . . ." *Id.* at 2565-66. It concluded: "Minn. Stat. s 179.12(9) is not preempted because the State of Minnesota has a legitimate interest in regulating this area to prevent violence and to promote the peaceful settlement and negotiating in strike situations." *Id.* at 2566.

Supreme Court precedent cannot stand.\textsuperscript{111} He thus held the Act to be preempted by the NLRA.\textsuperscript{112} As the passage above indicates, however, in reaching his decision, Judge Rosenbaum never questioned the validity of the \textit{Mackay Radio} doctrine on which it depended. Indeed, he specifically rejected the State's attempt to call the doctrine into doubt, choosing to "follow \textit{Mackay Radio} and its unvarying progeny."\textsuperscript{113} An appellate court may have greater latitude to consider the matter more fully.\textsuperscript{114}

Thus far, Minnesota courts remain unconvinced. After \textit{Employers Ass'n}, the Minnesota Court of Appeals issued its opinion in the appeal of \textit{Midwest Motor Express}.\textsuperscript{115} The court,

\begin{itemize}
  \item \textsuperscript{111} Id. at 1567 (citations omitted).
  \item \textsuperscript{112} Id. at 1565.
  \item \textsuperscript{113} Id. at 1565 n.9.
  \item \textsuperscript{114} In addition, an appellate court may consider other apparent errors that detract from the significance of the \textit{Employers Ass'n} decision. Unlike \textit{Midwest Motor Express}, which involved a legal controversy arising out of an actual strike, the decision in \textit{Employers Ass'n} was not based on a particular strike. \textit{Compare id. at 1563 with Midwest Motor Express v. Local 120, Int'l Bhd. of Teamsters, 139 L.R.R.M. (BNA) 2563 (Minn. Dist. Ct. Feb. 26, 1992), aff'd, No. C6-92-1126, 1993 WL 7182 (Minn. Ct. App. Jan. 19, 1993). On appeal, the decision can thus be challenged on the ground that the court improperly exercised subject matter jurisdiction where no justiciable case or controversy existed between the parties. See \textit{Employers Ass'n}, 803 F. Supp. at 1562-63 (describing United Steelworker's argument).}
  \item The decision can also be challenged on abstention grounds, having been rendered while the Minnesota Court of Appeals was reviewing constitutional issues raised in \textit{Midwest Motor Express}. \textit{Id. at 1563.} In a similar case, \textit{Pittsburgh Press Co. v. Preate}, a federal district court in Pennsylvania employed the abstention doctrine to deny a newspaper's motion to enjoin Pennsylvania's enforcement of its Strikebreaker Act. \textit{797 F. Supp. 436, 440-41 (W.D.Pa. 1992), aff'd, No. 92-3486, 1992 U.S. App. LEXIS 33096 (3d Cir. Nov. 3, 1992); see also Bardane Mfg. Co. v. Jarbola, 724 F. Supp. 336, 342 (M.D.Pa. 1989) (holding that a provision of Pennsylvania's Strikebreaker Act requiring employers to give notice to replacement workers that the employment offered is in place of striking employees is not preempted by the NLRA). The Pennsylvania Act made an employer's hiring of a "strikebreaker" during a "labor dispute" unlawful. 43 PA. CONS. STAT. § 217.23(a) (1992). In deciding the abstention issue before it, the \textit{Pittsburgh Press} court held that "subject matter jurisdiction is lacking and the [employer's] complaint must be dismissed" because "Pennsylvania has an interest in maintaining peace during labor disputes and that interest extends to the public and the parties." \textit{797 F. Supp. at 440} (citing \textit{Bardane}, 724 F. Supp. at 342). The court reasoned further that "[i]t would be particularly inappropriate for a federal court . . . to render a decision on a question that goes to the heart of a ruling by a state court trial judge and is now pending before a state appellate court." \textit{Id.} Though the district court rendered its decision in \textit{Pittsburgh Press} on August 14, 1992, the court in \textit{Employers Ass'n} failed to cite it. See \textit{Employers Ass'n}, 803 F. Supp. at 1565.}
affirming the district court’s decision, upheld the law; it did not
discuss, however, the public safety argument.116 Instead, the
court responded to Judge Rosenbaum’s constitutional concerns
and held that the Act only applies to prevent the hiring of
replacements that would be considered “permanent” under
Minnesota contract law rather than federal labor law.117
“Those that have no connection to state contract law would be
outside the reach of the statute as we construe it,”118 the court
said, leaving such replacements permissible under federal law.
As Stephen Gordon, the attorney representing the union in
Midwest Motor Express, commented regarding the developing
conflict between state and federal law, “The only definitive res-
olution is the U.S. Supreme Court.”119

VI. QUESTIONS OF PREEMPTION

The Supreme Court’s application of preemption principles
to the NLRA would suggest at first that the Mackay Radio
doctrine should displace the Minnesota Picket Line Peace Act. In
the landmark labor law preemption decision, San Diego Build-
ing Trades Council v. Garmon,120 the Court held that state law
must yield “[w]hen it is clear or may fairly be assumed that the
activities which a State purports to regulate are protected by
section 7 of the National Labor Relations Act.”121 In addition,
reflecting its especially protective treatment of the NLRA, the
Court held that states may not regulate conduct that is even argu-
ably protected by the Act: “When an activity is arguably
subject to section 7 . . . of the Act, the States as well as the fed-
eral courts must defer to the exclusive competence of the Na-
tional Labor Relations Board if the danger of state interference
with national policy is to be averted.”122 Because the Minne-
sota law appears to redress the inequality of bargaining power
arising from employers’ increased use of permanent striker
replacements, which Mackay Radio says the NLRA allows, the
law would appear to be readily preempted—as Judge Rosen-

116. Id. at *2. The court stated: “We do not base our holding on respon-
dent’s claim that the legislature’s concern about strike-related violence brings
the statute under an exception to federal labor law preemption.” Id.
117. Id. at *5.
118. Id.
119. Jill Hodges, State Court Narrows Definition in Upholding ‘Strike-
breaker’ Law, MPLS. STAR-TRIB., Jan. 19, 1993, at 6B.
120. 359 U.S. 236 (1959).
121. Id. at 244.
122. Id. at 245.
Recently, however, Professor Michael Gottesman suggested that the preemption doctrine developed by the Supreme Court should be re-examined and narrowed in light of the sweeping changes that have occurred in the last thirty-five years. He noted that the NLRA's fundamental purpose was to create equality of bargaining power between workers and employers; when _Garmon_ was decided in 1958, private sector unionization was almost three times more prevalent than in 1989. Gottesman therefore concluded that "the NLRA is not working effectively and the institution of collective bargaining is in decline. . . . Congress has shown itself too politically paralyzed to make repairs." He observed that, at the same time, "many states are showing increasing enthusiasm for creating law to protect employee interests. These opposite paths invite inquiry whether state law may bolster the sagging NLRA." In short, Gottesman suggested that _Garmon's_ preemptive reach was broadly constructed to insulate the federal policy favoring worker organization against historic intrusions by states; but state laws clearly supporting federal policy should not be necessarily preempted.

In addition to _Garmon_ preemption, a separate line of authority, under _Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission_, has resulted in preemption of state regulations that intrude impermissibly on the balance of economic weapons reserved to employers and workers under the NLRA. The _Garmon_ and _Machinists_ lines of preemption suggest that states lack power to alter the regulation of economic weapons set forth under the NLRA. Consequently, the Minnesota statute appears to be preempted

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125. _Id._ at 357.
126. _See id._ at 362 & n.25 (in 1958, 38% of the private-sector workforce was unionized, but in 1989, only 13.8% was unionized).
127. _Id._ at 360.
128. _Id._ at 360-61.
129. _Id._ at 426.
131. In _Machinists_ itself, the Court preempted a state agency's order that restricted workers from using a limited work action (refusal to work overtime) in support of their collective bargaining strategy. _Id._ at 154-55.
because it alters the regulation of strike and strike-response weapons set forth under the NLRA and Mackay Radio.

As Gottesman suggested, however, preemption is not a doctrine to be applied mechanically; instead, its proper application requires analysis of context. The context of labor-management relations has changed perceptibly since Professor Archibald Cox set forth his foundation principles of preemption, cited as authority by the Supreme Court in Machinists. Most significantly, employers no longer use permanent replacements for valid business reasons, such as continuing operations through a strike, but rather use them abusively to break unions. With these thoughts in mind, the Minnesota Picket Line Peace Act should not be so easily preempted, as the following issues suggest.

The first issue relates to whether the Minnesota Legislature intended to protect the public against the increased likelihood of violence occasioned by strikes in which permanent replacements are hired. Long before the Minnesota Legislature had enacted the Picket Line Peace Act, it had specifically prohibited strikers from "interfer[ing] with the free and uninterrupted use of public roads, streets, highways, or methods of transportation . . . or to wrongfully obstruct ingress to and egress from any place of business or employment." Moreover, this restriction specifically constituted as "an unfair labor practice for any employee or labor organization . . . ." The state, therefore, has clearly had a long-standing concern about

132. Id. at 140 n.4 ("Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.") (quoting Archibald Cox, Labor Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972)).

133. See supra note 45 (survey results regarding use of permanent replacements); see also John J. Lawler, Unionization and Deunionization: Strategies, Tactics and Outcomes 182 (1990):

In what seems to be an increasingly common scenario, an employer either forces or takes advantage of a strike to secure deunionization . . . . [I]n a protracted strike in which the employer holds fast to its position, discord is apt to build among striking the 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.

Id. (citations omitted).


spillover effects from mass union picketing that imperil public safety.\textsuperscript{136} Thus, the Minnesota Picket Line Peace Act simply extends state regulation of picket line conduct; the Act is clearly not the legislature's first foray in this policy area. The Act stands as a reciprocal restriction against employer conduct that tends to incite picketers. Given that Minnesota experienced a profoundly bitter and occasionally violent strike in the mid-1980s, the public safety rationale for the Act appears sound. The Supreme Court's general acceptance of state regulations that protect property and public welfare further support the Act.\textsuperscript{137}

The second issue centers on whether, assuming that the legislature actually intended to redress a perceived inequality of bargaining power between Minnesota workers and their employers, either of Garmon's precepts or the Machinists rule would preempt the Act.

Under Garmon's "actual conflict" precept,\textsuperscript{138} the Minnesota law raises a paradox. It conflicts with no provision of the NLRA, since the NLRA is completely silent on the matter of an employer's right to hire permanent replacements. Nevertheless, the law clearly violates the doctrine from Mackay Radio conferring on an employer the right to hire permanent replacements. Thus, the paradox: Is Supreme Court dicta the constitutional equivalent of express statutory law for the purpose of preempting conflicting state law?

There would be particular irony in presenting the current Court with this issue. In early 1992, the Court in \textit{Lechmere},

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  \item[136.] See McQuay, Inc. v. United Automobile Workers, 72 N.W.2d 81 (Minn. 1955), aff'd, 351 U.S. 959 (1956) (holding that federal labor law did not preempt state courts from granting employers injunctive relief under this provision, where the union was obstructing highways and plant entrances, interfering with vehicles and their operators, and engaging in mass picketing which led to assaults, coercion, and intimidation of people working through the strike); see also Emery Air Freight Corp. v. Local 544, Int'l Bhd. of Teamsters, 379 N.W.2d 539 (Minn. Ct. App. 1985) (finding that the union violated a restraining order when its members engaged in acts of violence by blocking an employer's entrances).
  \item[138.] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act . . . due regard for the federal enactment requires that state jurisdiction must yield.").
\end{enumerate}
\end{footnotesize}
Inc. v. NLRB\textsuperscript{139} sharply curtailed the right of unions to gain access to nonunion workplaces for the purpose of union organizing. Union members in \textit{Lechmere} had placed handbills on the windshields of cars parked in the employee parking lot of a large shopping mall to inform currently unorganized mall employees of the advantages of union representation.\textsuperscript{140} Although the union did not interfere with any employee's work, the mall's management forced the union to leave the property.\textsuperscript{141} The NLRB ruled that the mall improperly denied the union access to mall employees under its \textit{Jean Country} doctrine, which weighed the employer's property rights against an employees' right to organize under the NLRA.\textsuperscript{142} A majority of the Supreme Court, however, refused to defer to the Board's presumed expertise in formulating labor-management policy.\textsuperscript{143} In arriving at its decision, the Court quoted section 7 of the NLRA, which "provides in relevant part that [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations.'"\textsuperscript{144} It noted that "[b]y its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers."\textsuperscript{145} The Court continued:

In cases involving employee activities, we noted with approval, the Board 'balanced the conflicting interests of employees to receive information on self-organization on the company's property ... with the employer's right to control the use of his property.' In cases involving nonemployee activities ... the Board was not permitted to engage in that same balancing ... .\textsuperscript{146}

Since the present Court gave literal effect to statutory provisions in the NLRA in \textit{Lechmere}, it follows that in evaluating the constitutionality of Minnesota's statute, the Court should also give literal effect to section 13 of the NLRA. Section 13 provides: "Nothing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike ...."\textsuperscript{147} A showing that hiring permanent replacements interfered with, impeded, or diminished in any way the right to strike would seem to make it difficult for the

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\textsuperscript{139} 112 S. Ct. 841 (1992).
\textsuperscript{140} Id. at 848.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 847-48; see \textit{Jean Country}, 291 N.L.R.B. 11, 14 (1988).
\textsuperscript{143} See \textit{Lechmere}, 112 S. Ct. at 853 (White, J., dissenting).
\textsuperscript{144} Id. at 845 (citing 29 U.S.C. § 157 (1988)).
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 848 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 109-10 (1956)).
\end{flushleft}
Court to favor its *Mackay Radio* dictum over the literal provisions of the NLRA.

Under *Garmon*'s "arguable conflict" precept,148 *Mackay Radio*'s unquestioned validity as precedent concerning permanent striker replacements provides a forceful argument for preempting Minnesota's law. In *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants,*149 the Supreme Court cited *Mackay Radio* as support to enlarge employer rights to use replacements to circumvent strikes.150 Therefore, to allow Minnesota's statute to coexist with the Supreme Court's well-developed policy permitting employers to hire permanent replacements would arguably present a conflict of authority.

Although this argument is compelling, it is hard to square with the Supreme Court's decision in *Belknap, Inc. v. Hale.*151 The Court there examined whether the NLRA preempted state contract and misrepresentation claims of employees who were hired as permanent replacements, and who were then dismissed when strikers returned to work pursuant to a strike settlement agreement that provided for reinstatement of strikers.152 The Court affirmed the Kentucky Court of Appeals' ruling that the NLRA did not preempt the replacement workers' state contract and misrepresentation claims.153

In its defense, Belknap had argued that unless the Kentucky claims were preempted, the result would be to expose it "to costly suits for damages under state law for entering into settlements calling for the return of strikers" and to establish policy that would "conflict with the federal labor policy favoring the settlement of labor disputes."154 The Court rejected this argument, concluding that

> when an employer attempts to exercise this very privilege by promising the replacements that they will not be discharged to make room

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148. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959) ("When an activity is *arguably* subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.") (emphasis added).

149. 489 U.S. 426, 443 (1989) (holding that an employer is not required to lay off junior crossover employees in order to reinstate core senior strikers at the conclusion of a strike).

150. *Id.* at 433-34.


152. *Id.* at 493.

153. *Id.* at 512.

154. *Id.* at 499.
for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentation may not be pursued.\textsuperscript{155}

This ruling arguably conflicts with federal labor policy that encourages settlement of all disputes between labor and management.\textsuperscript{156} Once employers hire permanent replacements, they expose themselves to enormous liability if they dismiss those replacements in favor of returning strikers. Thus, the ruling creates a clear disincentive for an employer to seek a settlement with a striking union. Justice Brennan summarized this argument in dissent: "[T]hese 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 \ldots\"\textsuperscript{157} He expressed concern over the threat the Belknap decision would pose to "the efficient administration of the National Labor Relations Act" and the resulting change in "the structure of the economic weapons Congress has provided to parties to a labor dispute."\textsuperscript{158} Underscoring the conflict between state and federal law resulting from the holding in Belknap, Brennan observed: "The potential for conflicting regulation clearly exists in this case. Respondents' breach of contract claim seeks to regulate activity that may well have been required by federal law. Petitioner may have to answer in damages for taking such action. This sort of conflicting regulation is intolerable."\textsuperscript{159} In short, Belknap sets a precedent for permitting states to regulate employer conduct concerning permanent replacements.

Finally, with respect to the Machinists rule, the Minnesota Picket Line Peace Act may, at least arguably, help to restore the balance established by the NLRA. Again, under a literal reading of the NLRA, such as that applied by the Supreme

\textsuperscript{155} \textit{Id.} at 500.
\textsuperscript{156} The LMRA states:
[I]t is the policy of the United States that \ldots sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees.
\textsuperscript{29} U.S.C. § 171(a) (1988).
\textsuperscript{157} Belknap, 463 U.S. at 518 (Brennan, J., dissenting).
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.} at 530.
Court in *Lechmere*, permanent striker replacements should not be allowed. In direct violation of section 13 of the NLRA, permanent replacements “interfere with,” “impede,” and “diminish” the right to strike. The *Mackay Radio* may be what is disturbing the balance envisioned by Congress in passing the NLRA. Congress intended strikes to be a potent weapon available to employees. The Minnesota Picket Line Peace Act may simply be restoring that weapon to its intended stature.

VII. CONCLUSION

Since 1938, the Supreme Court has made public policy concerning an employer's right to hire permanent replacements. Its task has been difficult because it has had to “decide the questions presented without any clear guidance from Congress.” The Court's *Mackay Radio* dicta allowing permanent replacements could possibly find support in the legislative history of the NLRA, common law precedents and statutes. Unfortunately, the Court has never articulated a legal justification for its *Mackay Radio* doctrine. In its present form, therefore, the doctrine stands as a hollow principle. It seems particularly hollow today, when the context of labor-management relations has changed so dramatically from when the Supreme Court decided *Mackay Radio* and set forth the principles of preemption.

Recently, the Court appears to have invited states to make their own labor policy, and the door may be open to a reexamination of the *Mackay Radio* doctrine. In *Belknap*, the Court suggested that Garmon's preemption principles may not prohibit all de facto state regulation of permanent replacements. In *Lechmere*, the Court indicated a renewed willingness to read the terms of the NLRA literally—a literal mindedness that may lead the Court to conclude that permanent replacements are not protected by the NLRA at all.

If the Court should ever consider whether the NLRA preempts the Minnesota Picket Line Peace Act, or another state equivalent, it would face some difficult questions if it were to overturn such a law. The Court could cite *Mackay Radio* as authority for overturning such legislation, but this runs the risk

160. See supra text accompanying note 147.
of showing that the emperor has no clothes. How could a Court that literally interprets the NLRA fail to give literal effect to the NLRA's express prohibition against judicial construction that diminishes, impedes, or interferes with the right to strike? It could cite Garmon's broad principles of preemption, but this could contradict the principles set forth in Belknap. It could cite the Machinists rule, but then it would be preserving a balance between employers and employees established by the Court alone, not by Congress in the NLRA. None of these results seems supportable.

In demonstrating its "unarticulated hostility toward strikes," the Burger-Rehnquist Court has all too often opened itself to the very criticism it makes of the Warren Court: it has legislated and ignored express statutory language. The Minnesota Picket Line Peace Act presents an excellent opportunity for the Court either to establish a solid jurisprudential basis for the Mackay Radio doctrine, or to apply the same "plain meaning" rule it applied in Lechmere and to overturn the Mackay Radio doctrine altogether.
