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"Let's Call It a Draw": Striker Replacements and the Mackay Doctrine

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"Let's Call It a Draw": Striker Replacements and the *Mackay* Doctrine

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The issue of striker replacements has divided the labor law academia. In this Article, Professors Bierman and Gely respond to a criticism of their prior proposal to shift the initial entitlement to striker replacements from the employer to the union, while requiring the union to bargain in good faith over the striker replacement issue. Professors Bierman and Gely describe their initial proposal, illustrate the criticisms that have been made of it, and respond to those criticisms.

I. INTRODUCTION

In a recent article[1] we discuss the issue of the use of permanent replacements for striking employees under the National Labor Relations Act (NLRA).[2] Our discussion focuses on the efficiency aspects of the seminal 1938 case of *NLRB v. Mackay Radio and Telegraph Co.*[3] In the article, we propose a "negotiations" approach, which we argue is likely to result in a more economically efficient interpretation of the *Mackay* doctrine.

As has been the case with other proposals made with respect to this very contentious issue,[4] our proposal has confronted some criticism. Professor William R. Corbett, in a recent piece in the *Ohio State Law Journal*,[5] has

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[1] *See* Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363 (1995).

[2] 29 U.S.C. §§ 141-87 (1988).

[3] 304 U.S. 333 (1938).

[4] *See generally* Leonard B. Boudin, *The Rights of Strikers*, 35 U. ILL. L. REV. 817 (1941) (arguing that employers have an obligation to bargain with strikers, yet they have an incentive to hire striker replacements); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992) (advocating for modifications to the *Mackay* doctrine, within the context of broader labor law reform); Samuel Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287 (1987) (describing the striker replacement doctrine as a troubled area of American labor law); Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547 (1990) (advocating for the outright overruling of *Mackay*); Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803 (1993) (suggesting that labor law and industrial relations policy reinforce management's growing bargaining advantage over unions).

[5] *See* William R. Corbett, *Taking the Employer's Gun and Bargaining About Returning*

attacked our proposal as "theoretically unsound" and unlikely to work in practice.[6] In this Article, we reply to Professor Corbett's criticism. In Part II, we briefly restate our initial proposal. In Part III, we present Professor Corbett's argument and respond to the criticisms he levies against our proposal. In Part IV, we discuss what we believe is the major flaw in Professor Corbett's attack, *i.e.*, a misunderstanding of the labor relations process and its implications for the development of public policy with respect to the striker replacement issue.

II. OUR ORIGINAL PROPOSAL

A. *The Current Approach*

For almost sixty years, the legal rights of striking employees and their employers have been in large measure defined by the U.S. Supreme Court's 1938 *Mackay Radio* decision.[7] In *Mackay*, the Court interpreted the NLRA to generally permit employers to hire permanent replacements for striking workers engaged in economic strikes.[8] The *Mackay* decision has been interpreted to allow employers broad authority to permanently replace economic strikers, and consequently gives little protection to many striking employees with regard to their jobs.[9] The *Mackay* doctrine, however, has been limited in several respects.[10] First, the Court has limited the terms of employment that firms can offer striker replacements.[11] Second, once the strike is over and the strikers have indicated an unconditional desire to be reinstated, the employer must

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It: A Reply to "A Law, Economics, and Negotiations Approach" to Striker Replacement Law, 56 OHIO ST. L.J. 1511 (1995) [hereinafter *Taking the Employer's Gun*]. Professor Corbett himself has also contributed to the ever growing literature on the issue of striker replacements with an interesting, yet misguided, proposal which focuses on procedural aspects of the *Mackay* doctrine. *See* William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" than the Workplace Fairness Act*, 72 N.C. L. REV. 813 (1994) [hereinafter *Procedural Proposal*].

[6] *See Taking the Employer's Gun*, *supra* note 5, at 1520.

[7] *See* NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938).

[8] *See id.* at 345.

[9] *See* Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) (discussing the uneven and unfair manner "in which the NLRA interferes with employees' exercise of economic freedom during a labor dispute").

[10] *See* Bierman & Gely, *supra* note 1, at 368–70.

[11] *See* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (holding that employers cannot, in order to attract replacement workers, offer these replacements superseniority or higher rates of pay than that received by the strikers).

reinstate the strikers to the same or substantially similar jobs as soon as openings occur.[12] Finally, the Court has directly limited the use of *Mackay* as an anti-union device by requiring employers to have clear proof that newly hired replacement workers oppose union representation before being able to assume that there is a "good faith doubt" as to the desire for union representation on the part of these workers.[13]

B. *The Problem*

Our analysis of the striker replacement issue starts from the proposition that a major drawback of the current legal standard is its failure to minimize "opportunistic behavior" between employers and unions.[14] We note that providing employers with the blanket right to hire permanent replacements for economic strikers, as the *Mackay* rule does, makes it difficult to differentiate between those situations where the employer really needs to hire such workers in order to continue operations and those cases where the employer is engaging in arguably opportunistic behavior.[15] Overturning the *Mackay* rule without more, however, will create a situation in which unions would possess complete protection against the hiring of permanent replacements, and thus might themselves have an incentive to engage in opportunistic behavior.[16]

Our interpretation of the problem that the *Mackay* doctrine creates is based on what we believe is a critical distinction in the striker replacement debate: the level of firm-specific investments the workers involved in the strike have made.[17] While this distinction is central to our proposal, it appears that Professor Corbett has overlooked or failed to understand its importance.

In our article, we assert that to understand the dynamics of the striker replacement issue we must first understand the economics of the employment relationship within which the parties interact. We argue that the unionized working environment can be better understood from the perspective of Internal Labor Markets (ILMs). ILMs refer to the type of employment arrangement in which there is a need for workers to develop skills that are idiosyncratic to the particular firm and thus not easily transferable within the industry (*i.e.*, firm-specific skills).[18] Without some form of an expectation or commitment to a

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[12] *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); *see also* NLRB v. Laidlaw Corp., 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

[13] *See* NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990).

[14] *See* Bierman & Gely, *supra* note 1, at 370.

[15] *See id.* at 371–74.

[16] *See id.*

[17] *See id.*

[18] *See* Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective*

long-term employment relationship, it is likely that neither workers nor employers will be willing to "invest" in the acquisition of these firm-specific skills.[19] ILMs refer to the set of explicit or implicit agreements wherein the investments made by the parties in training and other firm-specific skills are protected.[20] Thus, a special, internalized employment relationship between the employer and employee is established.[21]

By internalizing the employment relationship, firms can encourage workers to make long-term investments in the firm. Employees may invest early in their careers by agreeing to a below-market wage rate while learning the skills required to perform a job.[22] Employees recover a return on their investment at a later point in their careers—when their actual wage is higher than what they could make outside the firm.[23] Similarly, employers invest at the earlier stages of the employee's career by paying a wage that is higher than that employee's marginal productivity.[24] The employer recovers her investment during the employee's midcareer years. At that stage, the employee's marginal productivity is believed to exceed the wage paid by the employer.[25]

While, at first glance, ILMs appear to solve the problems associated with the acquisition of firm-specific skills, they create a different and potentially more significant kind of problem. Specific skills are in a sense sunk investments.[26] Once these investments have been made, a bilateral-monopoly bargaining arrangement is created and is ripe for strategic or opportunistic behavior.[27] "Opportunistic" behavior occurs when one party attempts to breach the ILMs arrangement by trying to "expropriate" the returns the other party expects from its investments.[28] The incentives for the employer to comply with the implicit contract are significantly reduced once the employer has recouped her investment.[29] Thus, if the employer terminates the employment relationship with its employees after the employees have learned the firm-specific skill and

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Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation, 136 U. PA. L. REV. 1349, 1353 (1988).

[19] *See id.* at 1361.

[20] *See id.* at 1357–58.

[21] *See id.*

[22] *See* Bierman & Gely, *supra* note 1, at 372; *see also* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 12–19 (1993) (providing alternative interpretations of the ILMs model).

[23] *See* Bierman & Gely, *supra* note 1, at 372–74.

[24] *See id.*

[25] *See id.*

[26] *See* Wachter & Cohen, *supra* note 18, at 1360.

[27] *See id.*

[28] *See id.*

[29] *See id.* at 1361–64.

the employer has recovered its investment, but before the employees are able to recover their investments, the employees' investments will be lost.[30] Similarly, employers' investments could be lost if, during the midcareer years, employees make it more difficult for employers to recover their investments by engaging in behavior such as shirking, withholding information, and otherwise increasing monitoring costs.[31]

Collective bargaining agreements provide a solution to the problem of enforcing ILMs.[32] By explicitly incorporating various aspects of the employment relationship (*i.e.*, rules governing working hours, promotion opportunities, and grievance procedures), enforcement mechanisms, and provisions making the agreement contingent on such future events as changes in the firm's product market or changes in the macro-economy, collective bargaining agreements attempt to control opportunistic behavior.[33]

Within this framework, the issue of striker replacements can easily be understood as an opportunistic behavior problem. The employer's ability to permanently replace economic strikers permits the employer to "force" the union to strike,[34] and then use the permanent replacement right to replace those

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[30] *See id.*

[31] *See id.*

[32] *See* George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, *in* PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR 109, 115–16 (Bruno Stein ed., 1990); *see also* Michael L. Wachter & Randall D. Wright, *The Economics of Internal Labor Markets*, *in* THE ECONOMICS OF HUMAN RESOURCE MANAGEMENT 86–108 (Daniel J.B. Mitchell & Mahmood A. Zaidi eds., 1990) (discussing how seniority and other sorts of tenure provisions protect workers from the potential opportunistic behavior of firms that have recouped their investments and who would be willing to fire older workers).

[33] *See* Wachter & Wright, *supra* note 32, at 86–108. Human resource management policies in nonunion firms serve the same purpose. For example, seniority provisions are not unique to the union firms. In academia, where the vast majority of employees lack union representation, tenure provisions are commonly used. The use of tenure provisions in academia nicely fits the ILMs model. Younger professors may invest time serving on idiosyncratic university committees and engage in other firm-specific endeavors with the assurance that, once they become tenured, the university cannot simply fire them later in their careers, when they happen to be less professionally active. *See generally* RICHARD P. CHAIT & ANDREW T. FORD, BEYOND TRADITIONAL TENURE (1982) (examining the changes taking place in the traditional concept of tenure); BARDWELL L. SMITH, THE TENURE DEBATE (1973) (explaining the different perspectives in the debate over tenure).

[34] The NLRA imposes on the employer and the union a duty to bargain in good faith. 29 U.S.C. §§ 158(a)(5), (b)(3)(d) (1988). 29 U.S.C. § 158(d) defines the scope of this duty:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable

employees that are in the recouping stage of the ILMs process.[35] The current law on striker replacements, we argue, fails to provide any mechanisms to constrain such kinds of behavior by employers. Neither the post-*Mackay* cases[36] nor the constraints imposed by the labor market[37] are sufficient to eliminate the kind of opportunistic behavior that arises out of the dynamics of the internal labor market.

On the other hand, we also note in our article that reversing *Mackay*, and in that way shifting the initial entitlement over the striker replacement issue, without more, might result in a situation in which unions can in turn engage in opportunistic behavior against the employer.[38] Under the internal labor market model, employees that have received firm-specific training can expropriate the employer's rents by engaging in behavior, such as withholding their job effort, that increases labor costs to the firm and thus reduces the firm's profitability. If unions are allowed to strike, knowing that their members cannot be permanently replaced, they will be free to engage in strikes and in that way expropriate rents due to the employer.[39]

C. *Our Solution*

Our proposal is thus based on the principle that the basic problem with respect to the right of employers to permanently replace economic strikers is

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> times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Thus, while the parties must bargain in good faith, there is no requirement that the parties reach an agreement. *See* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960) (discussing the implications of the duty to bargain in good faith).

[35] *See* Bierman & Gely, *supra* note 1, at 374–78.

[36] As discussed above, in the six decades after the *Mackay* ruling the Supreme Court and the NLRB have decided various cases which arguably attempt to limit the ability of employers to abuse their *Mackay* rights. We argue that current case law fails to provide an adequate constraint on the kind of opportunistic behavior described above. *See id.*

[37] Professors Wachter and Cohen argue that the external labor market will also serve as a check on employer opportunistic behavior. *See* Wachter & Cohen, *supra* note 18, at 1353. In our initial article, we argue that the labor market's constraints are generally insufficient to limit employer's opportunistic behavior. *See* Bierman & Gely, *supra* note 1, at 375–76.

[38] *See* Bierman & Gely, *supra* note 1, at 384–88.

[39] In our article, we illustrate the operation of the theory of ILMs and its relationship to the striker replacement issue with the example provided by the flight attendants' strike in the fall of 1993 at American Airlines. We argue that the flight attendants' strike illustrates the ineffectiveness of the *Mackay* doctrine and its progeny in deterring opportunistic behavior by both employers and unions. *See id.* at 380–83.

the need to prevent the kind of opportunistic behavior created by the dynamics of internal labor markets. A critical distinction in our proposal is that it is addressing the issue of striker replacements within the context of ILMs, a context which arises primarily in cases where there is a need for firms to motivate employees to acquire firm-specific skills.

The solution we propose involves (1) providing unions and striking workers with protection against permanent replacement by changing the initial legal right, and (2) making the striker replacement issue a mandatory subject of bargaining.[40] By providing this protection, we will make it more costly for employers to force a strike in the hope of getting rid of the union. The employer will only be able to accomplish this by paying a fairly high price: closing operations.[41] By making it a mandatory subject of bargaining, we limit the union's ability to behave opportunistically. Unions will have to make explicit tradeoffs between job security issues and other bargaining demands. The union could then exchange the protection against permanent replacements for other bargaining demands it might value more highly.[42]

III. PROFESSOR CORBETT'S RESPONSE

A. *The Allegory*

In his characteristic hyperbolic style,[43] Professor Corbett begins his reply with an allegorical rendering of our proposal.[44] In Corbett's rendition, the town's sheriff, just before a gunfight between "Employer" and "Union" is about to start, interferes, and asks Employer to hand over his gun.[45] In disbelief, Employer points to Union and pleads to the Sheriff to also take away Union's gun. The Sheriff refuses and explains to Employer that although Union will keep his gun, he will not shoot Employer. Instead, "[Employer] and Union are going to sit down and bargain about whether Union will give it back to you."[46] Employer grudgingly accepts after the Sheriff explains to him that for

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[40] *See id.* at 384–88.

[41] In *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Supreme Court held that a complete shutdown of a business, even if solely motivated to escape a union organizing effort, would not violate the employer's duties under the NLRA.

[42] *See* Bierman & Gely, *supra* note 1, at 388.

[43] *See Procedural Proposal*, *supra* note 5, at 815–26 (describing a tale of two labor battles); *see also Taking the Employer's Gun*, *supra* note 5, at 1516–19 (describing the confrontation between an employer and a union as a western movie type gun fight).

[44] *See Taking the Employer's Gun*, *supra* note 5, at 1516–19.

[45] *See id.* at 1517.

[46] *Id.*

the right price Union will certainly give back the gun to Employer.[47]

Corbett continues his allegory by describing what happens once bargaining starts. He describes how Union, any time a disagreement arises in negotiations, "[r]eaches down and taps his fingers on the gun protruding from his holster," and how Employer nervously retreats and asks Union to calm down.[48] Corbett also describes how Union's proposals to Employer, to the extent that Union will allow Employer to "shoot" some but not other of Union's people, are angrily opposed by those likely to be affected.[49] The story ends with Union laughing at a powerless Employer's threats, Employer reaching for another weapon—"[a] knife perhaps"—being shot by Union, and while wounded, reluctantly agreeing to Union's demands to save himself.[50]

B. *Mano a Mano: The Criticism and Our Response*

1. *Overview*

From this entertaining, yet distorting, rendition of the striker replacement problem, Corbett goes on to identify what he feels are the flaws in our proposal. Corbett's argument is threefold. First, Corbett argues that our proposal is incomplete in that it fails to recognize that *Mackay* is but one part of the current law regulating striker replacements. Second, according to Corbett, our proposal fails to make a case as to why we should change the default rule (*i.e.*, shifting the legal entitlement from the employer to the union). Contrary to our argument, Professor Corbett believes that under our proposal unions will be unlikely to bargain over the striker replacement issue, making it likely in turn for them to behave opportunistically. Finally, Corbett criticizes our proposal in terms of its practical implications.

2. *Round One: Failing to Recognize Other Limitations Under Current Law*

Professor Corbett's first criticism of our proposal is our alleged failure to "recognize or appreciate" that the law concerning striker replacements involves much more than just the *Mackay* doctrine.[51] Corbett recognizes that a main theoretical concern of our proposal was to respond to prior arguments[52] that the

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[47] *See id.*

[48] *Id.* at 1518.

[49] *See id.*

[50] *See id.* at 1519.

[51] *See id.* at 1520–23.

[52] *See* Cohen & Wachter, *supra* note 32, at 118.

external labor market limits opportunistic behavior by employers in this area because employers will find it difficult to hire permanent replacements at below-market wages, and because replacements will be reluctant to make firm-specific investments in firms that develop a reputation for behaving opportunistically.[53] However, Corbett argues that we failed to recognize that the U.S. Supreme Court and the National Labor Relations Board (NLRB) have imposed several constraints on the ability of employers to behave opportunistically.[54] These constraints, argues Corbett, are likely to result in efficient outcomes, without having to make the changes we proposed in our article.[55] In particular, Professor Corbett argues that cases like *NLRB v. Erie Resistor Corp.*,[56] *NLRB v. Fleetwood Trailer Co.*,[57] *NLRB v. Laidlaw Corp.*,[58] and *NLRB v. Curtin Matheson Scientific, Inc.*[59] serve as major impediments to the ability of employers to behave opportunistically.

Our response to Corbett on this point is twofold. First, we did recognize that the *Mackay* doctrine has been limited in several respects. In particular, we identified the four cases cited by Corbett as potential constraints.[60] Second, however, we argued that these cases do not represent real constraints on the kind of opportunistic behavior that arises from the dynamics of the internal labor market.[61] Consider, for example, the *Erie Resistor* decision.[62] Under *Erie Resistor*, the employer is prohibited from offering superseniority to striker replacements as an incentive to cross the picket line.[63] The *Erie Resistor* rule, under Corbett's analysis, represents a constraint on employer's opportunistic behavior, since it prevents the employer from offering replacements better conditions than those offered to strikers.[64] Our argument is that employers can circumvent *Mackay* without having to offer replacements any greater benefits than what currently is being offered to the union. We argued that during a strike an employer can in theory attract enough workers by offering them slightly more than what their best alternative will be, even if this is slightly less than the union's final demand.[65]

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[53] *See Taking the Employer's Gun*, *supra* note 5, at 1520.
[54] *See id.*
[55] *See id.* at 1521.
[56] 373 U.S. 221 (1963).
[57] 389 U.S. 375 (1967).
[58] 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).
[59] 494 U.S. 775 (1990).
[60] *See* Bierman & Gely, *supra* note 1, at 368–69.
[61] *See id.* at 374–78.
[62] NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).
[63] *See id.* at 235–36.
[64] *See Taking the Employer's Gun*, *supra* note 5, at 1521.
[65] *See* Bierman & Gely, *supra* note 1, at 375–76.

Next, Professor Corbett points out that there exist other constraints on the employer's ability to behave opportunistically. In particular, Professor Corbett notes that under our model, the employees that are in theory more likely to be subject to opportunistic behavior are the kind of employees that the employer will be less likely to terminate.[66] In particular, Professor Corbett points out that the employees that are in a vulnerable position are those that have invested in firm-specific skills.[67] The fact that these employees possess these firm-specific skills, argues Corbett, should be enough deterrent to an employer's incentive to behave opportunistically, since "they are the employees that the employer would have the most difficulty replacing because the replacements must be trained, and that training involves both cost and time."[68]

From the perspective of ILMs theory, the answer to Corbett's criticism lies basically in issues of timing. As Corbett correctly points out, there are strong incentives for an employer not to terminate employees who have made firm-specific investments. However, Corbett fails to realize that while the incentives to not behave opportunistically are strong during the middle years of the employees' careers (when their productivity exceeds their wages), they are substantially reduced at later years in the employees' careers, when their wages exceed their productivity.[69] For example, a university may have little incentive to replace a 40-year-old striking university professor,[70] who is an active researcher and who participates fully in the affairs of the school by means of extensive committee work (*i.e.*, a professor who has made firm-specific investments). However, the university's administration might well, absent tenure protection, permanently replace a striking 68-year-old professor who is no longer an active researcher, even though the latter has made substantial investments in firm-specific skills (*i.e.*, has also engaged in a substantial amount of administrative and committee work). The tenure system thus protects the professor's earlier firm-specific investments.

In general, though, ILMs present the key problem of how to reduce opportunistic behavior during the periods when there are no internal constraints that minimize the ability of the parties to the ILMs contracts to behave opportunistically. Contrary to Professor Corbett's argument, neither the cases

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[66] *See Taking the Employer's Gun*, *supra* note 5, at 1522–23.

[67] *See id.*

[68] *Id.* at 1522.

[69] *See* Schwab, *supra* note 22, at 15–19.

[70] Under the NLRA, university and college professors are not considered "employees," and thus are not covered under the protections afforded to employees under the Act. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). Various state statutes, however, allow university and college professors to organize and bargain collectively with their employers. *See, e.g.*, Higher Education Employer-Employee Relations Act, CAL. GOV'T. CODE § 3562 (West 1995).

refining the *Mackay* doctrine nor the dynamics of ILMs provide such a mechanism.

3. *Round Two: Failing to Explain Why the Default Rule Should Be Changed*

Having faulted our interpretation of the current state of the law concerning striker replacements, Professor Corbett not surprisingly goes on to criticize the proposal we advance to solve what we argue is the main problem with the current law on striker replacements.[71] As discussed above,[72] our proposal involves, first, providing unions and striking workers with protection against permanent replacement by changing the initial legal right. By providing this protection, we will make it more costly for the employers to force a strike in the hope of getting rid of a union. Second, we propose that the striker replacement issue be made a mandatory subject of bargaining. The second step is necessary in order to minimize union opportunistic behavior.

Professor Corbett first asserts that, contrary to our argument, unions will not be likely to bargain over the striker replacement issue.[73] In the context of the likelihood of unions to call strikes, Corbett recognizes that strikes are not cost-free for employees: striking employees do forego their regular paychecks, and any harm imposed on the employer ultimately harms the employees who are dependent on the employer for their financial well-being.[74] According to Corbett, however, neither of these two factors is sufficient to prevent unions' reliance on the strike weapon.[75] Corbett first points out that strikes do indeed occur.[76] This is evidence that the hardship of strikes on employees is not enough of a constraint to prevent unions' reliance on strikes. By further reducing the costs associated with engaging in a strike, our proposal, according to Corbett, will likely fuel more strike activity.[77] Second, argues Corbett, unions do not need to engage in a strike to reap the benefits of strike activity.[78] The "strike threat," especially under a paradigm in which employers cannot permanently replace economic strikers, should be sufficient to force excessive demands on employers.[79] Finally, since employers and unions have access to

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[71] *See Taking the Employer's Gun*, *supra* note 5, at 1525–35.

[72] *See supra* notes 40–42 and accompanying text.

[73] *See Taking the Employer's Gun*, *supra* note 5, at 1525.

[74] *See id.*

[75] *See id.* at 1526–27.

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

different information, and since both parties are likely to evaluate information differently, it is unlikely that the financial well-being of the employer will be a sufficient deterrent to the opportunistic use of the strike weapon by unions.[80] In particular, Corbett argues that "some employees may be concerned with the financial stability and competitiveness of the employer only in the short term, after which their own financial well-being may no longer depend on the employer."[81]

In response to Professor Corbett's first two arguments, it can be argued that exactly the opposite is now true under current law. That is, by allowing employers to hire permanent replacements, the current law reduces employer costs of forcing the union to engage in a strike. Further, *Mackay* not only reduces the costs of a strike, but also, and more dramatically, increases the potential benefits of a strike to an employer. For an employer who wishes to behave opportunistically by trying to use the strike and the concomitant hiring of permanent replacements to eviscerate the union, the *Mackay* doctrine is paramount. Thus, while our proposal arguably reduces the costs to the union of engaging in a strike, *Mackay* has a similar effect on employers' costs, plus an additional positive effect on their benefits. Holding other things constant, the current law on striker replacements should have a greater effect on the likelihood of strike activity.

In addition, Professor Corbett argues that we are wrong in suggesting that because the employee's future economic well-being depends on the employer, unions will be reluctant to make excessive demands that could have a detrimental long-term effect on the employer.[82] Professor Corbett argues that employees will be more concerned with the financial stability of the employer only in the short-term, but not thereafter.[83] This argument is interesting for several reasons. First, it is paradoxical that Professor Corbett uses the short-term vs. long-term dichotomy against employees. If there is one lesson that recent developments in financial markets have taught us, it is the propensity of U.S. companies to capitalize on short-term profits for the benefits of shareholders to the detriment of almost all other "stakeholders."[84] Second, Professor Corbett's criticism completely misses the dynamics of the ILMs model. What characterizes ILMs is the long-term nature of the employment relationships. Employees who have made firm-specific investments, and who are past the mid-years of their career, will be particularly concerned with the

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[80] *See id.*

[81] *Id.*

[82] *See id.*

[83] *See id.*

[84] *See Shareholders Values*, THE ECONOMIST, Feb. 10, 1996, at 15-16 (describing different models of corporate behavior).

future economic viability of the firm.[85] This is true because the external market opportunities for such employees at other firms are likely to be quite limited.[86]

Professor Corbett's next argument attacks our assertion that under current law there is not a proper set of incentives to permit the parties to negotiate over the striker replacement issue. Corbett raises several points in this respect. First, he questions why there have not to date been any significant attempts to negotiate provisions shifting the default right.[87] Even if transaction costs were high in general, argues Professor Corbett, we should have seen at least a few instances where the parties have negotiated such provisions.[88] An initial response to Corbett's argument, which still does not in any way concede to his broader criticism, is that in fact a few similar provisions have indeed been negotiated, even if on a more limited scale. For example, the following two provisions have been agreed to in collective bargaining contracts to guarantee the continuing operation of critical operations, even during the course of a contentious strike:

> [T]he Employees as well as the Union shall cross all picket lines for the performance of work which is essential to the maintenance of the Company's plant and equipment for standby operations.[89]

> No strike or lockout shall occur at the establishment covered by this Agreement during the life of this Agreement, and continuous kilns shall be maintained at all times at a temperature which will result in no loss of ware or damage to the kilns, and periodic kilns under fire shall be burned off. Pumping operations shall also be continued during any strike or work stoppage that may occur as stated above.[90]

Although not conclusive evidence, the lack of similar provisions in other collective bargaining agreements is at least an indication that there might be bargaining impediments which make it more difficult for the parties to achieve

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[85] *See* Schwab, *supra* note 22, at 24–28; *see also* Olivia S. Mitchell, *Pensions and Older Workers*, *in* THE OLDER WORKER 151, 156 (Michael E. Borus et al. eds., 1988) (discussing the effect of pension arrangements in motivating employees to focus on the long-term time horizon of the firm).

[86] *See id.*

[87] *See Taking the Employer's Gun*, *supra* note 5, at 1527–28.

[88] *See id.*

[89] Collective bargaining agreement between Olin Corporation and the International Brotherhood of Electrical Workers, 2 Collective Bargaining Negot. & Cont. (BNA) No. 1281, at 77:376 (July 7, 1994).

[90] Collective bargaining agreement between Harbison-Walker Refractors and the Steelworkers, 2 Collective Bargaining Negot. & Cont. (BNA) No. 1281, at 77:377 (July 7, 1994).

such results. Making the striker replacement issue a mandatory subject of bargaining would remove one such impediment.

Corbett then goes on to argue that we failed to provide any support for our conclusion that the initial entitlement should be shifted to the union. Corbett characterizes our proposal as resting on the proposition that the only reason to argue for the shifting of the initial legal entitlement over the right to hire permanent replacements to the union is that unions tend to value the right concerning the hiring of permanent replacements more highly than employers.[91] Corbett argues that we provide no support for such a rationale, and goes on to provide an alternative rationale which, he argues, demonstrates that any shift in the initial allocation of rights is unwarranted.[92]

In particular, Professor Corbett argues that a better approach to determining the allocation of the initial entitlement is to focus on the transaction costs of a particular proposal.[93] According to Corbett, our proposal will likely increase transaction costs, and thus make it less likely that the parties would successfully negotiate a solution to the striker replacement conflict. Corbett first points out that all issues in collective bargaining agreements are normally negotiated at the same time (*i.e.*, in batches)[94] and not discretely issue by issue. This makes it difficult for unions to explain to their members what they got in exchange for the rights they bargained away. Therefore, unions that have an initial entitlement may refuse to bargain it away.[95] Second, Corbett argues that because of the tendency of employees to value more highly an entitlement that initially belongs to them, as compared to an entitlement that initially belongs to the employer, unions will "charge employers more to purchase the entitlement than unions would pay employers for that entitlement."[96] Consequently, concludes Corbett, unions' valuation of the initial entitlement will be exaggerated in the collective bargaining context, making it less likely that the parties will reach an agreement on the striker replacement question.[97]

In addition to the tendency of unions to exaggerate the valuation of their initial entitlement, Professor Corbett argues that there exist several factors that make it unlikely that unions will ever agree to bargain away their right prohibiting the use of permanent strikers. For example, argues Corbett, because

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[91] *See Taking the Employer's Gun*, *supra* note 5, at 1528.

[92] *See id.* at 1529.

[93] *See id.*

[94] *See* DOUGLAS L. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 426–27 (3d ed. 1992) (providing a law and economics analysis of the collective bargaining process).

[95] *See Taking the Employer's Gun*, *supra* note 5, at 1531.

[96] *Id.* at 1532.

[97] *See id.*

of the difficulties in assessing the preferences of members with respect to whether or not to bargain away the striker replacement right, union leaders will find it "politically expedient" to not bargain over the striker replacement issue.[98] Similarly, by bargaining away this right, unions will be less willing to strike, since they will have reduced bargaining power vis-à-vis the employer.[99] Bargaining away the protection against the use of striker replacements has implications not only for the current set of negotiations, but for future negotiations as well. One of those implications is that unions will enter future negotiations in a weaker bargaining position.[100] As a result, concludes Corbett, unions will be unwilling to bargain the right away in the first place.

While Professor Corbett criticizes our analysis as incomplete and naïve, his argument against the shifting of the initial entitlement to unions is even more unpersuasive. The problems that he identified as likely to cause unions to exaggerate the valuation of the initial entitlement, and that will likely result in unions being unwilling to negotiate away this right, seem equally applicable to employers within the collective bargaining process.[101] Similar to union leaders, these negotiators will have to make assessments concerning what they believe to be the preferences of their principals. Except for the possible "numbers" differentials *(i.e.*, union leaders might be trying to assess the preferences of hundreds or thousands of employees, while management officials usually have a smaller number of principals), Professor Corbett fails to provide any evidence that the problems he identified are in fact unique to union negotiators.[102] Professor Corbett thus provides no rationale for why the default rule should favor the employer. He merely identifies the various valuation problems that *any* negotiator worth her salt will have to overcome.

Even conceding that unions confront those problems, that in itself is not a sufficient reason to argue against the shifting of the initial entitlement. While union leaders might have to confront such valuation problems, that is exactly what they are elected to do. To the extent that members care about an issue—and arguably the issue of striker replacements is important enough to command the employees' attention—leaders should be expected to be quite responsive to the preferences of their members.[103] To say that union leaders are likely to be

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[98] *See id.*

[99] *See id.* at 1532–33.

[100] *See id.*

[101] *See* THOMAS A. KOCHAN & HARRY C. KATZ, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS: FROM THEORY TO POLICY & PRACTICE 201–07 (1988) (describing the problems faced by management in preparation for collective negotiations).

[102] *See id.* at 201–05.

[103] *See* ROBERT J. FLANAGAN ET AL., ECONOMICS OF THE EMPLOYMENT RELATIONSHIP 470 (1989) (describing the politics of internal union structure).

responsive to the preferences of members on these issues does not mean that unions will always negotiate away the right to hire permanent replacements. Obviously, that will depend on all the other circumstances surrounding a particular set of negotiations. Professor Corbett argues that because of the future implications negotiating away the striker replacement rights will have on unions, they will be very unlikely to engage in such an exchange. By giving up their legal right against being permanently replaced, unions will be giving up "future leverage for a collective bargaining agreement in the present."[104] It is inconsistent for Professor Corbett to argue that by shifting the right to unions, unions will be more likely to strike, while at the same time arguing that if the entitlement is shifted and bargained over unions will never strike again. More fundamentally, however, Professor Corbett misinterprets the implications of our proposal and assumes that unions will behave in a way which is not supported by recent developments in collective bargaining.

Clearly, under our proposal, unions will have to make a tradeoff between the benefits to be derived from a current collective bargaining agreement and the position that such a tradeoff leaves them in for future negotiations. That, basically, is the essence of collective bargaining. Whenever unions negotiate for higher wages, changes in work rules, or the inclusion of a grievance arbitration process in a contract, they have to be cognizant that they are paying a price for the benefits they get.[105] Moreover, sometimes the price unions pay will not be realized until later. Unions appear to be quite good at making those tradeoffs, as evidenced, for example, by the era of concession bargaining during the 1980s.[106] Unions during the 1980s negotiated contracts that resulted in tremendous concessions to management, the impact of which was felt not only during the terms of the contracts, but also for years after the agreements expired.[107]

Obviously, not all unions at every single negotiation will trade off a right such as the protection against permanent replacements. Nevertheless, some unions will do so some of the time. This is the nature of the collective bargaining process. Those that do—and Professor Corbett is correct in this regard—will indeed be giving up some leverage for future negotiations. If they make such a tradeoff, unwise as Professor Corbett feels that decision will be, it will be their decision and they will have to confront its future consequences. It has been a tenet of American labor policy to not second guess the parties'

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[104] *Taking the Employer's Gun*, *supra* note 5, at 1532–33.

[105] *See* FLANAGAN ET AL., *supra* note 103, at 540–46.

[106] *See id.*; *see also* THOMAS A. KOCHAN ET AL., THE TRANSFORMATIONS OF AMERICAN INDUSTRIAL RELATIONS 109–21 (1986) (discussing the era of concession bargaining and providing an analytical framework to understand the causes of that period).

[107] *See id.*

agreement.[108] This is what collective *bargaining* is all about.

4. *Round Three: Not Worthwhile in Practice*

Professor Corbett takes a parting shot at our proposal from a more practical as opposed to theoretical perspective. He argues that unions will not adopt the bargaining strategy that derives from our proposal due to the political implications of such a strategy.[109] Professor Corbett correctly points out that our proposal is based on the distinction between employees with firm-specific skills and those with more general skills. Arguably, those employees with firm-specific skills are the ones that are likely to be subject to employer opportunistic behavior, due to the idiosyncrasies of their training. In deciding whether and how to protect employees with firm-specific skills, unions might have to make tradeoffs with negative implications for other employees. In this sense, argues Corbett, the bargaining strategy that derives from our proposal is in conflict with the self-preservation interests of unions.[110] Corbett goes further, arguing that even if such conflict is not enough to prevent unions from making tradeoffs, unions, as a matter of principle, should not adopt such a strategy.[111] In particular, argues Corbett, "[t]o differentiate among employees regarding sale of the right to permanently replace would be extremely divisive, splintering the bargaining unit and setting it at war against itself."[112]

Professor Corbett's final criticism of our proposal evidences the same flaws as his earlier criticisms. In particular, Corbett, without any empirical evidence, assumes that the self-preservation concerns of a union will always dominate any other concerns or interests the union might be seeking to protect; thus, negotiation over the striker replacement issue will be unlikely. As Corbett suggests, some unions will be unwilling, because of internal political reasons, to negotiate provisions that have a disparate impact on various segments of their membership, even if permitted by law to do so. However, based on prior collective bargaining history, other unions may well adopt such a strategy. Seniority provisions[113] and two-tier wage systems[114] are but two examples of

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[108] *See* Leo Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL'Y. 583 (1990). *See generally* Getman & Marshall, *supra* note 4, at 1807-08 (discussing the traditional collective bargaining model of industrial relations).

[109] *See Taking the Employer's Gun*, *supra* note 5, at 1534.

[110] *See id.*

[111] *See id.* at 1535.

[112] *Id.*

[113] *See* FLANAGAN ET AL., *supra* note 103, at 525 (describing the use of seniority provisions as a mechanism in the allocation of benefits).

[114] Under two-tier agreements, newly hired employees are permanently subject to a lower wage schedule than current employees. *See id.* at 507; *see also* Bierman & Gely, *supra*

provisions that are frequently negotiated into labor agreements, and which have a disparate impact on various groups within the union.[115] Unlike Professor Corbett, we stop short of arguing that every union will, under all circumstances, negotiate away the right prohibiting permanent replacements. Some will do so, while others will not. While we do not know the answer to that, we believe there is strong prior evidence that such a result could occur. Under our proposal, it will be left up to the collective bargaining process.

C. *Last One Standing*

In the previous section we attempted to answer in detail Professor Corbett's criticisms of our initial proposal. In summary, however, we want to focus not on any particular component of our reply, but instead on what appears to be the general misunderstanding that Professor Corbett has of our proposal.

Professor Corbett appears to believe that both unions and employers are in similar positions with respect to their ability to behave opportunistically. His allegorical rendition of a gunfight between "Union" and "Employer," both of them wanting to have the gun and both willing and eager to kill the adversary, makes that much clear. In Professor Corbett's view, whoever happens to have the initial entitlement (*i.e.*, the gun) will be able to behave opportunistically. Moreover, it appears that in Professor Corbett's view unions are more likely than employers to behave opportunistically. His allegory is notably lacking in any reference to the *history* of the two gunfighters. Except for suggesting that there has been some "bloodshed" in the past, Corbett's allegory does not inform us about the background of the rivals. Has the bloodshed been mainly caused by Employer? Has Employer in the past used the gun to make outrageous demands from Union? The impression the reader gets from Corbett's allegory is that one gunfighter, Employer, will always use his gun appropriately, perhaps because of legal constraints (*Erie Resistor*, etc.), while the other gunfighter, Union, cannot be trusted and will, under all circumstances, abuse the right to initially hold the gun.

We believe that this view grossly misinterprets the realities of the collective bargaining process. Unions, while likely to behave opportunistically if given a chance, are ultimately constrained by employers' ability to financially survive in their respective markets. Even if the allocation of initial entitlements allows unions to behave opportunistically, and even if none of the possible legal constraints operate to control or eliminate such behavior on their part, unions

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note 1, at 391–93 (discussing the implications of two-tier wage structures on the duty of fair representation).

[115] *See* FLANAGAN ET AL., *supra* note 103, at 507.

will be constrained by forces in the product market.[116] Within the ILMs context such a constraint becomes much more relevant, given that those employees that have made firm-specific investments are very much dependent on the employer's survival as a necessary condition to recover their investments.[117]

On the other hand, employers are in a very different position with respect to their ability to behave opportunistically and the potential benefits of such behavior. By behaving opportunistically, employers are not only able to extract immediate rents due to employees, but are also able to potentially eliminate given unions. Within the striker replacement context, an employer's opportunistic behavior is manifested when an employer forces a strike at a time when most employees have made investments in firm-specific skills.[118] Under current law, the employer can then permanently (not just temporarily) replace these economic strikers.[119] Once the replacements are in place, it is very likely that the union will cease to exist (via decertification), or that it will no longer exercise any real representational function vis-à-vis management.[120] In short, while both employers and unions can potentially engage in opportunistic behavior, it seems that particularly within the striker replacement context employers have a much broader set of options in exercising the power derived from such behavior. Given these dynamics, it appears that among the two parties involved, while employers will be unlikely to ever negotiate away the right to hire permanent replacements (*i.e.*, if I want to shoot and kill Union, I certainly need a gun), unions might be more inclined to do so because killing Employer is no good.

IV. LET'S CALL IT A DRAW

The debate generated by our initial article and Professor Corbett's pointed response is illustrative, we believe, of a fundamental characteristic of the broader debate on the issue of striker replacements: there is hardly any middle ground for compromise. In our original article, we provided what we thought was a balanced and sound approach to the striker replacement dispute. While unions will be given the initial entitlement against the use of striker replacements, they will be closely monitored against the opportunistic use of

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116 *See* Kochan & Katz, *supra* note 101, at 56–59.

117 *See* Schwab, *supra* note 22, at 24–28.

118 *See* Bierman & Gely, *supra* note 1, at 379.

119 *See supra* notes 7–13 and accompanying text.

120 *See* Cynthia L. Gramm, *Empirical Evidence on Political Arguments Relating to Replacement Worker Legislation*, 1991 LAB. L.J. 491, 493 (finding that unions are less likely to survive following the use of permanent replacements by the employer).

such a right by means of the duty to bargain in good faith.[121] Given what we believed to be the realities of the industrial relations process, unions, we argued, would be more likely to negotiate away the right against striker replacements. Under such conditions, the parties will reach their own "best" solution.

In reading Professor Corbett's response, however, one would be lead to believe that our initial proposal was absolutely one-sided, that it was unresponsive to management concerns, and that we were unwilling to recognize that unions, like employers, can and do engage in opportunistic behavior. His reply takes an absolute, "no way" response to our proposal, thus leaving very little room for some sort of "negotiated" solution.

Perhaps this contentious area of labor law is one in which there is no room for compromise. A proposal that allows management to hire permanent replacements will not be able, at the same time, to prevent employers from behaving opportunistically, while a proposal that protects unions against the use of permanent replacements will fail in protecting employers against union abuses. However, we continue to be somewhat more optimistic about the prospect of a negotiated solution within the context of our proposal. While academics have failed to reach an agreement on the matter, perhaps those in the trenches will show us the way—if we just give them a chance.

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[121] *See* 29 U.S.C. § 158(d) (1988).