Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in *Chamber of Commerce v. Reich*

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One of the most contentious decisions an employer can make during a labor dispute is to replace striking workers permanently. When striking Greyhound workers were permanently replaced by their employer, replacement bus drivers and bus riders became the targets of sniper fire.¹ As expected, customer use of Greyhound buses significantly declined in those areas in which buses had been targeted, and Greyhound quickly discovered that replacements were unwilling to drive those routes.² Similarly, the Hormel Company's decision to hire permanent striker replacements was accompanied by such violence that Minnesota Governor Rudy Perpich called in the National Guard to quell the unrest.³

Strikers' willingness to resort to violence is due largely to the fact that permanent replacements represent an immediate, long-term threat to their future livelihood. Such violence cannot be condoned, but the tangible effect on those who contract with the firm employing the replacements must be recognized. The external effects of an employer's decision to hire permanent replacements raise even more significant concerns when the federal government is contracting with the struck business. The prospect of the government's being unable to fulfill its obligations, especially in times of crisis or national emergency, would suggest that it should be allowed to protect its interests when employers with which it contracts are involved in contentious strikes involving permanent replacements.⁴

On March 8, 1995, President Bill Clinton issued Executive Order 12,954, designed to bar the federal government from contracting with employers who

1. See James Bovard, *Union Goons' Best Friend*, WALL ST. J., June 2, 1994, at A14.

2. See *id.*

3. See Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 MINN. L. REV. 843, 844 (1993).

4. Noting how receiving goods from companies using permanent replacements could have a negative effect on quality, Labor Secretary Robert Reich stated, "'We don't want American service men and women in Bosnia trying to keep the peace while driving around on tires made by rookies and replacement workers.'" Toni Locy, *Court Strikes Down Replacement Worker Order*, WASH. POST, Feb. 3, 1996, at A12.

permanently replace striking workers during the course of a labor dispute.⁵ The purpose of the Order was to protect the federal government's "economy, efficiency, and cost of operations" by promoting stable relationships between those businesses contracting with the federal government and their employees.⁶ The Order referred specifically to overarching problems that accompany an employer's decision to use permanent replacements. First, it stated that using such replacements exacerbates labor disputes, resulting in longer and more contentious strikes.⁷ Second, it asserted that by using permanent replacements, employers often lose the "accumulated knowledge, experience, skill, and expertise" of the replaced employees to the detriment of the federal government with which the employer has contracted.⁸

By barring those contracting with the federal government from using permanent replacements during a labor dispute, the Order attempted to protect the proprietary interest of the federal government. Under the Procurement Act,⁹ the President has the power to issue executive orders dealing with federal contracting to protect the government's proprietary interest as a contracting party. Although the stated purpose of the Order was to protect the government's proprietary interest, its implementation was the focus of much partisan criticism, largely because of the controversial nature of permanent replacements.¹⁰ Recent studies have indicated that strikes in which employers use permanent replacements last longer and are more contentious than strikes in which no such replacements are used.¹¹ By issuing the Order, the Clinton Administration made a policy choice—it chose to accept the rationale that the use of permanent replacements was a cause, rather than a result, of unstable labor relations—and took action to restrict the use of such replacements by those contracting with the government. Such a choice undeniably had political overtones. Although the stated purpose of the Order was to protect the government's proprietary interest, it also was an attempt by President Clinton to curry favor with labor interests.¹²

5. See Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995). This Note will refer to this document as "Order" throughout the text.

6. *Id.* at 13,023.

7. See *id.*

8. *Id.*

9. See Federal Property Management Improvement Act of 1949, 40 U.S.C. § 486 (1994).

10. See Asra Q. Nomani, *Clinton Bans Use of Firms That Replace Strikers; GOP and Business Vow Battle*, WALL ST. J., Mar. 9, 1995, at A5.

11. See John F. Schnell & Cynthia L. Gramm, *The Empirical Relations Between Employers' Striker Replacement Strategies and Strike Duration*, 47 INDUS. & LAB. REL. REV. 189 (1994).

12. Labor interests traditionally have been major contributors to Democratic presidential campaigns and dedicated substantial resources to Clinton's reelection campaign. See Phil Kuntz, *GOP Launches Counterattack Against Labor For Its Bid to Help Democrats Recapture Congress*, WALL ST. J., Aug. 20, 1996, at A12; see also Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 120 (1996) ("Admittedly, the Clinton Administration owed a considerable political debt to organized labor . . ."). However, as an ardent supporter of the North American Free Trade Agreement (NAFTA), Clinton provoked the ire of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), which was against its passage. See *Clinton Targets Firms' Use of Striker*

The controversy surrounding the use of permanent replacements can be traced back to the passage of the National Labor Relations Act (NLRA).¹³ In 1935, the Supreme Court upheld the NLRA,¹⁴ which protected employees' right to organize, bargain collectively, and engage in concerted activities.¹⁵ The right to strike is one of the most important concerted activities in which employees can participate and is specifically mentioned in section 13 of the NLRA: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike"¹⁶

Although the NLRA presents a strong congressional statement in support of an undiminished right to strike, the Supreme Court qualified this right in 1938. In *NLRB v. Mackay Radio & Telegraph Co.*,¹⁷ the Court stated: "[The employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."¹⁸ It is this dictum¹⁹ that has become the basis for subsequent Court decisions recognizing an employer's right to replace striking workers permanently.²⁰ The fact that the NLRA is silent on the issue of permanent replacements and explicit in its protection of the employees' right to strike has been the basis for much criticism of the *Mackay* doctrine.²¹

Replacements, WALL ST. J., Mar. 8, 1995, at A22; Nomani, *supra* note 10. In light of the presidential campaign, it is doubtful that Clinton did not consider the fact that issuing the Order would help garner labor's support in the 1996 election. See Nomani, *supra* note 10. In reference to the Order, Republican challenger Senator Bob Dole stated, "'Let me just lay it out cold. This is all about politics, nothing to do with workers or anybody else. It's all about 1996 and President Clinton trying to shore up his base.'" Robert Reno, 'Politics' is Dole's New Verbal Crutch, STAR-LEDGER (Newark), Mar. 19, 1995, at 1.

13. 29 U.S.C. §§ 151-69 (1994).

14. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69).

15. See 29 U.S.C. § 157.

16. *Id.* § 163.

17. 304 U.S. 333 (1938).

18. *Id.* at 345-46 (footnote omitted).

19. See William D. Turner, *Restoring Balance to Collective Bargaining: Prohibiting Discrimination Against Economic Strikers*, 96 W. VA. L. REV. 685, 690 (1994) (calling section of decision regarding permanent replacements "bald and wholly unsupported dicta"); Jack J. Canzoneri, Comment, *Management's Attitudes and the Need for the Workplace Fairness Act*, 41 BUFF. L. REV. 205, 213 (1993) ("Despite the fact that this language was mere dictum, it has endured as controlling law to this very day and has been elevated to the status of doctrine, albeit a doctrine which legal scholars . . . have strongly criticized.").

20. The judicial construction of the right to replace striking workers permanently is not itself without limits. See, e.g., Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 300-02 (1991); *infra* Section I.C. For example, employees who are striking in protest of an employer's unfair labor practice are protected from being permanently replaced, and in such cases the employer must reinstate striking workers upon their request for reinstatement. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

21. See, e.g., LeRoy, *supra* note 3, at 849 ("*Mackay Radio's* approval of the hiring of permanent replacements is plainly at odds with the NLRA's prohibition against judicial construction that diminishes the right to strike."); Pollitt, *supra* note 20, at 296 ("[The *Mackay*] dictum has evolved today into an albatross that so burdens employees' exercise of the right to strike that it seriously undermines effective collective bargaining."); Canzoneri, *supra* note 19, at 215 ("Since management's use of permanent replacements does *impede and diminish* the statutory right to strike, the argument that the *Mackay* doctrine undermines the intent of the NLRA is justifiable.").

Recently, employers have more readily resorted to the use of permanent replacements as a means of maintaining operations during labor disputes and breaking a strike.²² This has prompted labor to prioritize the passage of a federal anti-replacement law.²³ The most recent legislative attempt to overrule the *Mackay* dicta was the Cesar Chavez Workplace Fairness Act, which passed in the House of Representatives, but was defeated in the Senate by a Republican-led filibuster in 1994.²⁴ In the wake of the defeat of this Act, President Clinton issued the Order, thus affirming a prolabor policy with regard to the controversial striker replacement doctrine.²⁵

This policy choice did not go uncontested. A number of probusiness interests,²⁶ led by the Chamber of Commerce, challenged the validity of the Order in federal court and claimed that, by interfering with an employer's right to hire permanent replacements, the Order violated the National Labor Relations Act.²⁷ In *Chamber of Commerce v. Reich*,²⁸ the United States Court of Appeals for the D.C. Circuit struck down the Order.²⁹ In doing so, the court noted that there was "undeniably . . . some tension between the

22. See Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935-1991*, 16 BERKELEY J. EMP. & LAB. L. 169, 176 (1995) (attributing employers' increased use of permanent replacements in past 20 years to factors including high unemployment rates and employer retainment of labor consultants who teach legal strike-breaking techniques). Many scholars attribute the rise in the use of permanent replacements to the "union-busting" attitude of the Reagan Administration in the 1980s, particularly Reagan's decision to replace striking air traffic controllers permanently. See, e.g., Pollitt, *supra* note 20, at 307; Turner, *supra* note 19, at 695-97. LeRoy, however, argues that the rise in the use of permanent replacements can be traced back to 1975, and that Reagan's replacement of the air traffic controllers was not the catalyst for the increase. See LeRoy, *supra*, at 175-76. For anecdotal examples of the ease with which employers have used *Mackay* dicta to replace striking workers permanently, see THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? 231-36 (1991).

23. See Turner, *supra* note 19, at 687; Kevin G. Salwen, *Ban on Replacing Strikers Seen Facing Bleak Future as House Prepares to Vote*, WALL ST. J., June 15, 1993, at A2.

24. See Canzoneri, *supra* note 19, at 206; Asra Q. Nomani, *Senate Ban on Permanent Replacement of Strikers Is Stalled, in Labor Defeat*, WALL ST. J., July 13, 1994, at A2. A previous bill offered during the Bush Administration that would have banned the hiring of permanent replacements met with the same fate. See Peter M. Leibold, *Labor Legislation in the 104th Congress: Follow the Money*, 12 LAB. LAW. 137, 152-53 & n.127 (1996).

25. See Nomani, *supra* note 10.

26. These included the Chamber of Commerce, the American Trucking Associations, Inc., the Labor Policy Association, the National Association of Manufacturers, Bridgestone/Firestone, Inc., and Mosler, Inc. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996).

27. See *id.* at 1332 ("Appellants' most powerful argument on the merits, it strikes us, is their claim that the Executive Order is in conflict with the NLRA.").

28. 74 F.3d 1322.

29. See *id.* at 1339. The Clinton Administration initially promised "'to take all appropriate steps to have [the *Reich*] decision overturned.'" *Court Rules Clinton Erred on Labor Issue*, STAR-LEDGER (Newark), Feb. 3, 1996, at 1 (quoting President Clinton); see also Glenn Burkins, *Clinton Seeks to Reinstate His Order Penalizing Employers of Strike-Breakers*, WALL ST. J., Feb. 5, 1996, at A16. Despite this promise, it ultimately decided not to appeal the *Reich* decision to the United States Supreme Court. See *Clinton Abandons Bid to Enforce 1995 Order Guarding Strikers' Jobs*, WALL ST. J., Sept. 10, 1996, at A24; Peter Szekely, *White House Abandons Legal Effort Against Companies that Replace Strikers*, STAR-LEDGER (Newark), Sept. 10, 1996, at 9. An anonymous administration official explained this decision stating, "'There was some concern that a negative ruling from the Supreme Court could have very far-reaching implications on any president's authority to issue executive orders.'" Szekely, *supra*.

President's Executive Order and the NLRA"³⁰ and held that the Order was preempted by the NLRA.³¹ The court also concluded that the Order was "regulatory in nature," and, as such, an impermissible use of the President's executive order powers.³²

This Note will argue that *Reich* was an example of judicial overreaching for three reasons. First, the court paid undue deference to the dicta of *NLRB v. Mackay Radio & Telegraph Co.*³³ The *Reich* court treated *Mackay* as if it were explicit statutory text and failed to acknowledge the limitations placed on it by Congress and the Supreme Court. Second, the court improperly extended the preemption doctrine developed in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*³⁴ to the acts of the President of the United States.³⁵ Not only was such action unprecedented, but it was also contrary to the Supreme Court's recent trend toward limiting the *Machinists* preemption doctrine.³⁶ Third, the court refused to recognize the fact that the scope of the Order fell within the government's proprietary interest as defined in the Supreme Court's recent *Boston Harbor* decision³⁷ and, as such, was a legitimate exercise of the executive order power within the realm of labor relations.

I. THE EXTRAORDINARY ELEVATION OF *MACKAY*

In *Reich*, the D.C. Circuit Court of Appeals held that the Order as implemented by the Secretary's regulations "promise[d] a direct conflict with the NLRA."³⁸ It stated that the NLRA is "a statute that delegates no authority to the President to interfere with an employer's right to hire permanent replacements during a lawful strike."³⁹ According to the court, the Order altered "the delicate balance of bargaining and economic power that the NLRA establishes."⁴⁰ The NLRA, however, does not explicitly address an employer's use of permanent replacements; instead, the right to replace workers permanently is derived from dicta contained in the *Mackay* decision

30. *Reich*, 74 F.3d at 1333.

31. *See id.* at 1339.

32. *See id.*

33. 304 U.S. 333, 345-46 (1938).

34. 427 U.S. 132 (1976).

35. The *Machinists* preemption doctrine restricts states from regulating the choice of economic weapons used by employers and unions in the course of a labor dispute. *See id.* at 144. In *Machinists*, the Court held that in passing the NLRA, "Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces." *Id.*

36. *See, e.g.,* *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *infra* Part II.

37. *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218 (1993). This case is commonly referred to by courts and commentators as the *Boston Harbor* decision and shall be referred to as such throughout the text of this Note.

38. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1338 (D.C. Cir. 1996).

39. *Id.* at 1332.

40. *Id.* at 1337.

of 1938. By stating that the NLRA delegated no authority to the President to address the issue of permanent replacements, the court misrepresented the issue.

This Part presents three arguments in critique of the *Reich* decision. First, the court mistakenly characterized the Order as an attempted repeal by implication. The court supported this characterization by elevating the dicta of *Mackay* to the level of explicit statutory text. Because the NLRA is *silent* on the issue of permanent replacements, the court, in order to reach its conclusion, had to treat the dicta of *Mackay* as though it were the actual text of the NLRA. Second, the court failed to take note of specific provisions of the Order that serve to limit its scope so that it does not entirely eliminate an employer's replacement rights. Third, the court, in unduly deferring to the *Mackay* dicta, failed to acknowledge the existence of statutory and judicial limitations on the employer's right to use replacement workers.

A. The "Repeal by Implication" Argument

In any analysis of the Order, there are two major statutes that must be addressed: the Procurement Act, which gives the President the power to issue executive orders for the purpose of preserving the economy and efficiency of the federal government,⁴¹ and the NLRA, which regulates labor-management relations.⁴² The court reasoned that since the NLRA addresses labor policy more specifically than the Procurement Act, the NLRA is controlling absent express congressional intent in the Procurement Act to repeal the NLRA's striker replacement doctrine. In making this analogy, the court failed to mention the fact that the specific statute—the NLRA—does not address the issue of permanent replacements.⁴³

In *Morton v. Mancari*,⁴⁴ the Supreme Court set forth three general rules addressing the issue of repeals by implication. First, the Court restated the "cardinal rule . . . that repeals by implication are not favored."⁴⁵ Second, it stated that "[i]n the absence of some affirmative showing of an intention to repeal, the *only* permissible justification for a repeal by implication is when the earlier and later statutes are *irreconcilable*."⁴⁶ Third, the court ruled that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one."⁴⁷

41. See 40 U.S.C. § 486 (1994).

42. See 29 U.S.C. §§ 151–69 (1994).

43. See *infra* Section I.C.

44. 417 U.S. 535 (1974).

45. *Id.* at 549 (citations omitted).

46. *Id.* at 550 (emphasis added).

47. *Id.* at 550–51.

An application of the general rules of *Mancari* to the Order does not require its invalidation. First, the Order does not violate the rule against implied repeals. As discussed below,⁴⁸ the specific provisions of the Order do not prohibit the use of permanent replacements by an employer. They only disallow federal government contracting with the employer *during the labor dispute* in which permanent replacements are used.⁴⁹ Second, the Order and the *Mackay* doctrine are not irreconcilable. The Order merely places a limit upon an employer's use of permanent replacements,⁵⁰ in that by using permanent replacements during a labor dispute, the employer forgoes the opportunity to enter into government contracts. An employer is still free to choose to use such replacements.⁵¹ Finally, using the terms of *Mancari*, the Order cannot be considered a general statute.⁵² It specifically addresses the use of permanent replacements,⁵³ the resulting injury to the government as a contracting party,⁵⁴ and the processes by which termination and debarment of an employer using replacements will take place.⁵⁵ The Order is, in fact, akin to a specific statute designed to protect the government's proprietary interest,⁵⁶ and it can coexist with an employer's right to hire permanent replacements. It does not represent control by a general statute over a specific statute.

B. *The Specific Provisions of Executive Order 12,954*

In arguing that the Order is inconsistent with the NLRA as interpreted by *Mackay*, the court does not address the specific provisions of the Order. These provisions are tailored to protect the government's proprietary interest, to limit

48. See *infra* Section I.B.

49. See Permanent Replacement of Lawfully Striking Employees by Federal Contractors, 60 Fed. Reg. 27,856, at 27,862 (1995); *infra* Subsection I.B.1.

50. Limits on the use of permanent replacements are not unusual. There have been both legislative enactments and judicial decisions that have limited their use. See *infra* Section I.C.

51. Cf. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (stating that repeals by implication are disfavored when two statutes are capable of coexistence because of value of harmonizing different statutes and constraining judicial discretion).

52. The Order, like the *Mackay* doctrine, is not a statute. Because the NLRA and the Procurement Act are both silent on the issue of permanent replacements, the proper "statutory" analogy for the purposes of a repeal by implication argument should be drawn between the Order and the judicial interpretation of the NLRA found in *Mackay*.

53. See Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995).

54. See *id.*

55. See *id.*; see also Permanent Replacement of Lawfully Striking Employees by Federal Contractors, 60 Fed. Reg. 27,856, at 27,861-62 (1995) (Secretary of Labor's final implementation regulations).

56. In other cases involving executive orders passed under the power of the Procurement Act, courts have held that such orders were akin to a statutory enactment. See *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967) (stating executive order "is to be accorded the force and effect given to a statute enacted by Congress"); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 7 (3d Cir. 1964) (stating that executive orders, regulations, and rules issued under power of Procurement Act "have the force and effect of laws"). For a general discussion on the historical use of executive orders issued under the authority of the Procurement Act, see *American Federation of Labor & Congress of Industrial Organizations v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc).

debarment to the length of the labor dispute, and to allow for case-by-case, discretionary application of the Order. As such, the Order need not be read as inherently inconsistent with an employer's discretion to use permanent replacements.

1. *Debarment Limited to Length of Labor Dispute*

The Order does not, by its terms, prevent an employer from hiring permanent replacement workers. It simply protects the government's proprietary interest by limiting its contracting to employers with stable labor relationships.⁵⁷ The Order is specifically tailored to prevent the government from contracting with employers using permanent replacements during the course of the labor dispute in which such replacements are used. It provides: "[T]he debarment will not extend beyond the date when the *labor dispute* precipitating the permanent replacement of lawfully striking employees has been resolved"⁵⁸ Once the labor dispute is resolved, the employer is no longer debarred from receiving government contracts, even if permanent replacements continue to be employed.⁵⁹

The Secretary of Labor is vested with the authority to determine when the labor dispute has been resolved.⁶⁰ Although an employer cannot contract with the federal government while involved in a labor dispute during which permanent replacements are used, the employer's debarment—the time during which it cannot contract with the federal government—is specifically limited to the time period during which the labor dispute is unresolved. Unilateral reinstatement of all striking employees is not a condition precedent to an employer's removal from the debarment list.

In many labor disputes in which permanent replacements are used, it is common for the dispute to be resolved by an agreement between the parties that does not require the unilateral reinstatement of all replaced workers.⁶¹ In fact, cases subsequent to *Mackay* have stated that the reinstatement of

57. See *infra* Part III.

58. 60 Fed. Reg. at 27,862 (emphasis added).

59. Cf. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986). In *Gould*, the Court struck down a state statute debarring state agencies from contracting with repeat NLRA violators for a period of three years. This automatic, "rigid" period of debarment was a factor mentioned by the Court in determining that the statute was "on its face" an enforcement provision. See *id.* at 287. By contrast, the terms of the Order require that the employer no longer be debarred once the labor dispute is resolved. Debarment under the Order is thus limited to the time during which the government's proprietary interest is specifically threatened.

60. Section 270.16 of the Order's implementation regulations specifically lists factors to be considered by the Assistant Secretary of Labor in making this determination. These include: (1) whether the parties have reached a formal settlement; (2) whether the parties have agreed informally to end the dispute; (3) whether the striking employees have returned to work; and (4) any other relevant factors tending to lead to the conclusion that the dispute has ended. See 60 Fed. Reg. at 27,862.

61. See, e.g., *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 430–31 (1989) (discussing post-strike situation in which permanent replacements retained their positions and former strikers were reinstated as vacancies occurred).

employees may or may not be a precondition to ending the labor dispute.⁶² Thus, labor disputes may be concluded without reinstatement of all strikers. The Order does not condition an employer's eligibility to receive government contracts on the reinstatement of striking workers, but rather on the resolution of the labor dispute. As such, the Order is limited to protecting the government as a contracting party from harms related to a labor dispute, and does not impermissibly regulate the employer's use of permanent replacements.⁶³

Those opposed to the Order might argue that there exists within the marketplace a subset of employers who are almost entirely dependent upon government contracts for their livelihood, and that the Order places such employers in a no-win situation: either hire permanent replacements during a strike and lose their primary source of income, or avoid a strike by submitting to the union's demands. Such an argument necessarily assumes that there are not sufficient alternative methods of maintaining business operations during a strike other than hiring permanent replacements. Employers, however, do have other options. Such options include continuing operations using labor from nonstrikers and supervisory personnel, hiring outside contractors to perform the struck tasks, stockpiling inventory in anticipation of a strike, and hiring temporary replacements.⁶⁴ As to the viability of using temporary replacements, some commentators suggest that employers are generally able to attract a sufficient number of employees to remain operational during a strike even when they offer only temporary employment.⁶⁵ Other

62. See *id.* at 438–39.

63. As with any administrative structure in which a government agency or employee is given discretion in making an important factual determination, the Order grants authority to the Secretary of Labor to decide whether or not a labor dispute has indeed ended. *Cf.* *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 175 (3d Cir. 1971) (stating that courts ought to give "more than ordinary deference" to administrative agency's interpretation of executive order); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.2 (5th Cir. 1967) (noting that enforcement of nondiscrimination provisions in government contracts have historically been entrusted to governmental agencies with assistance of presidential committee) It is possible that, based on the policy of a specific administration or Secretary, the determination of the time at which a dispute has actually ended could be either postponed or brought forward. This is an inevitable result of the administrative process. However, some checks exist on the possibility that a Secretary would unfairly extend the time period during which a labor dispute is considered to exist. First, the Order does provide for a process by which debarred employers can petition the government to challenge their debarment. See *infra* note 79 and accompanying text. Second, the government agencies that are denied contracting with a particular employer during the course of a labor dispute also have the ability to challenge a debarment. See *infra* note 78 and accompanying text. Third, the political process provides a check upon routine overextension of debarment time periods. Should a particular administration construe the definition of labor dispute too broadly to the chagrin of business interests, such interests could challenge the administration in the political process. Finally, if it appears that the Secretary is acting in an arbitrary or capricious manner in extending the time period of debarment, an employer could challenge such a determination in court.

64. See Hal Keith Gillespie, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 790–91 (1972); Jeffrey A. Spector, Comment, *Replacement and Reinstatement of Strikers in the United States, Great Britain, and Canada*, 13 COMP. LAB. L.J. 184, 200–01 (1992).

65. See Canzoneri, *supra* note 19, at 232; see also William Feldesman, *Dictum Carried to Extremes: Mackay Radio Revisited*, 12 LAB. LAW. 197, 203–04 (1996) (describing examples of temporary replacement availability and existence of market providing temporary replacements to struck employers); Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 LAB. LAW. 165, 167

commentators have argued that, even if an employer would find it difficult to hire a sufficient number of replacements without offering them permanent status, the *Mackay* doctrine should not be the default rule. Instead, the burden of proof ought to be placed upon the employer, who would be required to justify the necessity of using permanent replacements in a given situation.⁶⁶

There are a number of factors suggesting that employers are able to attract temporary replacements. First, although in the past higher unionization rates resulted in moral stigmatization of workers willing to replace strikers,⁶⁷ today approximately ten percent of private sector employees are unionized.⁶⁸ As a result, employers have less reason to offer replacements permanent status to overcome a replacement worker's moral concerns.⁶⁹ Second, even when employers have made an offer of "permanent" employment to a replacement, such replacements have often lost their positions once the employer and union settled the labor dispute.⁷⁰ Thus it is unclear how much significance can be

(1996) (describing means available to employers for hiring "peripheral" workers, including use of temporary help agencies, employee leasing firms, and service contractors). The availability of temporary work is not limited to unskilled jobs. A market for professional temporary workers such as lawyers, nurses, and writers also exists. See Hiatt & Jackson, *supra*, at 171-72.

66. 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, 876-77 (1994); Deborah Eberts, Comment, *The Mackay Doctrine: The Grand Dame of Labor Law Clashes with Current State of Union*, 57 J. AIR L. & COM. 257, 284 (1991); Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 682-83 (1993).

67. See Gillespie, *supra* note 64, at 789 (arguing that employers might find it difficult to hire replacements in pro-union communities); Charles E. Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 OHIO ST. L.J. 639, 652 n.99 (1985) (same).

68. See Estreicher, *supra* note 12, at 117 ("From a highpoint in the mid-1950s—when unions represented over 35 percent of workers in private firms . . . —the unionization rate has plummeted to under 12 percent of the private sector workforce."); Frank Swoboda & Martha M. Hamilton, *Labor Looks to Grow from the Grass Roots*, WASH. POST, Feb. 18, 1996, at H1 (noting decline in private sector unionization rate from peak of approximately one-third of workforce to only 10% today).

69. See Gillespie, *supra* note 64, at 792. I use the term "moral concerns" since anti-replacement propaganda traditionally painted a decision to replace another worker as immoral and repugnant. See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) (discussing use of "scab" as anti-replacement epithet). The *Old Dominion* decision quoted a piece of trade union literature commonly attributed to Jack London which concludes: "[A] SCAB is a traitor to his God, his country, his family, and his class." *Id.* at 268. One commentator has suggested that today younger workers who have never belonged to a union are more likely to replace strikers: "We call them 'scabs,' but they are just being realists. They read *The Tribune* looking for strikes as if they were want ads. In the old days they wouldn't scab, because they'd hope one day to be in a union, too. But labor's dying now, or its dead . . ." GEOGHEGAN, *supra* note 22, at 233; see also Estreicher, *supra* note 12, at 118 ("American workers born after World War II are less inclined to favor collective and statist solutions . . .").

70. Despite receiving an offer for permanent employment, a replacement is still subject to discharge if a collective bargaining agreement requires that replacements be discharged. See Sean J. O'Sullivan, Note, *Protecting the Expectation of Permanent Replacements: When May an Employer Limit the Seniority Rights of Striking Employees?*, 5 HOFSTRA LAB. L.J. 109, 112 (1987). To appease a union, employers may also discharge replacements before the settlement of a strike. See *id.* Thus the offer of permanency can be illusory. See Gillespie, *supra* note 64, at 790. Replacements often know of these factors and understand that, despite being promised a permanent position, their offers were nonpermanent in that they are subject to dismissal. See Samuel Estreicher, *Collective Bargaining or "Collective Begging"? Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 604 n.110 (1994); Anthony G. Moleski, Comment, *Labor Law—Should Third Party Lawsuits Be Preempted?* *Belknap, Inc. v. Hale*, 10 J. CORP. L. 291, 302-03 (1984).

accorded an offer of permanent employment.⁷¹

Any contractor who loses a federal government contract because of the Order will likely argue that if he or she is not allowed to offer permanent positions to replacements, there will be insufficient interest in the temporary jobs. As a result, the contractor will argue that the business will be severely affected. However, there is another response to the contractor who is solely reliant upon federal government contracts: No one has a right to a federal contract. In *American Federation of Labor & Congress of Industrial Organizations v. Kahn*,⁷² the D.C. Circuit addressed the mandatory nature of a compliance program instituted by an executive order. That order had been issued under the authority of the Procurement Act and had denied federal government contracts to companies that failed or refused to comply with certain voluntary wage and price standards.⁷³ In upholding the validity of this order, the court stated:

Further, any alleged mandatory character of the procurement program is belied by the principle that *no one has a right to a Government contract*. As the Supreme Court ruled in *Perkins v. Lukens Steel Co.*, “[T]he Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.” Those wishing to do business with the Government must meet the Government’s terms; others need not.⁷⁴

Although Clinton’s Order may impose some costs on federal contractors, especially on those who rely solely upon federal contracts for their livelihood, such are the costs of doing business with the government. Since the Order has been publicly issued and its guidelines, as interpreted by the Secretary of Labor, have been publicly promulgated,⁷⁵ government contractors have had full knowledge of these potential costs. Those contractors who believe such costs are prohibitive or who do not wish to be subject to the terms of the Order can choose not to contract with the federal government.⁷⁶

71. *But see* *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (allowing replacements who were offered permanent status and then subsequently fired when strikers returned to bring suits in state court against employer). *Belknap* suggests that, even if replacement employees cannot rely upon an offer of permanent employment actually resulting in permanent employment, they could have a right of action against an employer who offered them permanent status. However, the costs of pursuing such an action could be prohibitively high in practice.

72. 618 F.2d 784 (D.C. Cir. 1979).

73. *See id.* at 785–86.

74. *Id.* at 794 (emphasis added) (citations omitted); *see also* *Contractors Ass’n v. Secretary of Labor*, 442 F.2d 159, 174 (3d Cir. 1971) (“The prospective contractors may either agree to undertake the [terms of executive order at issue], or forego bidding on federally assisted work.”).

75. *See* Exec. Order 12,954, 60 Fed. Reg. 13,023 (1995); *Permanent Replacement of Lawfully Striking Employees by Federal Contractors*, 60 Fed. Reg. 27,856, at 27,860–62 (1995) (final implementation regulations promulgated by Secretary of Labor).

76. *See* Michael H. LeRoy, *Employer Treatment of Permanently Replaced Strikers, 1935–1991* Public

2. Discretionary Element of the Order

The Executive Order also allows for discretion in the termination of a contract with an employer using permanent replacements during a labor dispute.⁷⁷ It implements procedures that permit flexibility and promote decentralized decisionmaking by placing the power to veto a contract termination or employer debarment with individual department heads.⁷⁸ In addition, the Order requires that the Assistant Secretary notify the employer of any proposed termination or debarment and give the employer an opportunity to submit arguments and attend a hearing in order to contest such action.⁷⁹ These discretionary checks prevent a rigid application of the Order when such an application would be harmful to the government's interests.

C. Qualifying the Use of Replacement Workers

The *Reich* court stated: "It is . . . undisputed that the NLRA preserves to employers the right to permanently replace economic strikers as an offset to the employees' right to strike."⁸⁰ In support of this statement, the court noted that "[t]he [Supreme] Court has repeatedly approved and reaffirmed *Mackay Radio*."⁸¹ This assertion by the court cannot be denied; ever since the *Mackay* decision, the Supreme Court has consistently upheld the use of permanent replacements, and Congress has never explicitly overruled it. It is also true, however, that neither the Supreme Court nor Congress has allowed employers an unfettered right to replace striking workers. The *Reich* court did not recognize limits on an employer's right to replace workers in its decision, and, as such, implied that the Order represented an unprecedented interference with this right. This Section develops an analysis that acknowledges the limitations of the *Mackay* doctrine, thereby presenting a more balanced view of the striker replacement doctrine's evolution. Under this analysis, the Order appears less as an aberration and more as an acceptable action by the executive.

Policy Implications, 13 YALE L. & POL'Y REV. 1, 24-25 (1995).

77. In *Wisconsin Department of Industrial, Labor & Human Relations v. Gould*, 475 U.S. 282 (1986), the Court struck down a Wisconsin statute which debarred repeat violators of the NLRA from doing business with the state. Among the factors noted by the Court in striking this statute were "the rigid and indiscriminating manner in which the statute operates" and the fact that the statute "automatically deprive[s]" firms from competing for the state's business. *Id.* at 287-88. The Executive Order at issue in *Reich* does not involve automatic termination or debarment.

78. Section 270.14 of the implementation regulations provides that once the Assistant Secretary of Labor makes a finding that an employer is using permanent replacements, he or she must notify the head of any department or agency that contracts with the employer. If the head of the department or agency objects to the termination of this contract and notifies the Assistant Secretary of this objection, the contract will not be terminated. See 60 Fed. Reg. at 27,861.

79. See *id.* The Assistant Secretary is given the discretion to decide not to terminate or debar the employer based on the record of the hearing. See *id.*

80. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996).

81. *Id.*

1. Congressional Action Regarding Striker Replacements

One of the strongest arguments in support of the *Reich* decision is that Congress has repeatedly rejected recent attempts to overturn the *Mackay* doctrine. Although Congress has been relatively silent in legislating directly in the area of permanent replacements, it has implicitly recognized the existence of the striker replacement doctrine by not using its plenary power to overrule it explicitly by statute. Congress has, by contrast, passed legislation addressing and limiting an employer's use of replacements.

The most obvious statutory provision limiting the use of permanent replacements is the NLRA itself, which, as noted previously, protects the employee right of concerted activity and specifically protects the right to strike.⁸² Yet, as stated above, Congress has never acknowledged an inconsistency between the NLRA and the *Mackay* doctrine. To be sure, if the *Mackay* doctrine were in direct contravention of congressional intent, Congress could have taken some action within the past fifty-eight years to reconcile the inconsistency. The lack of explicit congressional action repealing the *Mackay* doctrine lends credence to the *Reich* court's decision.

In addition to the language in the NLRA, however, there are three other statutory provisions that touch, at least indirectly, on the employer's right to use replacements. These are the Targeted Jobs Credit section of the Internal Revenue Code,⁸³ the Byrnes Act of 1936,⁸⁴ and the Wagner-Peyser Act of 1933.⁸⁵ Although none of these acts repeals an employer's right to replace striking workers, each recognizes limitations of this right.

The Targeted Jobs Tax Credit Act allows employers to receive a tax credit for forty percent of "qualified" first-year wages in a given year.⁸⁶ Wages are qualified if they are "paid or incurred by the employer during the taxable year to individuals who are members of a targeted group."⁸⁷ However, this section specifically eliminates from this category wages paid to employees who are performing work that is substantially the same or similar to the work performed by currently striking or locked-out employees.⁸⁸ Thus the wages

82. See National Labor Relations Act, 29 U.S.C. §§ 157, 163 (1994); *supra* note 21

83. 26 U.S.C. § 51 (1994).

84. 18 U.S.C. § 1231 (1994).

85. 29 U.S.C. § 49(j)(b) (1994).

86. See 26 U.S.C. § 51(a) (1994).

87. *Id.* § 51(b)(1). The targeted groups are defined in § 51(d).

88. See *id.* § 51(c)(3). The statute reads:

(3) Payments for services during labor disputes.

If—

(A) the principal place of employment of an individual with the employer is at a plant or facility, and

(B) there is a strike or lockout involving employees at such plant or facility,

the term "wages" shall not include any amount paid or incurred by the employer to such individual for services which are the same as, or substantially similar to, those services performed by employees participating in, or affected by, the strike or lockout during the period of such strike or lockout.

paid to replacement workers during the course of a labor dispute do not qualify for tax credits under the Act. This Act signals a legislative willingness to withdraw benefits from employers using replacements. In doing so, Congress essentially taxes employers for using replacements. Both the Targeted Jobs Tax Credit Act and the Order, though enacted after *Mackay*, impose a cost on an employer's use of permanent replacements.

There is also statutory evidence of Congress's sensitivity to the issue of "strikebreakers"⁸⁹ which predates the *Mackay* doctrine. The Byrnes Act criminalizes the transportation across state lines of strikebreakers who are brought to the labor dispute for the purpose of forcibly obstructing or interfering with employees' self-organization or picketing rights.⁹⁰ In addition, the Wagner-Peyser Act requires the Secretary of Labor to provide notice to job applicants of any strikes or lockouts at a workplace before referring them for employment there.⁹¹ Both acts illustrate a congressional awareness of problems accompanying the use of strikebreakers. Although both acts predate the *Mackay* decision, they remain valid law despite the fact that they qualify an employer's right to use replacements. Hence, Congress has set implicit limits on the striker replacement doctrine.

2. Judicial Interpretations and Limitations

By stating that the Supreme Court has "repeatedly approved and reaffirmed *Mackay Radio*,"⁹² the *Reich* court oversimplifies the complex development of the *Mackay* doctrine. The court is correct in stating that, since *Mackay*, the Supreme Court has indeed recognized an employer's right to hire permanent replacements.⁹³ In noting the acceptance of *Mackay* while failing to acknowledge judicial limitations of that decision, the *Reich* court painted the Order as steadfastly contrary to Supreme Court precedent. A deeper analysis of Supreme Court decisions subsequent to *Mackay* reveals a less than wholehearted acceptance of the *Mackay* doctrine.

In *Mackay*, the Court placed a limit upon an employer's use of replacements by holding that the discriminatory reinstatement of workers at the conclusion of the strike based on their union activity was an unfair labor

89. Replacements, both permanent and temporary, have been referred to by a number of names, including "strikebreakers" and "scabs." See *supra* note 69.

90. See 18 U.S.C. § 1231 (1994). The Byrnes Act is titled "Transportation of strikebreakers" and imposes a punishment of a fine or up to two years' imprisonment on anyone who transports persons for the purpose of obstructing or interfering by force with a labor dispute. See *id.*

91. See 29 U.S.C. § 49(j)(b) (1994). The section is titled "notice of strikes and lockouts to applicants." *Id.*

92. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996).

93. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

practice.⁹⁴ At the conclusion of a strike, employers are not permitted to pick and choose based on union animus or activity among employees applying for reinstatement.⁹⁵ In *NLRB v. Fleetwood Trailer Co.*,⁹⁶ the Supreme Court held that the employer was required to rehire permanently replaced workers preferentially if positions became available after the conclusion of the strike.⁹⁷ This requirement to rehire replaced strikers before other applicants extends even beyond the date on which the strikers initially request reinstatement.⁹⁸ In *Fleetwood Trailer*, the Court concluded that there were only two legitimate business justifications for not reinstating a striker: if the job were filled by a permanent replacement, or if the job had been eliminated for substantial and bona fide reasons.⁹⁹ In *Mastro Plastics Corp. v. NLRB*,¹⁰⁰ the Court created a distinction between unfair labor practice strikes (in which employees strike to protest illegal employer actions) and economic strikes (in which employees strike to achieve objectives such as increased pay and more benefits). Unlike an economic strike, at the conclusion of an unfair labor practice strike the employer is required to reinstate all previously striking employees who would like to return—even if “permanent” replacements have been hired.¹⁰¹ The right to replace workers was further limited in *NLRB v. Erie Resistor Corp.*,¹⁰² in which the Court struck down an employer’s grant of twenty years of unearned seniority credit to replacement workers and crossover employees.¹⁰³ The Court held that the employer had engaged in an unfair

94. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 346–47 (1938).

95. See *id.*; see also *George Banta Co. v. NLRB*, 686 F.2d 10, 21 (D.C. Cir. 1982) (stating rule that strikers are entitled to “reinstatement without discrimination on the basis of relative union activity”), *Newbery Energy Corp.*, 94 L.R.R.M. (BNA) 1307, 1310 (1976) (ordering that any discharged striker improperly denied reinstatement be paid back pay plus interest).

96. 389 U.S. 375 (1967).

97. See *id.* at 380–81; *Augusta Bakery Corp.*, 134 L.R.R.M. (BNA) 1028 (1990) (holding that employer violated NLRA by refusing to reinstate former strikers).

98. See *Fleetwood Trailer*, 389 U.S. at 380–81.

99. See *id.* at 379; see also *Laidlaw Corp.*, 68 L.R.R.M. (BNA) 1252 (1968) (holding economic strikers to be entitled to reinstatement in their prestrike jobs absent legitimate and substantial business justification). The *Fleetwood Trailer* Court also held that considerations relating to labor relations were not to be considered bona fide reasons for not reinstating a striker. See *Fleetwood Trailer*, 389 U.S. at 379. Interestingly, the Court has never applied the bona fide reason test to the initial decision to hire permanent replacements. For a discussion of the merits of amending the NLRA to create a rebuttable presumption that employers have “no legitimate business necessity” to hire permanent replacement workers, see Note, *supra* note 66, at 682.

100. 350 U.S. 270 (1956).

101. See *id.* at 278; see also *NLRB v. International Van Lines*, 409 U.S. 48, 76 (1972) (calling unfair labor practice strikers’ right to unconditional reinstatement “well settled”); *NLRB v. Harding Glass Co.*, 80 F.3d 7, 10 n.3 (1st Cir. 1996) (stating that “[u]nfair labor practice strikers are entitled to unconditional reinstatement” absent contractual or statutory provision to the contrary); *Hoffman v. Polycast Tech. Div.*, 79 F.3d 331, 333 (2d Cir. 1996) (emphasizing obligation to reinstate strikers dependent on whether strike protested unfair labor practice or economic conditions); *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995) (stating unfair labor practice striker who unconditionally offers to return to work is entitled to reinstatement); *F.L. Thorpe & Co.*, 148 L.R.R.M. (BNA) 1055, 1060 (1994) (holding failure to reinstate unfair labor practice strikers to be violation of NLRA).

102. 373 U.S. 221 (1963).

103. See *id.* at 235–36. Crossover employees are employees at the time the strike commences who choose not to honor the picket line and resume work despite the existence of the strike.

labor practice by giving this significant seniority bonus to nonstriking and replacement employees. As such, the *Erie Resistor* decision placed limits on preferential treatment of replacement workers or crossover employees by employers.¹⁰⁴

3. *The Order Is Analogous to Other Limitations*

The *Reich* court is correct in acknowledging that the Supreme Court and Congress have accepted an employer's right to replace striking workers. If the intent of the Order was to eliminate this right entirely, the *Reich* decision would be justified. Employers are legally entitled to replace workers so long as Congress fails to repeal the *Mackay* doctrine by explicit statute.

However, the Order does not prohibit an employer's use of permanent replacements. It instead in effect requires employers to make an economic decision weighing the value of using permanent replacements versus the potential loss of government contracts during the time of the labor dispute. As will be discussed below, the government has asserted legitimate proprietary interests for not contracting with employers utilizing permanent replacements.¹⁰⁵ Employers may choose to employ permanent replacements despite the effect this will have on their ability to contract with the federal government during the labor dispute.¹⁰⁶ Once the labor dispute is resolved, the employer will once again be free to contract with the government, even if permanent replacements are still employed. Employers thus retain the right to use permanent replacement workers.

The statutory provisions and Supreme Court decisions listed above illustrate the give-and-take involved in the striker replacement doctrine. Although the right to replace workers has been recognized for nearly sixty years, it has been subject to limits. In considering the validity of the Order, the *Reich* court ought to have recognized these limits. A fundamental problem with the court's analysis in *Reich* is that it fails to explain how the limitations imposed upon the striker replacement doctrine by the Order are inconsistent with other existing limitations. The *Reich* decision, in fact, does not acknowledge the existence of any limitations of the *Mackay* doctrine.

104. *But see* *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989) (holding that employer could protect permanent replacements and less senior employees who worked during strike from being bumped to less desirable work site by returning strikers with greater seniority despite provision in collective bargaining agreement providing for bumping based on seniority).

105. *See infra* Part III.

106. Other commentators have suggested that employers may decide to forgo participation in government contracts under the Order because of the value they place on using permanent replacements. *See, e.g.,* LeRoy, *supra* note 76, at 24–25; *cf. supra* note 74 and accompanying text (discussing cases in which courts have articulated view that no contractor has right to federal contract).

II. THE UNPRECEDENTED EXPANSION OF THE *MACHINISTS* PREEMPTION DOCTRINE

In addition to failing to acknowledge the limitations that have been placed upon the *Mackay* doctrine and treating the *Mackay* dictum as if it were the explicit text of the NLRA, the *Reich* court also adopted an expansive reading of the *Machinists* preemption doctrine.¹⁰⁷ The *Reich* court relied heavily on the *Machinists* doctrine, which prevents state or municipal governments from passing legislation regulating areas that Congress, in passing the NLRA, intended to be left unregulated.¹⁰⁸ This rigid application of *Machinists* preemption by the court is of questionable validity for two reasons. First, the Supreme Court in *Belknap, Inc. v. Hale*¹⁰⁹ limited the scope of *Machinists* preemption. Second, the application of *Machinists* preemption to the President of the United States is without precedent in labor law. While the Supreme Court has limited the application of *Machinists* preemption, the D.C. Circuit Court in *Reich* adopted an unprecedented expansion of the doctrine to the executive. Such expansion is inconsistent with the development of the *Machinists* doctrine.

A. *Machinists Preemption Doctrine*

The concept of preemption is rooted in the Supremacy Clause of the Constitution.¹¹⁰ The *Machinists* preemption doctrine is based upon the interplay between the NLRA and the Supremacy Clause. Since the NLRA is a federal statute, the Supremacy Clause dictates that it shall preempt any state law that interferes with its functioning. *Machinists* preemption deals specifically with state regulation of areas Congress intended to be left unregulated, including the use of economic weapons during labor disputes.¹¹¹

In *Machinists*, the Supreme Court struck down a cease and desist order entered by the Wisconsin Employment Relations Commission against a union and its members who had refused to work overtime during a labor dispute with their employer.¹¹² In its decision, the Court noted that "Congress meant to leave some activities unregulated and to be controlled by the free play of

107. See *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

108. See *id.*

109. 463 U.S. 491 (1983).

110. U.S. CONST. art. VI, cl. 2. The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ." *Id.*

111. See *Machinists*, 427 U.S. at 149-51.

112. See *id.* at 155.

economic forces.”¹¹³ The Court specifically included the parties’ right to use economic self-help weapons within this regulation-free zone.¹¹⁴

B. *Belknap, Inc. v. Hale*

The *Reich* court noted that the use of permanent replacements was specifically mentioned in *Machinists* as a weapon available to the employer to counter the union’s refusal to work overtime.¹¹⁵ There was, however, no reference to the subsequent Supreme Court decision in *Belknap, Inc. v. Hale*,¹¹⁶ in which the Court refused to apply the *Machinists* preemption doctrine rigidly. In that case, Belknap, the employer, decided to replace its striking employees permanently. Belknap made a number of assurances to the replacement workers it hired that they were indeed “permanent.”¹¹⁷ Despite these assurances, Belknap entered into a settlement agreement with the union that included the reinstatement of the striking workers. Upon being displaced by the returning strikers, a number of replacement employees brought actions in state court against Belknap for misrepresentation and breach of contract. The question of whether these actions in state court were preempted by the *Machinists* doctrine was subsequently brought on appeal to the Supreme Court.

The Supreme Court upheld the right of the displaced replacements to bring suit in state court. In so doing, the Court rejected the employer’s argument that “[s]ubjecting the employer to costly suits for damages under state law for entering into settlements calling for the return of strikers would . . . conflict with the federal labor policy favoring the settlement of labor disputes.”¹¹⁸ Holding that the *Machinists* doctrine did not preempt the replacements’ suit, the Court stated: “If federal law forecloses this suit, more specific and persuasive reasons than those based on *Machinists* must be identified to support any such result.”¹¹⁹ The Court thereby rejected a rigid adherence to the *Machinists* preemption doctrine. By allowing displaced “permanent” replacements to bring suit under state law against their employer, the Court

113. *Id.* at 144.

114. *See id.* at 147–48.

115. *See* Chamber of Commerce v. Reich, 74 F.3d 1322, 1334 (D.C. Cir. 1996). After finding that the *Machinists* preemption doctrine precluded the State’s interference with the union’s use of an economic weapon—the refusal to work overtime—the Court in *Machinists* mentioned, in dicta, economic weapons to which the employer could have resorted to counter the union’s actions. These included the use of a lockout or permanent replacements. *See Machinists*, 427 U.S. at 152–53.

116. 463 U.S. 491 (1983).

117. To retain replacement workers, Belknap placed an ad in a local newspaper that offered jobs to “qualified persons looking for employment to permanently replace striking warehouse and maintenance employees.” *Id.* at 494 n.1. Upon accepting employment at Belknap, replacement employees signed a contract that stated in part: “I as of this date have been employed by Belknap, Inc. . . . as a regular full time permanent replacement” *Id.* at 494–95. During the course of the strike, Belknap distributed a letter to replacements assuring them of their permanent status. *See id.* at 495.

118. *Id.* at 499.

119. *Id.* at 507.

placed a limit upon an employer's ability to use permanent replacements as an economic weapon.¹²⁰ Employers cannot offer a "permanent" position to a replacement without potentially being subject to sanction under state law should they ultimately reinstate strikers at the replacement's expense.¹²¹

The *Belknap* decision is not the sole example of the Court's reluctance to invoke the *Machinists* preemption doctrine to invalidate state legislation in the labor context.¹²² In the face of preemption challenges, the Court has upheld state statutes providing strikers with unemployment payments,¹²³ mandating inclusion of minimum insurance benefits for employees in collective bargaining agreements,¹²⁴ and requiring minimum severance benefits to employees who lost their jobs due to plant closings.¹²⁵ *Belknap* is especially significant, however, in that it allows private action under state law that ultimately interferes with the employer's use of permanent replacements. The *Belknap* decision represented such a definitive step away from a rigid application of the *Machinists* doctrine that it inspired speculation as to the potential legitimacy of future state legislation limiting economic weapons in labor disputes.¹²⁶ It is doubtful that the return with a vengeance of the *Machinists* doctrine in the *Reich* decision could have been predicted.

C. Application of *Machinists* Preemption to the Executive Branch

By finding the Order to be preempted by the *Machinists* doctrine, the *Reich* court not only ignored recent Court precedent that has refused to apply this doctrine rigidly, but has also expanded it to the actions of the executive. The Supreme Court has never used *Machinists* preemption to invalidate an executive order. President George Bush issued two Executive Orders during his term which, under the *Reich* analysis, would have been within the purview of the *Machinists* preemption doctrine had they been challenged.¹²⁷ When

120. See *id.* at 536-38 (Brennan, J., dissenting) (arguing that allowing suits by displaced replacements will burden employers' right to use permanent replacements); cf. Moleski, *supra* note 70, at 311 ("By the clear explication of replacements' rights in *Belknap*, unions now realize that the hiring weapon of the employer will be used carefully, and quite possibly, sparingly. Employers will be required to weigh hiring decisions at the beginning of a strike.").

121. The *Belknap* decision may have harmful repercussions for unions as well. Employers may become very reluctant to agree to reinstate striking workers at the conclusion of the labor dispute for fear of subjecting themselves to liability from replacement suits. See *Belknap*, 463 U.S. at 532 (Brennan, J., dissenting).

122. See Gerald A. McDonough, Note, *Federal Labor Law Preemption and Strikes: What Can State and Local Governments Do?*, 24 SUFFOLK U. L. REV. 117 (1990) (discussing recent cases that demonstrate Court's unwillingness to apply *Machinists* preemption strictly).

123. See *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979).

124. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

125. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

126. See, e.g., McDonough, *supra* note 122.

127. Executive Order 12,800 required all employers contracting with the federal government to post conspicuous notice to its employees of their right *not* to be required to join or maintain membership in a labor union. See 57 Fed. Reg. 12,985 (1992). Executive Order 12,818 was titled "Open Bidding on Federal

these Executive Orders were brought to the court's attention in *Reich*, it responded by noting the fact that neither was subject to litigation, and that, therefore, no court had the opportunity to pass on their legality¹²⁸—a valid point, but one which lent no precedential support to the court's decision to strike down Clinton's Order.

In fact, the *Reich* court invalidated Clinton's Order after listing a host of executive orders issued by previous Presidents "designed to ensure equal employment opportunities" that, when challenged, were sustained by federal appellate courts.¹²⁹ The *Reich* court does not cite any example of an executive order being struck down for conflicting with the NLRA.¹³⁰ Despite this lack of supporting precedent, the court invoked the *Machinists* doctrine to strike down the Executive Order issued by the President of the United States.

The *Reich* court explained that: "Nor, as we have noted, is there any doubt that *Machinists* 'pre-emption' applies to federal as well as state action."¹³¹ In support of this statement, the court cited the Supreme Court's decision in *NLRB v. Insurance Agents*.¹³² In *Insurance Agents*, the Court held that the NLRB did not have the power to find a union's slow-down activities during a labor dispute unlawful under the NLRA.

The *Reich* court extended the holdings of both *Insurance Agents* and *Machinists* to stand for the proposition that preemption applies uniformly to all federal action by any federal entity. A closer reading of *Machinists*, however, shows that in enunciating its preemption doctrine, the Supreme Court dealt specifically with the states and not with the executive branch. It stated:

and Federally Funded Projects" and barred government contractors from entering into pre-hire agreements that were expressly permitted under the NLRA. See 57 Fed. Reg. 48,713 (1992).

128. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996).

129. See *id.* at 1332 (D.C. Cir. 1996) (listing seven Executive Orders dealing with equal employment opportunities upheld by U.S. appellate courts); see also *American Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 870 F.2d 723 (upholding Executive Order excluding certain subdivisions of Marshal's Service from coverage under Federal Service Labor-Management Relations Act); *American Fed'n of Labor & Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (upholding validity of Executive Order imposing wage and price standards designed to combat inflation); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971) (upholding equal employment Executive Order against NLRA-based challenge as within presidential authority as conferred under Procurement Act); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967) (stating Executive Order barring discrimination based upon national origin "to be accorded the force and effect given to a statute enacted by Congress"); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964) (stating Executive Order and regulations promulgated thereunder designed to prohibit federal contractors from racial discrimination have "full force of law").

130. This is unsurprising since the *Machinists* doctrine has never previously been used to strike down an executive order.

131. *Reich*, 74 F.3d at 1334.

132. 361 U.S. 477, 499–500 (1960) (recognizing NLRB not authorized to "define through its processes what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining"). Note that the *Reich* court cites *Insurance Agents* in support of its interpretation of *Machinists* despite the fact that it was decided 16 years before *Machinists*. See *Reich*, 74 F.3d at 1334. Although it is cited within *Machinists*, it is not cited for the broad proposition of federal-federal preemption espoused by the *Reich* court. See *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141–43 (1976).

Our decisions hold that Congress meant that these activities . . . were not to be regulable by States any more than by the NLRB, for neither States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful."¹³³

Machinists specifically dealt with the preemption of a state activity intruding upon the free zone of economic weaponry created by the NLRA. It analogized a state's inability to regulate within this free zone with that of the NLRB.¹³⁴ However, it did not apply principles of preemption to the executive branch.

The *Reich* court relied on the assumption that, if the NLRB is restricted from interfering within this free zone, then other federal entities regulating economic weapons during a labor dispute—specifically the executive branch by way of issuing an executive order—must likewise be preempted.¹³⁵ The problem with this analysis is that it compares two federal entities—the President and the NLRB—that serve quite different purposes. The NLRB is a government agency designed specifically to enforce the NLRA. The President's executive order authority, however, does not derive from the NLRA, nor was it designed to serve or regulate the NLRA.¹³⁶ Whereas NLRB decisions are issued for the purpose of interpreting the NLRA, executive orders are not. An NLRB decision that interferes with the free zone intended by Congress in passing the NLRA is much different than an executive order issued for the purpose of protecting the proprietary interest of the federal government. Thus, a NLRB decision incongruous with the NLRA would have to be reversed by a court, but an executive order requiring certain conditions to be met by those parties contracting with the federal government need not be. Even if an executive order were to be struck down, the *Machinists* preemption doctrine is not the appropriate means by which to do so.

133. *Machinists*, 427 U.S. at 149 (quoting *Insurance Agents*, 361 U.S. at 498)

134. See *id.* at 153 ("[S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB . . .").

135. Alternatively, the *Reich* court might be suggesting that actions a state takes that would be preempted by the NLRA would also be preempted if taken by the President of the United States. This theory, however, would be a gross contortion of the Supremacy Clause, which does not deal with interaction among branches of the federal government. See U.S. CONST. art. VI, cl. 2.

136. See, e.g., *American Fed'n of Labor & Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979). In *Kahn*, the court upheld an executive order issued under the authority of the Procurement Act, explaining:

[The Procurement Act] grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency.

Id. at 789. Additionally, in *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), the court stated, "Nothing in the National Labor Relations Act purports to place any limitation upon the contracting power of the federal government," and held that "the President acted within his implied contracting authority." *Id.* at 174.

The *Machinists* preemption doctrine has never been used to invalidate an executive order. It has almost exclusively been applied to state legislation.¹³⁷ By using the *Machinists* doctrine as a justification for striking down the Order, the *Reich* court engaged in judicial overreaching. Perhaps if the Supreme Court were in the process of expanding the application of the *Machinists* doctrine, the *Reich* decision could be considered prescient. However, such action taken in light of the fact that the Supreme Court has contracted the scope of *Machinists* preemption appears, at best, inconsistent.

D. Policy Implications of Reich's Expansion of the *Machinists* Doctrine

The *Reich* court's expansion of the *Machinists* doctrine has profound implications for the relationship among the branches of the federal government. Most significantly, it distorts the Supremacy Clause in a manner that severely restricts the President from acting through his legitimate executive order power in the field of labor relations. As noted above, the *Machinists* doctrine is based on the interplay between the Supremacy Clause and the NLRA. By relying upon *Machinists* preemption to strike down the Order, the *Reich* court has implicitly used the Supremacy Clause to invalidate the action of the President, and thereby restrict the legitimate powers of the federal executive branch. Policy decisions implemented by the President via an executive order—including those dealing with labor or employment issues—have customarily not been reviewed by the judiciary under preemption doctrines.¹³⁸ Reviewing presidential policy decisions on such grounds ignores the fact that the executive branch is a coequal with the legislative and judiciary branches. By applying the *Machinists* preemption doctrine to the actions of the executive, the court is treating such actions as akin to those of a state. Such treatment does not acknowledge the right of the executive to contribute to labor policy in areas undefined by the legislature.¹³⁹ As a coequal federal branch, the executive cannot have its actions "preempted" by Congress, especially in areas to which the legislature has never explicitly spoken.

137. The only exception to this mentioned in *Reich* is the *Insurance Agents* case which dealt with a decision by the NLRB and was decided well before *Machinists*. See *supra* note 132 and accompanying text.

138. See *supra* note 129 and accompanying text (citing cases upholding executive orders without invoking preemption doctrines).

139. Recall that the right to replace workers permanently is grounded not within explicit statutory language, but in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–46 (1938). As such, any action dealing with this aspect of labor relations, including those by the executive branch or those by a state, does not violate the will of the legislature. State activity in this area, however, could be considered preempted by *Machinists* which held that a free zone of economic activity exists which Congress had intended to be left unregulated, see *Machinists*, 427 U.S. at 144, because state action is subordinate to federal action under the Supremacy Clause of the Constitution. The Supremacy Clause, however, does not subordinate the executive branch to the legislative branch or the judiciary. Thus, if the executive branch chooses to "legislate" in a manner that affects this free zone of economic activity, such action cannot be "preempted."

The implications of this decision are even more substantial given that the invalidated Order did not expressly contradict the terms of the NLRA, but merely limited a judicial interpretation of it. Not only does *Reich* stand for the proposition that an executive order affecting a congressional act is preempted, it also means that the President does not possess the legal power to issue an executive order limiting a judicial interpretation of a congressional act—even when the scope of such an order is expressly limited and within the government's proprietary interest.¹⁴⁰

Reich has important implications for the concept of separation of powers among the branches of the federal government. By striking down the Order, the *Reich* court passed its judgment upon the *political* choice made by the President. Undoubtedly, there were political motivations underlying the President's decision to issue the Order.¹⁴¹ However, implementing a political policy is not per se an illegitimate action by the executive. The decision to issue the Order was similar to the decisions to issue executive orders dealing with equal employment opportunities—all were controversial actions with political ramifications. Should the Order prove to be unpopular or unrepresentative of the will of the American people, there are a number of checks that could be used to limit or block its implementation. These include congressional action preventing the Order's implementation, presidential recognition that the Order was contrary to popular sentiment and subsequent withdrawal of the Order, and political action in the form of angry voters electing a challenger to the President who could then rescind the Order. However, it is not the province of the judiciary to pass upon the legitimacy of the political action of the President, especially when such action does not contradict explicit statutory provisions of the NLRA and furthers the proprietary interest of the federal government.

III. THE ORDER AND THE GOVERNMENT'S PROPRIETARY INTEREST

The *Reich* court held that, by issuing the Order, the government acted impermissibly as a regulator.¹⁴² However, the court sidestepped a substantial amount of Supreme Court precedent that permits the government to take action within its proprietary interest when interacting with private participants in the marketplace.¹⁴³ The court's contention that the government acted as a regulator can be challenged for two reasons: the Order was limited in scope

140. See *infra* Part III.

141. See *supra* note 12 and accompanying text.

142. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1339 (D.C. Cir. 1996).

143. See, e.g., *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 227 (1993) ("When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*.").

to transactions to which the government is a party; and the Order addressed legitimate proprietary interests of the government. This Part will briefly address both of these justifications for the Order.

A. *The Scope of the Order*

The Order was issued "to ensure the economical and efficient administration and completion of Federal Government contracts."¹⁴⁴ By its nature and scope, it is limited solely to contracts to which the government is a party. It is important to note that the Order does not limit or regulate the use of permanent replacements between private parties. It also does not outlaw parties who are in a contractual relationship with the government from using permanent replacements. These employers may still choose to use such replacements should they decide that the potential loss of the government contracts they hold during the period of the labor disputes is not outweighed by the benefit of using permanent replacements.¹⁴⁵

In *White v. Massachusetts Council of Construction Employers*,¹⁴⁶ the Supreme Court upheld an executive order issued by the Mayor of Boston that required all construction projects financed with city funds to be performed by a work force consisting of at least fifty percent Boston residents. In upholding this order, the Court placed great significance on the fact that the scope of the Mayor's order was limited to activities in which the city was a market participant:

In this case, the Mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the order is, in a substantial if informal sense, "working for the city." Wherever the limits of the market participation exception may lie, we conclude that the executive order in this case falls well within the scope of [decisions made in support of a state's activity as a market participant].¹⁴⁷

President Clinton's Order is limited in scope in much the same way as was the Mayor's order in *White*. Corporations receiving federal contracts are, by entering into the contract, working for the government. By applying solely to government contracts, the Order is equivalent to the setting of a condition by one party to the contract. It does not represent an attempt at regulation over contracts between private, nongovernmental entities.

144. Exec. Order No. 12,594, 60 Fed. Reg. 13,023 (1995).

145. See LeRoy, *supra* note 76, at 24-25; *supra* note 74 and accompanying text.

146. 460 U.S. 204 (1983).

147. *Id.* at 211 n.7 (citing *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)).

B. *The Interests Served by the Order*

1. *Government as Proprietor*

In *Boston Harbor*,¹⁴⁸ the Supreme Court held that there is a "distinction between government as regulator and government as proprietor."¹⁴⁹ Although the *Machinists* preemption doctrine precludes state and municipal regulation in areas that Congress intended to leave unregulated,¹⁵⁰ it does not preclude state activity as a market participant. Assuming arguendo that *Machinists* preemption applies to an executive order,¹⁵¹ actions taken by the government as a market participant would not be subject to this preemption.¹⁵²

In *Boston Harbor*, the Court was presented with state activity affecting labor negotiations. The Massachusetts Water Resources Authority (MWRA), an agency of the Massachusetts State government, hired Kaiser Engineers, Inc., as a project manager. Kaiser Engineers was responsible for negotiating a long-term contract with the Building and Construction Trades Council (BCTC) for the cleanup of Boston Harbor.¹⁵³ Kaiser Engineering suggested to the MWRA that it negotiate an agreement with BCTC that would "assure labor stability over the life of the project."¹⁵⁴ MWRA agreed with this suggestion, and Kaiser Engineering negotiated an agreement with the BCTC that included a union security provision, a ten year no-strike agreement, and a requirement that all construction contractors and subcontractors working on the project be bound by these terms.¹⁵⁵ Despite the fact that union security agreements and no-strike provisions are issues normally left to negotiations between the employer and the union,¹⁵⁶ the Court upheld the contract negotiated by MWRA, which included these terms. It concluded that the state had acted as a market participant, not as a regulator, in creating contractual terms designed to promote labor peace.¹⁵⁷

148. *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218 (1993).

149. *Id.* at 227.

150. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986).

151. *But see supra* Section II.C (arguing that extension of *Machinists* preemption doctrine to executive branch of federal government is unprecedented).

152. *See Building & Constr. Trades Council*, 507 U.S. at 229-30; Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469, 574 (1993); Wilson McLeod, *Rekindling Labor Law Successorship in an Era of Decline*, 11 *HOFSTRA LAB. L.J.* 271, 346 (1994).

153. The cleanup of the Harbor was expected to cost \$6.1 billion over 10 years. *See id.* at 221.

154. *Id.*

155. *See id.* at 221-22. Although union security clauses are generally illegal under the NLRA, a specific exception is made for the construction industry. *See* 29 U.S.C. § 158(f) (1994).

156. In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), the Court specifically stated: "States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts . . ." *Id.* at 614-15 (emphasis added).

157. *See Building & Constr. Trades Council*, 507 U.S. at 230-33.

There are many ways in which the *Boston Harbor* agreement and the Order are similar. Most importantly, both involve a governmental entity imposing a contractual term upon private parties. In *Boston Harbor*, the agreement negotiated between the MWRA and BCTC imposed the "labor peace" requirements not only upon the party directly engaged in negotiations with the government—the BCTC—but also upon every private subcontractor that was a part of the Boston Harbor cleanup project and their employees. The relevant part of the bid specification stated:

"[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed . . . on behalf of [MWRA] and [BCTC] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract."¹⁵⁸

Thus the *Boston Harbor* decision allows the government, when acting as proprietor, to impose contractual conditions upon parties not directly contracting with the government and upon employees not working directly for the government. In a similar manner, the Order imposes a requirement on those contracting with the federal government that does not involve the imposition of a contractual term between the government and the contractors, but between the contractors and their employees.

Under this framework, the Order clearly falls within the proprietary interest category as defined in *Boston Harbor*. The Order creates conditions that must be met by those contracting with the government. The condition that it requires—that parties with which the federal government contracts not use permanent replacements—could be justified on the basis that it promotes labor peace.¹⁵⁹ This is the same justification given for the agreement between MWRA and BCTC which was upheld in *Boston Harbor*.¹⁶⁰

The most significant difference between *Boston Harbor* and the Order involves the scope of the Order's application. In *Boston Harbor*, the Court noted that "the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project."¹⁶¹ The Order, by contrast, applies to all those contracting with the federal government, and is

158. *Id.* at 222 (quoting MWRA Bid Specification 13.1).

159. *See infra* Subsections IV.B.2.a–b (discussing how use of permanent replacements during labor dispute leads to longer and more violent strikes).

160. *See Building & Constr. Trades Council*, 507 U.S. at 221 (discussing MWRA's "development of a labor-relations policy that would maintain worksite harmony, labor-management peace, and overall stability throughout the duration of the project").

161. *Id.* at 232.

not limited to a specific project. In *Reich*, the court noted this distinction and opined: "Surely, the result would have been entirely different, given the Court's reasoning, if Massachusetts had passed a general law or the Governor had issued an executive order requiring all construction contractors doing business with the state to enter into collective bargaining agreements [containing the *Boston Harbor* clause]." ¹⁶² Such a distinction, however, loses force as a justification for invalidating the Order considering that previous executive orders that imposed equal employment requirements upon *all* those contracting with the federal government were upheld by the judiciary, despite their broad application. ¹⁶³

In addition, it is important to note the Order's discretionary elements and limitations on its scope. ¹⁶⁴ As noted above, debarment under the Order is explicitly limited to the length of the labor dispute, and the resolution of such labor disputes need not include the rehiring of striking workers or the dismissal of replacements. ¹⁶⁵ In addition, the Order provides a process by which federal government contractors can contest debarment and allows the head of the government agency contracting with an employer using permanent replacements to object to the debarment of that employer. ¹⁶⁶ While these elements of the Order do not change the fact that its application extends to more than just one discrete project as did the agreement in *Boston Harbor*, it does show that the Clinton Administration considered the fact that the Order had a broader application, and it took steps to limit potential harms. The *Reich* court assumed that the Order's broader application necessarily means that the Order is regulatory rather than proprietary. Using this logic, however, the court would allow an executive order to be promulgated upon the award of each individual federal contract requiring that an employer not use permanent replacements during a labor dispute, but the court would not (and did not) allow the Order to stand because it combined all of these permissible orders. Although there are potential problems with issuing one order that would cover a number of contracting relationships, including the potential for its application in a specific case in which it should not have been applied, the Order allows for contract-specific exceptions and enables both government agencies and the contracting party to initiate a review process if they believe the debarment should not be pursued in a specific case. ¹⁶⁷

162. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996).

163. *See Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *supra* note 129

164. *See supra* Section I.B.

165. *See supra* Subsection I.B.1.

166. *See supra* Subsection I.B.2.

167. *See Permanent Replacement of Lawfully Striking Employees*, 60 Fed. Reg. 27,856, at 27,861 (1995); *supra* Section I.B.

2. *The Defensible Nexus*

One reason given by the *Reich* court for striking down the Order was the lack of a nexus connecting the Order with its stated goal of efficient completion of government contracts.¹⁶⁸ Although the *Reich* court claimed to be "quite reluctant to consider the President's motivation in issuing the Executive Order,"¹⁶⁹ it nevertheless went on to compare the federal government's proprietary interest to that of a private contractor, and questioned why "so long as the goods or services contracted for were provided in a timely fashion and met quality standards," the government would be concerned about whether or not the employer was using permanent replacements.¹⁷⁰

In *Hughes v. Alexandria Scrap Corp.*,¹⁷¹ the Supreme Court upheld a Maryland statute in which the State paid a bounty to persons who "scrapped" inoperable automobiles, despite the fact that the statute imposed more onerous documentation procedures on out-of-state residents who attempted to collect this bounty. In upholding this statute as a legitimate action by the State as a market participant, the Court stated that, "a statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it."¹⁷² By arguing that the typical contractor would not be concerned with whether or not an employer used permanent replacements, the *Reich* court is doing precisely what the Supreme Court refused to do in *Hughes*—invalidating a statute (or, in this case, the Order) because, in the view of the court, there was not a precise fit between the government's proprietary interest and the use of permanent replacements by firms contracting with the federal government. Simply put, the court subjected the stated justification of the Order to a high level of scrutiny, requiring an exact fit between the stated justification for the Order and its purpose.

Had the court correctly applied *Hughes*, it would have found a sufficient basis justifying a correlation between restricting a firm's use of permanent replacements and the proprietary interest of the federal government.¹⁷³ The

168. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996).

169. *Id.* at 1335.

170. *Id.* at 1336.

171. 426 U.S. 794 (1976).

172. *Id.* at 813 (declining to hold statute unconstitutional even though it could have been drawn "more artfully, more directly, or more completely"); see also *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988) (stating that state's market participant activities are "of no greater constitutional concern than those of a private business").

173. The concepts of economy and efficiency stated in the Procurement Act upon which the executive order authority is based have been broadly defined by reviewing courts. See, e.g., *American Fed'n of Labor & Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784, 788-89 (D.C. Cir. 1979) ("[The Procurement Act] recognizes that the Government generally must have some flexibility to seek the greatest advantage in various situations. 'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions.").

court chose to judge the Order based on a “typicality” standard in which it asked whether the government’s desire not to contract with firms using permanent replacements would be considered typical behavior of private contractors acting in their economic self-interest.¹⁷⁴ Although the court decided that the “typical” contractor would be unconcerned with whether or not the firms with which they contract hire permanent replacements, this conclusion is unpersuasive. The court ignored the stated justification of the Order, namely that employers’ use of permanent replacements results in longer lasting and more contentious strikes than those in which permanent replacements are not used—a justification supported by recent empirical studies.¹⁷⁵ Because the Order targets activity that results in labor unrest, and because promoting “labor-management peace, and overall stability” was identified by the Court in *Boston Harbor* as a proper proprietary goal,¹⁷⁶ the Order does have a defensible nexus with a governmental proprietary interest. More importantly, the fact that the use of permanent replacements has some correlation to lengthy and contentious strikes refutes the court’s typicality analysis. Private contractors would undoubtedly have an interest in stability and consistency, characteristics that are often absent from firms engaged in a contentious labor dispute. Those contracting with a struck employer are subject to potential delays in the shipment of goods, quality defects resulting from the work of lesser-trained replacements, and even unlawful and violent interference from strikers.

a. *Strike Duration*

One assertion made by the Order was that “the use of permanent replacements can change a limited dispute into a broader, more contentious struggle, thereby exacerbating the problems that initially led to the strike.”¹⁷⁷ A recent study has determined that the mean duration of strikes in which permanent replacements were used is three times longer than those in which they were not used, and that strikes during which the employer merely *threatened* to use permanent replacements are on average twice as long as strikes during which no such threat was made.¹⁷⁸ The Order made note of this fact.¹⁷⁹

174. See *Reich*, 74 F.3d at 1336–37.

175. See, e.g., LeRoy, *supra* note 3, at 844 (violence); Schnell & Gramm, *supra* note 11, *passim* (longer strikes).

176. *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 221 (1993).

177. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995).

178. See Schnell & Gramm, *supra* note 11, at 194; cf. Canzoneri, *supra* note 19, at 235–36 (noting “devastating effect” that employer’s threat to use permanent replacements has on union’s bargaining leverage).

179. Exec. Order No. 12,954, 60 Fed. Reg. at 13,023 (“It has been found that strikes involving permanent replacement workers are longer in duration than other strikes.”).

Although studies have shown a correlation between the permanent replacement of workers and extended strike duration, this may not prove that use of the permanent replacements is the *cause* of a longer strike. Specifically, the contentious nature of the strike might lead to the use of permanent replacements, rather than the reverse. However, there is no reason for the court to believe that the "typical" contractor would accept this alternative hypothesis rather than the one embraced by the Order. In fact, there is a compelling reason to believe that the "typical" contractor would be concerned that using permanent replacements causes longer disputes. Once the decision is made to use permanent replacements, an employer greatly increases the distance between its position and that of the union. The permanent replacement issue is added to the issue(s) that initially led to the strike and creates a compelling need for the union to negotiate on a new subject: the eventual reinstatement of its workers.¹⁸⁰ Additionally, *Belknap* makes employers, once they offer permanent positions to replacements, reluctant to agree to a striking union's condition that its members be reinstated at the conclusion of the labor dispute.¹⁸¹ Thus, by using permanent replacements, the employer arguably ties its own hands and increases the rift between the two parties. As a result, those contracting with the employer are forced to deal with delays, quality concerns, and other strike-related issues for a longer period of time.

b. *Strike Violence*

As previously noted, one of the justifications given by the President for issuing the Order was that "the use of permanent replacements can change a limited dispute into a broader, more contentious struggle."¹⁸² A number of commentators have noted that, because the replacements represent a threat to the strikers' livelihood, and due to the proximity of the replacements and strikers during a labor dispute,¹⁸³ violence often results.¹⁸⁴ However, just as it ignored the strike duration justification, the *Reich* court did not acknowledge the "contentious struggle" justification offered by the President.

180. See, e.g., *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 437 (1989) (describing "exacerbated" differences and "poststrike resentments" resulting from employer's use of permanent replacements); Diane Bruce & Tara Ann Koenig, *Confusion Surrounding the Good Faith Doubt Evidentiary Standard Goes Unchecked: NLRB v. Curtin Matheson Scientific, Inc.*, 6 ST. JOHN'S J. LEGAL COMMENT. 93, 113-14 (1990) (discussing strike in which all issues upon which strike had been based were resolved, but strike continued because of unresolved issue of status of striker replacements).

181. See *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *supra* Section II.B.

182. Exec. Order No. 12,954, 60 Fed. Reg. at 13,023.

183. Replacements typically must cross strikers' picket lines in order to get to work.

184. See Wilson, *supra* note 67, at 666; see also Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1868 (1993) ("Strikers have traditionally been willing to use violence to prevent others from taking their jobs."); Norman H. Kirshman & Robert Zentz, *Striker Replacements: The Law, the Myths, the Realities*, NEV. LAW., Jan. 1995, at 20, 21 (stating that employer's announcement of intent to hire permanent replacements "often escalates a peaceful, manageable labor dispute[] to one earmarked by violence").

Again, that is not to say that this justification could not be subject to the same causation argument as the strike duration justification—namely that it is the contentious nature of the strike that causes an employer to hire permanent replacements, and it is the contentious nature of the strike rather than the use of permanent replacements that leads to violence. However, even corporate managers, when deciding whether or not to hire permanent replacements, consider the fact that a decision to do so will often lead to strike violence.¹⁸⁵ Union leaders also acknowledge that the hiring of replacements leads to violence by striking workers. When questioned during a 1993 labor dispute, United Mine Workers President Richard Trumka stated: “I think you’d have to be very naive to believe if [the employer] tried to bring these scabs that there won’t be some of that [violence] somewhere And it won’t be because we don’t try to stop it.”¹⁸⁶ Other union leaders have been more explicit in expressing the connection between the decision to resort to violence and an employer’s decision to hire replacements. In a 1993 article on the Workplace Fairness Act, it was reported that Rodney Trump, the President of a United Auto Workers local union, “was so worried about replacements that he bought baseball bats. He said he would have issued them to pickets if any replacements had tried to cross the picket line.”¹⁸⁷

Again, it is doubtful that the “typical” contractor would not be concerned with the prospect of contracting with a firm using permanent replacements, considering the spillover of violence that accompanies such action during labor disputes. Two prominent examples are illustrative. From 1985 to 1986, union workers went on strike at the Austin, Minnesota plant of the Hormel Company. When Hormel’s management decided to reopen the plant using permanent replacement workers, the violence was so severe that Minnesota Governor Rudy Perpich called out the National Guard.¹⁸⁸ When the National Guard was withdrawn, the ensuing vandalism and violence prompted the local sheriff to describe the situation as “‘mob rule.’”¹⁸⁹ The extent of this unrest and accompanying violence led the Minnesota legislature to pass the Picket Line Peace Act,¹⁹⁰ which made it illegal for employers to hire permanent replacements.¹⁹¹ Similarly, violence resulted when Greyhound Lines, Inc. decided to hire 3000 permanent replacements workers in response to a strike lasting from 1990 to 1993. Fifty-two sniper attacks were made against

185. See Donald T. O’Connor, Editorial, *Manager’s Journal: Nothing Fair About Striker ‘Fairness’ Act*, WALL ST. J., July 26, 1993, at A11 (noting employer’s fear of strike violence when considering use of permanent replacements).

186. See *Violence Likely if Strikers Replaced, UMW Chief Says*, FT. WORTH STAR-TELEGRAM, Sept. 3, 1993, at 3.

187. See Kim Clark, *Business, Unions Disagree on Strike Bill*, BALTIMORE SUN, June 18, 1993, at 12D.

188. See LeRoy, *supra* note 3, at 844.

189. *Id.* at 855.

190. See *id.* at 844–45.

191. See *id.* at 858.

Greyhound buses driven by replacement workers, resulting in a significant decrease in customer demand and replacement willingness to cover many routes.¹⁹² Shortly after the strike began, Greyhound filed for bankruptcy.¹⁹³

The Hormel and Greyhound examples illustrate how violence precipitated by an employer's decision to hire permanent replacements can affect the ability of the struck business to provide goods and services on a timely basis.¹⁹⁴ Just as strike violence significantly impaired Greyhound's ability to provide its bus service to customers on certain routes, so could a firm contracting with the federal government be impaired from delivering goods or services. Even the typical private contractor would be concerned with the effects of strike violence on a firm's ability to deliver contracted for goods and services. The *Reich* court never considered how even those goals that it lists as of paramount concern to the typical contractor—timely deliveries and quality standards¹⁹⁵—are affected by a contracting partner's decision to hire permanent replacements. Spillover effects of strike violence are an example of why a typical contractor might legitimately be concerned about contracting with a firm utilizing permanent replacements during the course of a labor dispute.

IV. CONCLUSION

In *Chamber of Commerce v. Reich*, the United States Court of Appeals for the D.C. Circuit engaged in judicial overreaching in striking down Executive Order 12,954. The court justified this action by treating *Mackay* dictum as explicit NLRA text. It improperly characterized the Order as a prohibited repeal by implication, failed to consider thoroughly specific terms of the Order that were consistent with an employer's right to use permanent replacements, and never acknowledged existing limitations on the right to use permanent replacements that have been expounded by both the Supreme Court and Congress.

192. See Bovard, *supra* note 1; Randall Samborn, 'Replacements' Spur Labor Action, NAT'L L.J., May 28, 1990, at 1.

193. See Corbett, *supra* note 66, at 849–50.

194. For other examples of violence provoked by an employer's decision to hire permanent replacements, see LeRoy, *supra* note 76, at 25–26. One notable example is the Bridgestone/Firestone strike in 1994, during which an employer's contemplation of making temporary replacements permanent allegedly was accompanied by the bombing of a replacement's home, the impaling of a striker with a tire iron, and the smashing of a replacement worker's car windshield with a baseball bat. See *id.* at 25 n.136. At a meatpackers strike in Grayson, Kentucky, in which permanent replacements were used, strike violence included shots fired at strikers in the union headquarters and a striker's driving replacement workers off the road. See *id.* at 26 n.144. When discussing the less well-known incident of replacement-motivated violence in Kentucky, LeRoy states: "This kind of strike, while failing to attract national attention because large numbers of workers, big-name employers, and trendy issues have not been involved, nevertheless typifies the intense divisiveness that communities experience when permanent replacements cross hostile picket lines." *Id.*

195. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1336 (D.C. Cir. 1996).

The court also adopted an expansive interpretation of the *Machinists* preemption doctrine that could significantly alter the balance of power among the federal branches of government. By applying the *Machinists* doctrine to an executive order, the court opened the door for expansive judicial review of any executive order involving labor-management relations. Any presidential decision that affects labor relations undeniably will possess a political element, especially decisions dealing with highly controversial issues such as permanent striker replacements.¹⁹⁶ The policy adopted should properly be subject to political, rather than judicial, restraints. Had President Clinton's Order proved to be contrary to popular political sentiment, a number of checks could have been executed so as to limit or prohibit its implementation. First, Congress could have taken action by passing legislation barring enforcement of the Order.¹⁹⁷ Second, Clinton could have decided that the Order lacked political support and rescinded it himself. Third, the President could have been voted out of office and his successor could have rescinded the Order. After becoming President, Clinton took analogous action when rescinding executive orders issued by President Bush not only regarding labor relations, but also in other politically charged areas such as abortion.¹⁹⁸

These possible responses to an unpopular executive order dealing with labor relations have one common characteristic: they are all subject to political checks. By expanding the *Machinists* doctrine, the *Reich* court has injected an element of judicial review where it had not previously existed. *Reich* empowers the politically unaccountable federal judiciary to review politically charged policy decisions of the President. Even more striking is the fact that *Machinists* had never before been used to invalidate an executive order; it had been applied solely to state regulations and NLRB decisions regarding state regulations.¹⁹⁹ Additionally, the D.C. Circuit Court, by expanding the *Machinists* doctrine as it did in *Reich*, moved in a direction diametrically opposed to that of Supreme Court decisions limiting the application of *Machinists* preemption.

The court's decision in *Reich* has important repercussions upon the ability of the federal government to act as a market participant. The precedent established by the Supreme Court, culminating with *Boston Harbor*, explicitly

196. See Leibold, *supra* note 24, at 152 (noting Republican partisan opposition to Order). Nomani, *supra* note 10 (same).

197. In fact, such action was attempted by the House and the Senate Appropriations Committee in an effort to prevent enforcement of the Order. See David Rogers, *GOP's \$13 Billion Spending-Cut Bill Aims for Compromise with President*, WALL ST. J., Mar. 27, 1995, at A6; David Rogers, *Senate Panel Restores Funds Cut by House*, WALL ST. J., Sept. 18, 1995, at A4. Secretary of Labor Robert Reich's announcement of President Clinton's intent to issue the Order spurred efforts in Congress to prevent funding for its development and enforcement predating its actual issuance by the President. See Leibold, *supra* note 24, at 153.

198. See Ruth Marcus, *At Issue: Abortion*, WASH. POST, Aug. 16, 1992, at A21. *Planning for the Abortion Debate*, WASH. POST, Sept. 18, 1993, at A20.

199. See *supra* Part II.

permits government action in its role as a market participant in areas affecting labor relations. *Reich* represents a significant departure from this precedent. The *Reich* decision, if not overturned, could eventually be interpreted as a flat prohibition on any and all government activity dealing with labor issues previously left unregulated by Congress. As a result, the federal government could find itself impotent to protect its proprietary interests effectively through the use of no-strike provisions, union security clauses (in contracts involving the construction trades), and other contractual terms designed to deter lengthy labor disputes. Alternatively, *Reich* provides justification for substantial judicial review of the means by which the government chooses to protect its proprietary interest. The role of the judiciary would be expanded to include judgments of both policy and legality. Such a dual role is troubling as it gives the politically unaccountable judiciary the power to strike down legal policy decisions of the executive, even solely on the basis of political differences with the elected executive.²⁰⁰

In striking down the Order, the *Reich* court opened the door for significant review of political policy by the federal courts. The Order represented a policy choice by the Clinton Administration regarding the means by which it would protect the proprietary interests of the federal government. Although, as with any policy decision, the Order had a political dimension, it was a legally justifiable action. The ultimate fate of this Order rightfully rested with the politically accountable executive or legislature, not with the politically unaccountable judiciary.

200. The constitutional ramifications of the federal judiciary's willingness to decide matters of policy have not gone unnoticed. As one commentator has noted, "It is the judiciary's assumption of power not rightfully its own that has weakened, indeed severely damaged, the constitutional structure of the nation." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 115 (1996).