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ESSAY

TAking Stock of the Takings Debate

Lois J. Schiffer*  

Until recently, the Environment and Natural Resources Division ("ENRD" or "Division") at the United States Department of Justice ("DOJ" or "Justice Department") was known as the Land and Natural Resources Division. Old habits die hard, for many of the old-time veterans at the Justice Department still refer to the ENRD as the "Lands" Division. While most of the ENRD's lawyers are primarily environmental lawyers, vexing issues of property law continue to present themselves to the Division on a daily basis.

As a takings litigator, I would like to add my voice to the current debate on takings issues. This essay addresses two related topics. First, I will describe the DOJ's takings docket before the United States Court of Federal Claims.1 Second, I will share my thoughts on the so-called "takings bills" being considered by the U.S. Congress, particularly the bills that would impose sweeping new compensation mandates.2

I. Overview of the Takings Docket

Before turning to our inverse condemnation cases, it should be noted that the overwhelming majority of property acquisitions by the federal government occur either by voluntary acquisition or direct condemnation—in other words, without any dispute at all over whether a taking has occurred. The Justice Department currently has more than

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1. See infra Part I.
2. See infra Part II.
4000 condemnation matters pending in the ENRD's Land Acquisition Section, and it recently calculated that the total estimated compensation for these condemnations was more than $360 million.\textsuperscript{3} Certain participants in the takings debate contend that the government routinely disregards its constitutional obligation to pay just compensation when it takes private property. But in reality, in the vast majority of cases, the issue of whether there has been a taking simply does not arise. The ENRD acknowledges the need for the taking, and compensates for it. These acquisitions include not only fee simple acquisitions for new federal buildings, but also the purchase of a wide variety of other property interests including flood and flowage easements, scenic easements, and buffer zone easements for military installations.

The takings cases that generate the most controversy are not the eminent domain cases, but the inverse condemnation cases.\textsuperscript{4} The Division's inverse condemnation practice has traditionally consisted of cases that involve the physical occupation or invasion of property. For example, there are the overflight cases, which date back to the 1946 Supreme Court decision, \textit{United States v. Causby}.\textsuperscript{5} The \textit{Causby} Court made clear that the inconveniences caused by government aircraft are normally not compensable under the Takings Clause of Fifth Amendment,\textsuperscript{6} but it held that a taking may occur where flights over private land are "so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land."\textsuperscript{7}

The physical invasion cases under review at the ENRD also include flooding and flowage easement cases, which date back to the early 1900's. A taking may occur where flooding is the natural and probable consequence of authorized gov-

\textsuperscript{3} These and other statistics cited in this article regarding the Justice Department's takings docket were compiled by Assistant Attorney General Schiff from the litigation files and computer databases located at the U.S. Department of Justice, Environment and Natural Resources Division, Washington, D.C.

\textsuperscript{4} Inverse condemnation is the name given to a cause of action against a governmental agency to recover the value of property which has been taken in fact by the governmental agency, even though there has been no formal exercise of the power of eminent domain. \textit{Restatement of the Law (Second) of Property: Landlord and Tenant} § 8.1 (1977).

\textsuperscript{5} 328 U.S. 256 (1946).

\textsuperscript{6} U.S. CONST. amend. V.

\textsuperscript{7} \textit{Causby}, 328 U.S. at 266.
ernment action and is inevitably recurring.\(^8\)

The ENRD also litigates tenancy “holdover” cases. These cases involve situations in which the federal government continues to occupy property after a lease expires. The court determines the just compensation due for the “holdover” period.

If you consider how much of the takings debate focuses on federal regulation that merely restricts the use of property—such as wetlands regulation—it may come as a surprise to learn that well more than a third of the Environment Division’s inverse condemnation portfolio consists of physical-invasion takings cases.

This section of the essay summarizes the Division’s cases that involve only a restriction on land use, without any physical invasion (“reg-take” cases). At the close of fiscal year 1997, the ENRD had about 180 such cases on its docket. Over the past three or four years, this number has remained relatively stable, and the current mix of cases is generally representative of the Division’s reg-take docket. The largest category—roughly a quarter of the reg-take docket—involves the permit program under section 404 of the Clean Water Act\(^9\) and related protections under section 10 of the Rivers and Harbors Appropriation Act of 1899.\(^10\) Permits issued under section 404 authorize discharges of dredged or fill material into waters of the United States, including wetlands.\(^11\)

The ENRD currently has approximately forty-six reg-take cases arising out of permit denials or other actions under the section 404 program. It is important to keep these claims in perspective, and to view them in the context of the number of regulatory decisions made each year under the section 404 program. In fiscal year 1996, the Army Corps of Engineers reports that more than 64,000 landowners asked the Corps for a section 404 permit.\(^12\) More than eighty-five percent of the applicants received authorization under a general permit in an average time of just fourteen days.\(^13\) Only

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13. Id.
less than one-half of one percent—of the applications were denied.\textsuperscript{14} In other words, only a tiny fraction of agency actions under the wetlands protection program generate the cases that comprise our regulatory takings docket.

Claims alleging a regulatory denial of access to land constitute the next largest category. For example, a holder of a mineral interest in government land might seek just compensation for a temporary taking if the government disputes the validity of the claim and temporarily denies access to the land. The Division is currently litigating about thirty-four takings cases based on regulatory denial of access.

The ENRD has about twenty-two inverse condemnation cases under the “Superfund” cleanup program.\textsuperscript{15} Certain property owners have claimed that government-compelled monitoring wells and other cleanup activities affecting their property entitle them to just compensation under the Fifth Amendment.

The fourth largest category of reg-take cases involves allegations of takings of oil, gas, and mineral interests, such as those arising under the Outer Continental Shelf Lands Act.\textsuperscript{16} Approximately fifteen such cases are pending in this area.

The ENRD has about twelve reg-take claims based on alleged breach of contract. For example, the claimant might argue that an alleged breach of a timber contract by the United States Forest Service constitutes a taking of property. Not surprisingly, the plaintiffs in these cases often assert a breach of contract claim as well.

Surface mining regulation has spawned about five cases on our current regulatory takings docket. A decision that certain property is unsuitable for surface mining, the prohibitions against surface mining in protected areas, or government entry on property to abate the adverse effects of past surface mining might give rise to such cases.

The ENRD is currently litigating another four regulatory takings cases under the “rails-to-trails” program. The Na-

\textsuperscript{14} Id.
\textsuperscript{17} Id.
\textsuperscript{18} See 42 U.S.C. §§ 9601-9675.
tional Trails Systems Act,\textsuperscript{19} authorizes the Interstate Commerce Commission ("ICC") to approve interim use of railroad rights-of-way as trails where a qualified person takes responsibility for the trail operation. When the railroad's interest in the right-of-way is conditioned on continued use for railroad purposes, these ICC approvals might give rise to claims that they have taken the reversionary interest in the right-of-way.

There are an additional four pending reg-take cases that involve protections for endangered species or other wildlife.

The remaining cases involve various situations where the landowner alleges that regulatory activity has encroached on the use or enjoyment of her property. For example, the Division faces takings challenges to what might be called federal "land-use" regulatory programs, such as legislation designed to preserve the Columbia River Basin Gorge.

These figures are constantly changing and they are, therefore, necessarily approximations. But they should give the reader a sense of the relative numbers within the major categories of cases on the ENRD's regulatory takings docket. It should be noted that the Justice Department's Civil Division litigates additional takings cases where the property interest does not concern land.

II. TAKINGS LEGISLATION

This section of the essay addresses the so-called takings bills, focusing on three topics. First, I will describe what the Clinton Administration is doing to address the legitimate concerns of property owners. Second, I will explain why the pending takings bills are fundamentally flawed. Finally, I will briefly respond to some of the so-called "horror stories" that have dominated the takings debate.

A. Clinton Administration Reforms

The Clinton Administration has clearly demonstrated its strong support for the protection of private property rights. Where government regulations impose unreasonable burdens on private property, this Administration is committed to reforming those rules to make them more fair and flexible.\textsuperscript{20} In

\begin{itemize}
  \item \textsuperscript{19} 16 U.S.C. §§ 1241-51 (1994).
  \item \textsuperscript{20} The Right to Own Property: Hearings on S. 605 Before the Senate
\end{itemize}
the following description of these initiatives, please note that
certain reforms are being challenged in court.

Recent initiatives in the wetlands program\textsuperscript{21} will give
landowners much welcomed flexibility.\textsuperscript{22} Under a regulation
that establishes a new general permit, landowners will be
allowed to affect up to one-half acre of non-tidal wetlands to
build or expand a single-family home and related features
such as a garage or driveway, without having to go through
the individual permit process.\textsuperscript{23} The Administration has also
moved to expedite the approval process for wetlands mitiga-
tion banking, which will allow more development projects to
go forward more quickly.\textsuperscript{24} In addition, the Army Corps of
Engineers is reforming the wetlands program to make the
permit application process quicker and easier for everybody.\textsuperscript{25}

At the United States Department of the Interior, Secretary Bruce Babbitt is implementing landmark reforms under
the Endangered Species Act of 1973\textsuperscript{26} to address landowner
concerns.\textsuperscript{27} Under one new proposal, low-impact activities
that affect five acres or less will be presumed to have only a
negligible adverse effect on threatened species.\textsuperscript{28} Under an-
other initiative called the "No Surprises" Policy, property
owners who agree to help protect endangered species on their
property are assured that their obligations will not change,
even if the needs of the species change over time. Furthermore, other new "safe harbor" policies protect landowners from additional land use restrictions where the owner voluntarily enhances wildlife habitat.

Proponents of statutory compensation mandates argue that they are necessary because it is difficult and time-consuming to litigate a takings claim in federal court. Attorneys at the DOJ are keenly aware of the need to assure that all Americans can seek redress through the courts for meritorious claims. A property owner who successfully litigates a takings claim in the Court of Federal Claims is entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The DOJ is committed to working with the courts to ensure that takings claims may be resolved quickly and efficiently, including, for example, the use of alternative dispute resolution techniques where appropriate.

B. The Basic Defects of Takings Compensation Legislation

Of course, every citizen should be protected from unreasonable regulatory restrictions on property. But compensation bills are exactly the wrong way to go.

There were three such bills that were the focal point of the takings debate in the 104th Congress. The House-passed bill was the Private Property Protection Act of 1995. It would have applied to protections under the Endangered Species Act of 1973 and section 404 of the Clean Water Act, as well as to federal reclamation or land use laws that

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30. Id. (statement of Joseph L. Sax, Counselor to the Secretary, U.S. Dep't of the Interior, Appendix: "Status of Department of the Interior's Reform of the ESA").

31. Id. at 62-63 (prepared statement of Nancie Marzulla, President and Chief Legal Counsel, Defenders of Property Rights).


The Private Property Protection Act would have required compensation where federal action reduces the value of any portion of private property by 20%. The other main takings bills in the 104th Congress were the Omnibus Property Rights Act of 1995 ("Omnibus Act") and its 1996 successor, both of which were far broader in scope. These compensation mandates were not limited to specific programs, but instead applied to federal actions across the board. The Omnibus Act contained a 33% loss-in-value compensation threshold. The 1996 successor to the Omnibus Act had a 50% trigger, was limited to real property interests, and contained exceptions for civil rights protections. In May 1997, Senator Hatch introduced a new omnibus takings bill. The 1997 bill is limited to real property interests and contains an exception for civil rights protections, but it resurrects the 33% loss-in-value compensation mandate from the original Omnibus Act.

Most significantly, all of these bills reduce the compensability inquiry to a single factor: loss in value of the affected portion of the property. These bills would create a rigid, "one-size-fits-all" approach that precludes consideration of factors normally considered by the courts under the Constitution, and that are critical to assessing the overall fairness of the situation. In Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, every member of the Supreme Court joined an opinion stating that loss in property value, by itself, is insufficient to demonstrate a compensable taking. This long standing constitutional principle recognizes that other factors must be considered in deciding whether compensation would be fair and just, such as: (1) the landowner's legitimate expectations, (2) the extent to which the claimant has

38. Id.
45. Id.
47. Id. at 645.
benefited from government action, and (3) the effect of the proposed land use on neighboring landowners and the public.\footnote{Id. at 643-44.} Because compensation bills basically preclude consideration of these factors, they would necessarily result in unjustified windfalls at the taxpayers’ expense.

The compensation bills are further flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that under the Constitution, fairness and justice require an examination of the regulation’s impact on the parcel as a whole.\footnote{See id.} Under takings bills, however, if a single government action enhances the value of most of the property, but reduces the value of a small portion, compensation would be required.

These radical compensation schemes would force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, the environment, worker safety, and other values that give us the high quality of life Americans have come to expect. The other option would be to do what these proposals require: pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through our neighborhoods, and so forth. Basically, American taxpayers would be forced to pay corporations and other landowners for simply following the law.

In 1995, the Office of Management and Budget estimated that the House bill would cost $28 billion through the year 2002.\footnote{Senate EPW Hearings, supra note 22, at 134-46, 181-83 (testimony of Alice Rivlin, Director, Office of Management and Budget).} This estimate does not include the substantial costs of administering a compensation claims program, or the costs of managing the patchwork quilt of property parcels that the federal government would be forced to acquire.\footnote{Id.} The compensation scheme in the Senate bills is far broader in scope, and would cost several times the $28 billion cost of the House-passed legislation.\footnote{Id.}

Bill proponents sometimes argue that individual landowners are unfairly shouldering these costs now.\footnote{Hearings on S. 605, supra note 20 (prepared statement of Jonathan Adler, Competitive Enterprise Institute, Washington, D.C.)} However,
this simply is not true. The potential costs of these bills are so high because they would require compensation in many cases where compensation would be unfair and unjust, for example: where the landowner had no reasonable expectation to use the land in the manner proposed, where land-use regulation benefits the property as a whole, or where other uses would yield a reasonable return on investment without harming neighboring landowners or the public. If the government takes ten actions, nine which enhance land value, and one which reduces value, then these bills would require compensation. Fairness goes right out the window.

Both the Omnibus Act and the Private Property Protection Act purport to address health and safety concerns by providing an exception to the compensation requirement where the property use at issue would constitute a nuisance under applicable State law. However, the Congress generally provides for federal protection of human health, public safety, the environment, and other important interests only where State law is inadequate to the task. Furthermore, State nuisance law is often unable to provide comprehensive protection for human health and the environment. Thus, the narrow nuisance exception set forth in these bills is little more than a ruse; it is basically meaningless.

C. The “Horror Stories”

One may ask, if takings bills are so obviously flawed, why are they being considered? Much of the debate has been driven by anecdotal evidence, the so-called “horror stories,” stories of people who have supposedly been victimized by overzealous regulators. A closer evaluation of these horror stories reveals that they taint the ability of lawmakers to make sound policy decisions.

One so-called victim of Environmental Protection Agency (“EPA”) regulators is John Pozsgai—convicted of forty counts

56. See Hearings on S. 605, supra note 20, at 65 (prepared statement of John R. Schmidt, Associate Attorney General, U.S. Department of Justice); Senate EPW Hearings, supra note 22, at 81-87 (statement of Joseph L. Sax, Counselor to the Secretary, Department of the Interior, Appendix: “Memo on the Nuisance Exceptions in H.R. 925 and S. 605”).
of violating the Clean Water Act after he illegally filled wetlands on his property.\textsuperscript{57} Supporters of takings bills frequently attempt to portray Pozsgai as both a victim and a hero. Yet, you will not hear from these supporters that Pozsgai knew he needed a permit to fill the property when he purchased it.\textsuperscript{58} He even negotiated a drop in his purchase price due to the wetlands protections that applied to the land.\textsuperscript{59} Pozsgai then ignored repeated warnings from the EPA and the Army Corps of Engineers to stop filling the wetlands without a permit.\textsuperscript{60} He likewise violated a temporary restraining order issued by a federal district court which prohibited further violations.\textsuperscript{61} His neighbors’ property was damaged by flooding after he illegally filled the wetlands, which normally serve to absorb excess storm water.\textsuperscript{62} According to one source, at Pozsgai’s sentencing proceeding, the court said: “[I]t is hard to visualize a more stubborn violator of the laws that were designed to protect the environment. . . .”\textsuperscript{63} “If everyone followed Mr. Pozsgai’s example and placed his or her interests above the laws duly enacted by Congress we would live in an anarchy, not a democracy governed by law.”\textsuperscript{64} Thus, John Pozsgai is no hero.

Other property rights advocates trumpeted the case of John Chaconas, who owns a home built on wetlands in Louisiana.\textsuperscript{65} They sought to portray him and the previous owner of the land as victims of the EPA because the Agency notified them that the wetlands on the property had been filled illegally.\textsuperscript{66} Much to the surprise and chagrin of supporters of takings bills, however, when Mr. Chaconas testified before the Senate Judiciary Committee, he stated, “I have been por-
trayed as the victim of an unfair law and overzealous bureaucrats. I want to set the record straight. We... have become victims of larger interests pursuing their agenda to dismantle wetlands policy through takings legislation.\(^6\) He testified that when he bought the property in 1993, it appeared to be high, dry, flat land, perfect for a home for his family and a pasture for his horses.\(^6\) Due to the violations of wetlands protections, he said he cannot walk ten feet out his front door without being ankle deep in water and heavy clay mud.\(^9\) He also stated that frogs stream in the front door when it opens, and water moccasins swim outside his bedroom window.\(^7\) He testified that he is dismayed by takings bills that would require taxpayers to compensate people simply for complying with the wetlands law, the violation of which has caused him endless misery.\(^7\)

III. CONCLUSION

Like the horror stories that drive the debate, there is something downright deceptive about these compensation bills. The special-interest groups that support these bills have dressed them up in property-rights rhetoric, even though they would hurt most property owners. They say these bills would protect constitutional rights, even though they would replace two centuries of constitutional law. That is not good government. In order to improve laws concerning Takings Clause issues, there needs to be more public debate on the merits of various proposals so the public can make fair assessments to guide their choices. That is what sound public policymaking and good lawyering are all about.

\(^6\) Id.
\(^7\) Id.
\(^9\) Id.
\(^7\) Id.
\(^7\) Id.
\(^7\) Id. at 96-97.
COMMENTS

CROSSING THE PICKET LINE IN SUPPORT OF THE UNION: THE NEW FLAVOR OF SALTING

I. INTRODUCTION

In recent years, organized labor has witnessed a significant drop in membership. In 1995, 15% of American wage and salary workers belonged to unions, compared to a high of 33% in 1953. In the private sector, the numbers are even more dramatic with union membership dropping from 36% in 1953 to 10% in 1995. However, this is not the first time labor has been confronted with low numbers. During the 1920's, union membership dropped as low as 12%. It remains to be seen if unions can once again mount a comeback.

More aggressive union techniques support the notion that a resurgence is in the near future, if not already in progress. For example, in 1997, the American Federation of Labor – Congress of Industrial Organizations (“AFL-CIO”) i-
creased its annual budget for organizing unions from $2.5 million to $30 million. Additionally, organized labor contributed millions to the re-election campaign of President Clinton, which has prompted some to speculate that labor will be looking for legislative and regulatory paybacks. Furthermore, the AFL-CIO has implemented less traditional programs such as “Union Summer,” an event that sent 1,600 college aged men and women across the country to assist in everything from picketing to voter registration as a means of resurgence. Recent research suggests that new and innovative methods, such as Union Summer, may be the key to union success in the future.

In 1995, the United States Supreme Court upheld the creative union-organizing technique of having paid union organizers obtain employment with non-union businesses with the intent to form a union, a tactic known as “salting.” This technique was a response to a 1992 Supreme Court decision which severely restricted the union’s ability to distribute information to employees they wished to organize while on company property. By becoming “employees” as defined by the National Labor Relations Act (“NLRA”), union organiz-

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11. See John T. Delaney et al., Planning for Change: Determinants of Innovation in U.S. National Unions, 49 INDUS. & LAB. REL. REV. 597, 598 (1996) (“Although increased innovation does not ensure greater union effectiveness, the fate of American unions may depend more on identifying new practices to cope with the environment of the 1990’s than on perfecting old methods.”).
13. See Lechmere, Inc. v. NLRB, 502 U.S. 527, 541 (1992). An employer may prohibit distribution and solicitation by non-employee union organizers anywhere on company property, so long as the union has “reasonable access to employees outside an employer’s property.” Id.
14. 29 U.S.C. § 152 (1994). The National Labor Relations Act (“NLRA”) is a federal statute that regulates the relations between unions, employers and employees. See generally COX ET AL., supra note 7, at 74-112. It also established the National Labor Relations Board (“NLRB”), an administrative agency responsible for preventing and remedying violations and administering representation provisions of the NLRA. Id. at 100.

Section 152(3) of the NLRA provides that:
The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor
ers gained protection to distribute pro-union solicitation on company property during their non-working time.\textsuperscript{15}

There remain, however, areas in the law where unions are at a significant disadvantage and are in need of innovative techniques.\textsuperscript{16} One such area lies in an employer's ability to permanently replace striking employees.\textsuperscript{17} In \textit{NLRB v. Mackay Radio & Telegraph Co.},\textsuperscript{18} the Supreme Court held that employers are not required to discharge replacement workers hired during a strike once the strike is over, or to otherwise create jobs for returning economic\textsuperscript{19} strikers.\textsuperscript{20} In other words, while the NLRA makes it an unfair labor practice\textsuperscript{21} for employers to discipline or discharge employees for dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

\textsuperscript{17} For example, an employer is permitted to give anti-union speeches to employees on company time and property, even though the employer may refuse to give the union an equal opportunity to reply on company property during work hours. See \textit{NLRB v. United Steelworkers of Am.}, 357 U.S. 357 (1958).
\textsuperscript{18} See \textit{NLRB v. Mackay Radio & Tel. Co.}, 304 U.S. 333 (1938).
\textsuperscript{20} Id.
\textsuperscript{21} Workers who strike in an effort to receive increased economic benefits are considered “economic strikers.” \textit{Id.} Those that strike as a result of an employer's violation of the NLRA are classified as “unfair labor practice strikers.” See Mastro Plastics Corp. v. \textit{NLRB}, 350 U.S. 270, 292 (1956).
\textsuperscript{21} \textit{Mackay Radio & Tel. Co.}, 304 U.S. at 333. Unlike economic strikers, unfair labor practice strikers are entitled to reinstatement during or after a strike, even if it requires the discharge of replacement workers. \textit{See Mastro Plastics Corp.}, 350 U.S. at 270.

Black's Law Dictionary defines an unfair labor practice as:

\begin{quote}
Within National Labor Relations Act, it is an unfair labor practice for an employer: (1) To interfere with, restrain, or coerce employees in the exercise of their rights to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. (2) To dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it. (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. (4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act. (5) To refuse to bargain collectively with the representatives of his employees.
\end{quote}

engaging in a strike, at the same time, it allows for permanent replacement of them.\footnote{22}

Lawmakers have attempted to change the law in order to reverse the \textit{Mackay} holding.\footnote{23} In 1991, the House of Representatives passed the Workplace Fairness Act,\footnote{24} which would have amended the NLRA to prohibit hiring permanent replacements in the majority of strike situations.\footnote{25} The attempt, however, proved unsuccessful.\footnote{26} In July 1994, the Senate version\footnote{27} was dropped in light of a threatened filibuster.\footnote{28} Finally, in November 1994, the House and Senate removed the Workplace Fairness Act from the congressional agenda.\footnote{29}

After the bills failed to pass, President Clinton issued an Executive Order prohibiting the federal government from contracting with an employer who hires permanent replacements during a lawful strike.\footnote{30} Consequently, the Order was challenged in \textit{Chamber of Commerce v. Reich},\footnote{31} where the District of Columbia Circuit Court of Appeals struck down the Order, holding that “the Executive Order is regulatory in nature and is preempted by the NLRA which guarantees the right to hire permanent replacements.”\footnote{32} Thus, employers may still permanently replace striking workers.

Recently, a union attempted to combat \textit{Mackay} by using the newly validated tactic of salting in the strike context.\footnote{33} Specifically, union activists crossed the picket line and returned to work “for the announced purposes of campaigning for the union among replacement workers and monitoring the employer’s conduct.”\footnote{34} The employer was confronted with the difficult choice between taking the employees back un-

\begin{footnotes}
\item[23] See COX ET AL., \textit{supra} note 7, at 531.
\item[25] See COX ET AL., \textit{supra} note 7, at 531.
\item[26] \textit{Id.} at 532.
\item[27] S. 55, 103d Cong. (1993).
\item[28] See COX ET AL., \textit{supra} note 7, at 532.
\item[29] \textit{Id.}
\item[31] 74 F.3d 1322 (D.C. Cir. 1996).
\item[32] \textit{Id.} at 1339.
\item[33] See Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259 (D.C. Cir. 1997) (en banc).
\item[34] \textit{Id.} at 1282 (Henderson, J., concurring and dissenting).
\end{footnotes}
conditionally, with the potential threat of sabotage and violent confrontations with replacement workers, and placing conditions on the terms of employment, with the possibility that the employees would bring an unfair labor practice charge for discriminating against them due to union membership.\textsuperscript{35}

This comment provides an analysis of a union’s tactic of having activists cross the picket line in order to campaign for the union—salting. Section II provides an overview of the employer’s obligation towards returning economic strikers.\textsuperscript{36} This section also outlines two recent Supreme Court decisions pertaining to labor law.\textsuperscript{37} Additionally, the facts of \textit{Diamond Walnut v. NLRB},\textsuperscript{38} a case where union activists crossed the picket line during a strike, are detailed.\textsuperscript{39} Section III illustrates the unanswered questions left by the \textit{Diamond Walnut} decision.\textsuperscript{40} Section IV analyzes the relevance of the Supreme Court’s recent decisions to the facts presented in \textit{Diamond Walnut}.\textsuperscript{41} Finally, Section V proposes the need to follow the principles established by the Supreme Court,\textsuperscript{42} as well as the need to improve the tactic used in \textit{Diamond Walnut}.\textsuperscript{43}
II. BACKGROUND

A. Overview of Employer's Obligations Towards Returning Economic Strikers

1. The Mackay Doctrine

In *NLRB v. Mackay Radio and Telegraph Co.*, the United States Supreme Court held that while economic strikers cannot be fired for striking against their employer, they may be permanently replaced. Mackay was the result of a strike called by members of Local No. 3 of the American Radio Telegraphists against a San Francisco radio and telegraph company. In order to continue its operations during the strike, the employer brought in eleven employees from offices in other cities, five of whom accepted permanent positions in San Francisco. Fearing the strike was going to fail, a number of the striking employees offered to return to work. While some employees were reinstated, five employees who were active in both the union and strike were not, resulting in an unfair labor practice charge being filed with the NLRB. The Court held that employers are not required to discharge replacement workers in order to create vacancies for those strikers who wish to return to work. However, returning strikers are entitled to non-discriminatory review of their applications. Because the Mackay strikers did not get a non-discriminatory review of their applications, the employer committed an unfair labor practice by refusing to discharge replacement workers.

44. 304 U.S. 333 (1938).
45. Id. at 345-46.
46. Id. at 336.
47. Id. at 338.
48. Id. at 339.
49. Id. at 337.
51. Id.
52. Id. at 345-46. "[I]t does not follow that an employer... has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers... in order to create places for them." Id. Commentators have criticized this holding as illogical and unjust. See, e.g., Hal Keith Gillespie, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782 (1972); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 MINN. L. REV. 265, 301-302 (1978); Paul Weiler, Striking a New Balance: Freedom of Contract and the Prospects for Union Representation, 98 HARV. L. REV. 351, 387-391 (1984).
to rehire only those who were active in the union and strike.\textsuperscript{54}

2. \textit{Employer Justification of Discriminatory Treatment}

In \textit{NLRB v. Great Dane Trailers, Inc.},\textsuperscript{55} the Supreme Court clarified its previous holdings\textsuperscript{56} to establish "several principles of controlling importance"\textsuperscript{57} regarding when an employer can justify discriminatory acts towards employees based on union membership, thus avoiding an unfair labor practice charge.\textsuperscript{58} In \textit{Great Dane}, the employer refused to pay accrued vacation benefits to strikers, but offered the same pay to all non-strikers, prompting charges of section 8(a)(3) and section 8(a)(1) violations.\textsuperscript{59} The issue presented was "whether, in the absence of proof of an antiunion motivation, an employer may be held to have violated section 8 (a)(3) and section 8(a)(1) of the National Labor Relations Act."\textsuperscript{60}

In addressing the issue, the Court distinguished between "inherently destructive" discrimination and "comparatively slight" discrimination.\textsuperscript{61} Where the discrimination is inherently destructive of employees' rights, no proof of an antiunion motivation is required for the Board to find an unfair labor practice, even if the conduct was motivated by business concerns.\textsuperscript{62} Alternatively, if the discrimination is comparatively slight, "an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for

\textsuperscript{54} \textit{Id.}

[The employer] might have refused reinstatement on the ground of skill or ability . . . . It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike, but it is found that the . . . action taken by respondent [the employer], was with the purpose to discriminate against those most active in the union.

\textit{Id.}

\textsuperscript{55} 388 U.S. 26 (1967).


\textsuperscript{57} \textit{Great Dane Trailers, Inc.}, 388 U.S. at 30.

\textsuperscript{58} \textit{Id.} at 34.

\textsuperscript{59} \textit{Id.} at 30 (citing 29 U.S.C. § 158(a)(1)-(3) (1994)).

\textsuperscript{60} \textit{Id.} at 27.

\textsuperscript{61} \textit{Id.} at 34.

\textsuperscript{62} \textit{Id.}
the conduct. After deciding that the offer of vacation pay to non-strikers was discriminatory, the court found it unnecessary to determine the degree to which employee rights were affected since the employer offered no evidence of legitimate and substantial business justifications for its actions. Accordingly, the Court found the employer's action to constitute violations of section 8(a)(3) and section 8(a)(1) of the NLRA.

Soon after the Great Dane decision, the Court had an opportunity to apply the same rationale to the context of a striking employee's right to reinstatement in NLRB v. Fleetwood Trailer Co. In Fleetwood, the employer refused to rehire six striking employees after the conclusion of the strike, asserting that no jobs were available. However, two months later, six new employees were hired for positions for which the strikers were qualified, resulting in a complaint from the union charging violations of section 8(a)(1) and section 8(a)(3) of the NLRA. The Court held that a striker's right to reinstatement is not limited to job availability at the time of an employee's offer to return. Instead, "the status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment.'" Accordingly, the failure to rehire the striking employees constituted discrimination amounting to an unfair labor practice since "the employer [had] not shown 'legitimate and substantial business justifications'" for its decision.

3. Distinguishing Between Inherently Destructive and Comparatively Slight Discrimination

Because the employers in both Great Dane and Fleetwood failed to demonstrate any business justifications for their discriminatory treatment, the Supreme Court was not in a position to distinguish between inherently destructive and comparatively slight discrimination. Courts have sub-

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64. Id.
65. Id. at 35.
66. Id. at 375, 377 (1967).
67. Id.
68. Id.
69. Id. at 381.
70. Id. (quoting 29 U.S.C. § 152(3)).
71. Id. at 380 (quoting Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967)).
72. See Great Dane Trailers, Inc., 388 U.S. at 34; Fleetwood Trailer Co., 389 U.S. at 377.
sequently been required to make that distinction, and not surprisingly, no clear or concise rule has evolved. However, in *International Brotherhood of Boilermakers v. NLRB*, the court conducted a comprehensive review of cases which were found to be inherently destructive in order to "shed... light" onto the "dimly lit" path between the two. The *Boilermakers* court first concluded that the Supreme Court intended the phrases "inherently destructive" and "comparatively slight" to "encompass the universe of employer actions that have any non-trivial, adverse effect on employee rights." Therefore, if the act is less than inherently destructive, it is to be categorized as comparatively slight. Next, the court found that there existed two predominant factors for determining whether the discrimination is inherently destructive. First, an act is inherently destructive if it creates among strikers "cleavage that would endure after they return to work, and by dividing the employees, undermine[s] their ability to act in concert to exercise their [s]ection 7 rights." Secondly, an inherently destructive act "discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of the employees."

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73. 858 F.2d 756 (D.C. Cir. 1988).
74. *Id.* at 762.
75. *Id.*
76. *Id.* See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (holding that granting 20 years of super-seniority to replacement workers and returning strikers is to be inherently destructive); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954) (holding that discharging and suspending employees for soliciting for union membership is inherently destructive); see also *Note, Lockouts—Employer's Lockout with Temporary Replacements Is an Unfair Labor Practice*, 85 *Harv. L. Rev.* 680, 686 (1972) (noting the "distinction between conduct which merely influences the outcome of a particular dispute and that which is potentially disruptive of the opportunity for future employee organization and concerted activity.").
78. *Id.* at 762.
79. *Id.* at 762-64.
80. *Id.* at 764. For example, in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 225 (1963), the Supreme Court found an employer's offer of super-seniority to those strikers who returned to work to create such a division.
81. *Boilermakers*, 858 F.2d at 764.
4. To Which Positions Are Returning Strikers Entitled?

In *Rose Printing Co.*, the NLRB expanded upon its previous holding in *Laidlaw Corp.* that "replaced economic strikers who have made an unconditional application for reinstatement, and who have continued to make known their availability for employment, are entitled to full reinstatement to fill positions left by the departure of permanent replacements." *Rose Printing* involved three economic strikers who made unconditional offers to return to work. While no jobs were immediately available, approximately nine months later, the employer hired at least nine individuals to fill general worker positions without offering these jobs to the returning strikers. While the strikers were qualified for the positions, they involved lower pay and skill levels than their previous jobs. In this case, the NLRB addressed the unanswered issue of whether returning strikers are entitled to any job for which they are qualified, or only substantially equivalent ones.

"In striking the balance between employers' rights to continue business operations and employees' rights to engage in strikes, the NLRB held that returning strikers are "entitled to return to those jobs or substantial equivalents if such positions become vacant, and they are entitled to nondiscriminatory treatment in their applications for other jobs." In coming to this conclusion, the NLRB was concerned about the burden that would be imposed upon employers if employees were entitled to all available positions."

84. Id. at 1366 (emphasis added). Prior cases held that returning workers were only entitled to nondiscriminatory treatment as applicants, as opposed to being entitled to a position. Id. at 1369. See generally J. Finkin, *The Truncation of Laidlaw Rights by Collective Agreements*, 3 IND. REL. L.J. 591 (1979).
86. Id.
87. Id.
88. Id. at 1076.
89. Id. at 1078.
90. Id. at 1084 (emphasis added). The NLRB noted that while employees are not entitled to nonequivalent jobs, employers are "not free to prefer new applicants over [returning strikers] simply because they had been on strike." *Rose Printing Co.*, 304 N.L.R.B. at 1080.
91. Id. at 1079.

[Even though an employer has acted lawfully in replacing a striker, the employer would be obligated to reinstate the striker to a vacant nonequivalent job which the striker is qualified to perform. The em-
Thus, the NLRB found that the employer was not obligated to rehire the returning strikers to positions that were not equivalent to their pre-strike positions.92

B. "Salting"

1. The Lechmere Decision

While employees have the right to distribute union literature on company property during their non-working time,93 the right of union organizers to do the same has been severely restricted by the Supreme Court in recent years.94 In *Lechmere, Inc. v. NLRB*,95 an unfair labor practice charge was filed against an employer who refused to allow non-employee organizers access onto its property.96 In clarifying previous holdings,97 the Court held that so long as other reasonable means of communicating with employees exist, an employer may prohibit solicitation and distribution by non-employee organizers anywhere on company property.98 If no other reasonable means exist, the section 7 rights99 of employees are then balanced with the property rights of the employer.100 The Court stated that "reasonable access" is to be

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poyer would also be required to transfer the striker to a pre-strike job or to a substantially equivalent one when it became available and to hire another person to fill the vacancy left by the transferring striker. In our view, a striker is not entitled to such preferential treatment . . . .

*Id.*

92. *Id.* at 1090.
93. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
94. [T]ime outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.

*Id.* at 803 n.10.
95. *Id.* at 793.
97. *Id.* at 531. The union's actions on company property consisted primarily of placing handbills on the windshields of employee's cars. *Id.* at 529.
defined strictly, "applicable ‘only where the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.’”

2. Organized Labor’s Response to Lechmere

In response to Lechmere, unions increased their use of the tactic of paying union organizers to seek jobs with non-organized companies in order to organize their employees once hired, a technique known as "salting." The primary issue posed by salting is whether or not paid union organizers constitute "employees" under section 2(3) of the NLRA. As employees, organizers gain the protection of the NLRA. However, if they are not employees, employers could lawfully refuse to hire or fire them once their true motive was determined as they would be afforded no protection under the NLRA.

While the NLRB has consistently held that paid union organizers are employees under the NLRA, appellate courts split on the issue. For example, in H.B. Zachry Co. v.

105. Id. at 453.
106. Id. “‘Employee’ [is] a key term in the statute, since . . . rights belong only to those workers who qualify as ‘employees’ as that term is defined in the Act.” Id.
107. See, e.g., Sunland Constr. Co., 309 N.L.R.B. 1224 (1992) (finding paid union organizers to be “employees” under the act after the Fourth Circuit Court of Appeals refused to enforce its similar decision).
108. The Fourth, Sixth, and Eighth Circuits have found paid union organizers not to be “employees” under the NLRA. See H.B. Zachry Co. v. NLRB, 886 F.2d 70, 72-73 (4th Cir. 1989); NLRB v. Elias Bros. Big Boy, Inc., 327 F.2d 421, 427 (6th Cir. 1964); Town & Country Elec., Inc. v. NLRB, 34 F.3d 625, 628-29 (8th Cir. 1994), rev’d 116 S. Ct. 450 (1995). The Second, Third, and D.C. Circuits have found the opposite, that paid union organizers are "employees" under the NLRA. See NLRB v. Henlopen Mfg. Co., 599 F.2d 26, 30 (2d Cir. 1979); Escada (USA) Inc. v. NLRB, 970 F.2d 898 (3rd Cir. 1992), enforcing memorandum 304 N.L.R.B. 845 (1995); Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1329-31 (D.C. Cir. 1992), cert. denied, 507 U.S. 909 (1993).
The court found no unfair labor practice when an employer refused to hire a paid professional union organizer. The court emphasized that the "plain meaning of the term 'employee' contemplates an employee working under the direction of a single employer." Additionally, the court expressed concern over the "adversariness between employers and unions" as well as the "divided loyalties" that would be experienced by an employee with two employers. The holding was specifically limited to job applicants being paid by another employer, and was not meant to "encroach . . . upon the fundamental purpose of the NLRA [which is] to protect those with union sympathies and allegiances from unfair practices."

However, in Willmar Electric Service, Inc. v. NLRB, the court reached the opposite conclusion. Unpersuaded by concerns over having two employers, the court noted that at common law "'[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.'" Thus, only when the employee actually fails (as opposed to a future possibility) to perform for the non-union employer in favor of the union employer would the employee lose the protection of the NLRA.

In 1995, the Supreme Court, in NLRB v. Town & Country Electric, Inc., resolved the conflict between the federal courts, finding that paid union organizers are employees under the NLRA. In Town & Country, the thrust of the employer's argument was that under common law agency principles, the term "employee" could not be interpreted as

110. Id. at 72.
111. Id. at 73. "The term plainly does not contemplate someone working for two different employers at the same time and for the same working hours." Id.
112. Id. at 74.
113. H.B. Zachry Co. v. NLRB, 886 F.2d 70, 75 (4th Cir. 1989).
114. Id.
115. Id.
117. Id. at 1329.
118. Id. at 1329-30 (quoting RESTATEMENT (SECOND) OF AGENCY § 226 (1958)).
119. Id. at 1330.
121. Id. at 461.
including paid union organizers due to the inherent conflict of interest. In quickly dismissing this argument, the Court held that "service to the union for pay does not involve abandonment of... service to the company." Specifically, the organizer is able to perform as a model employee during working hours while limiting organizing efforts to non-working hours pursuant to Republic Aviation Corp.

Additionally, the employer argued that salting employees may possess a propensity to be disloyal, thus establishing the inference that Congress could not have intended paid union organizers to have been included as "employees" under the NLRA. Unpersuaded by these fears, however, the Court pointed out the flaws of the argument. First, there was no evidence that the organizers were acting in such a way that the employer would "lose control over the worker's normal workplace tasks." Next, acts that harm employers can be accomplished by any employee, including, for example, a dissatisfied worker with no union affiliation or an "unpaid union zealot." Lastly, the law affords employers other remedies "short of excluding paid or unpaid union organizers from all protection under the Act," such as the ability to fire an employee or notify law enforcement officials of illegal activity. Thus, paid union organizers constitute "employees" under the NLRA.

C. Presumptions Pertaining to Strikers and Replacements

After a union receives certification from the NLRB as the exclusive bargaining agent for an appropriate unit, there is an irrebuttable presumption that the union possesses major-

122. Id. at 455.
125. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); see also supra note 93 and accompanying text.
126. NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 455 (1995). It was argued that "salts' might try to harm the company, perhaps quitting when the company needs them, perhaps disparaging the company to others, perhaps even sabotaging the firm or its products." Id. at 456.
127. Id.
128. Id. The Court specifically noted that nothing about the organizers' objectives involved impermissible or unlawful activity. Id.
130. Id. at 457.
131. Id.
132. Id.
ity support by employees for one year. Following the first year, the presumption becomes rebuttable, thus allowing for a decertification election, if an employer is able to demonstrate that either: (1) the union does not, in fact, possess majority support, or (2) the employer has good-faith doubt, based upon a sufficient objective basis, of the union's majority support. In *NLRB v. Curtin Matheson Scientific Inc.*, the Court determined whether an employer, in establishing good-faith doubt of a union's support, could presume that striker replacements opposed the union.

In holding that an employer may not presume replacement workers to be anti-union, the Supreme Court offered helpful insight into presumptions pertaining to the relationship between striker replacements and striking employees. First, the Court established that "[p]resumptions normally arise when proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact... until the adversary disproves it." A presumption that the interests of strikers and replacements are diametrically opposed could not be established, since replacement workers could feasibly consist of workers who desired the representation of a union but are forced to cross the picket line due to economic concerns. Additionally, the Court found that a replacement may agree with unions in general while disagreeing with the purpose of a particular strike. However, the Court acknowledged that under some circumstances, an anti-union presumption is allowable. Specifically, the court embraced the NLRB's deci-

136. *Id.* at 777.
137. *Id.* at 796. "We hold that the Board’s refusal to adopt a presumption that striker replacements oppose the Union is rational and consistent with the Act." *Id.*
138. *Id.* at 788-89 (quoting *MCCORMICK ON EVIDENCE* § 343 (E. Cleary ed., 3d ed. 1984)).
139. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 789 (1990). “In this sense the replacement worker is not different from a striker who, feeling the financial heat of the strike on himself and his family, is forced to abandon the picket line and go back to work.” *Id.*
140. *Id.* at 775.
141. *Id.* at 792-93.
sions in Stormor, Inc.\textsuperscript{142} and I T Services,\textsuperscript{143} where strike related violence and employee anti-union sentiments allowed for the employer to presume that employees did not support the union.\textsuperscript{144}

In reaching its conclusion, the Court expressed concern over an employer's ability to abuse an anti-union presumption.\textsuperscript{145} Such a rule would enable an employer to more easily eliminate a union by hiring a sufficient number of replacement employees, thus encouraging the avoidance of good-faith bargaining.\textsuperscript{146} By contrast, the no presumption rule "[r]estrict[s] an employer's ability to use a strike as a means of terminating the bargaining relationship,"\textsuperscript{147} thus "serv[ing] the [NLRA's] policies of promoting industrial stability and negotiated settlements."\textsuperscript{148}

D. The Diamond Walnut Analysis

Diamond Walnut Growers v. NLRB\textsuperscript{149} is the result of an economic strike of 500 permanent and seasonal employees of Diamond Walnut Growers, Incorporated ("Diamond"), a Stockton, California-based plant that processes, packages and ships walnuts to national and international markets.\textsuperscript{150} The Cannery Workers, Processors, Warehousemen and Helpers, Local 601 ("Union") commenced the strike in September 1991, two months after their collective bargaining agreement with Diamond expired.\textsuperscript{151} After about a year of striking, the Union lost a representation election held to determine if they would continue as the employees' exclusive representative.\textsuperscript{152} However, as a result of objections filed by the Union, a sec-

\begin{footnotesize}
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\item 143. 263 N.L.R.B. 1183, 1185-88 (1982).
\item 144. See Stormor, Inc., 268 N.L.R.B. at 866-67; I T Services, 263 N.L.R.B. at 1185-88.
\item 146. Id. at 794.
\item 147. Id. at 794-95.
\item 148. Id. at 795.
\item 149. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
\item 151. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
\item 152. Id.
\end{itemize}
\end{footnotesize}
ond election was ordered to be held on October 7 and 8, 1993.\(^{153}\)

On September 20, 1993, the Union, by letter, informed Diamond that four economic strikers, including Willa Miller, wished to return to work unconditionally.\(^{154}\) The next day, the Union notified Diamond that two more strikers, including Alfonsina Munoz, were also willing to return to work.\(^{155}\) Diamond agreed to hire back the striking employees, but only for seasonal positions since all of the year-round positions were filled.\(^{156}\) Miller and Munoz accepted the seasonal employment, despite previously holding year-round positions.\(^{157}\) Citing concerns for employee safety and sabotage, Diamond made the decision to place the returning workers in "non-sensitive positions, i.e., positions that were well supervised, not isolated and did not allow them to move around the plant during work hours,"\(^{158}\) instead of positions for which they were qualified.\(^{159}\)

After returning to work, the former strikers campaigned for the Union and monitored the activities of Diamond, reporting their observations to the Union attorney after each shift.\(^{160}\) After the representations election on October 7 and 8, Miller and Munoz submitted letters of resignation and re-

\(^{153}\) Id.

\(^{154}\) Id. at 487. The letter stated in pertinent part:

Several of the strikers share the Union's conviction that because of Diamond management's blind determination to break the union . . . a fair election is simply impossible at this point. Nevertheless, because a rerun election is to be held, these employees feel that it is important that the replacement workers . . . have an opportunity to hear from Union sympathizers, an opportunity denied them last year because few worked with them or attended the mandatory employee meeting in which management personnel campaigned. Accordingly, the [four] strikers listed below have decided to cease their strike-related activities and have authorized me to inform you that effective upon delivery of this letter, they are available and willing to return to immediate active employment . . . .

\(^{155}\) Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 487 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).

\(^{156}\) Id. at 489.

\(^{157}\) Id.

\(^{158}\) Id. at 488.

\(^{159}\) Id.

\(^{160}\) Id.
turned to the picket line. The Union lost the election, with 475 employees voting for and 575 against the Union.

As a result of Diamond's failure to assign Miller and Munoz to positions for which they were qualified, the Board's General Counsel filed an unfair labor practice complaint against Diamond, citing violations of section 8(a)(3) and section 8(a)(1) of the NLRA. In his decision, the Administrative Law Judge applied the principle of Rose Printing, that "an employer's obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers' former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform." The ALJ found that the seasonal employment accepted by the workers was not substantially equivalent to their previous permanent employment; thus, Diamond had no duty to reinstate the strikers. Accordingly, a prima facie case was not established and the ALJ recommended that

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161. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 488 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam). The identical resignation letters, drafted by the Union attorney, stated:

This is to inform you that I have decided to resume the strike against Diamond effective immediately. Working here over the past couple of weeks has convinced me that conditions have significantly deteriorated and I must continue the Union's efforts to bring decency and respect to the long-term workers of Diamond. Henceforth I will not be crossing the picket lines.

Id.


163. Unions, employers and employees file charges of unfair labor practices with the General Counsel, who has the authority to investigate charges, to decide whether complaints should be issued and to direct the prosecution of such complaints. See Cox et al., supra note 7, at 103.


165. After the General Counsel issues a complaint, a hearing is held before an Administrative Law Judge who prepares a decision containing proposed findings of fact and recommendations to the NLRB for the disposition of the case. See Cox et al. supra note 7, at 104-05. The NLRB normally adopts the decision of the Administrative Law Judge if no exceptions are filed. Id.


168. Id.
the complaint be dismissed.\textsuperscript{169} The NLRB disagreed with the ALJ.\textsuperscript{170} Even though Diamond was under no legal obligation to reinstate the strikers to jobs that were substantially equivalent, the NLRB found that “once it voluntarily decided to reinstate them, it was required to act in a nondiscriminatory fashion toward the strikers.”\textsuperscript{171} In support of its actions, Diamond asserted a \textit{Fleetwood} defense,\textsuperscript{172} claiming there were legitimate and substantial business justifications for its decision.\textsuperscript{173} Specifically, Diamond noted previous violence directed at replacement workers, hostility between strikers and replacement workers and the potential for damage to its products.\textsuperscript{174} The Board, while not deciding whether a \textit{Fleetwood} defense was applicable, held that if it did apply, it would “lack merit.”\textsuperscript{175} Accordingly, the Board ordered Diamond to reinstate the workers and “to make them whole for the loss of earnings and benefits that they have suffered as a result of the discrimination against them.”\textsuperscript{176} Additionally, a third representation election was ordered.\textsuperscript{177}

Subsequently, Diamond petitioned to the United States Court of Appeals for the District of Columbia which granted review of the Board’s decision.\textsuperscript{178} The central issue presented was whether substantial and legitimate business justifications existed for assigning the returning workers to nonsensitive positions.

The court examined the reasoning behind the job placement of Miller and Munoz.\textsuperscript{180} Prior to the strike, Miller worked as a year-round quality control supervisor.\textsuperscript{181} Even

\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 38.
\textsuperscript{172} See supra Part II.A.2.
\textsuperscript{173} Diamond Walnut Growers, Inc., 316 N.L.R.B. 36, 38 (1991), enforcement denied in part, see Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259 (D.C. Cir. 1997) (en banc).
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 38-39.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485 (D.C. Cir. 1996), vacated and reh’g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
\textsuperscript{179} Id. at 486.
\textsuperscript{180} Id. at 490.
\textsuperscript{181} Id. at 500 (Wald, J., dissenting).
though there were seasonal openings for this position when she crossed the picket line, Miller was appointed to a position as a packer, where she “stuff[ed] one-pound bags of walnuts into large boxes” and received 32 cents less an hour than her previous job. Munoz had worked as a year round lift truck operator before the strike, and a seasonal position was available when she returned to work. Diamond, however, assigned Munoz to a cracker position, where she “crack[ed] open 17,000 grams of walnuts per day at a pay rate of $5/hour,” which was $2.50 to $5.00 an hour less than the wage of a lift truck operator.

In support of the conclusion that Diamond established substantial and legitimate business justifications for its reassignment of Miller and Munoz, the court first noted the strong relationship between the employees and the Union. Especially significant were both the Union’s instructions to not communicate with the employees, but to instead communicate directly with the Union, and the “omnipresen[ce]” of the Union lawyer. Instead of coming back to work, the strikers acted as a “union envoy,” seeking “temporary access to the work place, and work force.”

The court then presented two general concerns the employer faced in taking back the striking employees. First, the return of the workers “presented a high risk of unrest.” Early in the strike, violence between strikers and replacement workers existed, and the resulting tension still ex-

182. Id.
183. Id.
185. Id. at 499.
186. Id.
187. Id. at 490. “In short the returning strikers and the Union spoke with one voice.” Id.
188. Id.
189. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 490 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
190. Id.
191. Id. at 491-92.
192. Id. at 491.
istent when the workers crossed the picket line.\textsuperscript{194} Second, the court recognized Diamond's fear that "returning strikers could engage in product tampering, sabotage or otherwise disrupt the company's operation."\textsuperscript{195} Specifically, Miller and Munoz participated in a tour urging a boycott of Diamond products where strikers made disparaging comments pertaining to the company's product.\textsuperscript{196} If these employees were allowed to return to sensitive positions, they may be able to ensure that there charges became true.\textsuperscript{197} In light of these concerns, the court concluded that Diamond established substantial and legitimate business justifications for its placement of Miller and Munoz.\textsuperscript{198}

In a blistering dissent, Judge Wald strongly opposed the majority's finding that legitimate and substantial business justifications existed for the discrimination of Munoz and include, but are not limited to: rocks thrown at buses used to transport non-strikers from the parking lot to the plant; a non-striking employee severely beaten at a grocery store by two to three men who made strike related comments; all four tires of non-striker's vehicle slashed; non-strikers' homes pelted with broken eggs; and an anonymous phone call to a non-striking employee stating, "We know where you live and going to get you—won't have to worry about family if continue to work at Diamond Walnut." \textit{Id.}

\textsuperscript{194} Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 491 (D.C. Cir. 1996), \textit{vacated and reh'g en banc granted}, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam). Upon learning about the return of the striking employees, a replacement worker wrote a letter to co-workers stating in part:

\begin{quote}
They have threatened us—Intimidated us—Called us every name in the book—And even destroyed our property . . . . But . . . [l]et's not stoop to their level of immaturity. They may still say things that piss you off; but PLEASE for the sake of all of our futures here at Diamond Walnut let's keep cool and be level-headed in our everyday dealings with these people.
\end{quote}

\textit{Id.}

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} \textit{Id.} Leaflets distributed on the tour accused Diamond of hiring "unqualified replacements workers who allowed contaminated and inedible walnuts—with mold, dirt, oil, worms and debris—to be marketed." \textit{Id.}

\textsuperscript{197} \textit{Id. at 490}. In addition to the two general concerns, the court hypothesized specific scenarios that could occur if Miller and Munoz were allowed to return to their previous jobs. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 492 (D.C. Cir. 1996), \textit{vacated and reh'g en banc granted}, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam). As a quality controller, Miller was in a position to either cause or allow the distribution of defective products. \textit{Id.} As a lift truck driver, Munoz could cause damage by recklessly driving the 11,000-pound vehicle. \textit{Id.} Munoz was also in a position to cause production delay since the lift truck was an essential element of the production process which operated on a tight time schedule. \textit{Id. at 491.}

\textsuperscript{198} \textit{Id.}
Miller.\textsuperscript{199} According to Judge Wald, the majority “ignore[d] the impact of analogous contrary decisions involving differential treatment based on disloyalty or misconduct concerns.”\textsuperscript{200} More specifically, the thrust of the dissent’s opinion was the notion that the court’s inference of disloyalty and fears of violence based on the fact that employees were acting as agents of the Union was incompatible with the Supreme Court’s decision in \textit{Town & Country}.\textsuperscript{201} Judge Wald noted that the Supreme Court, in rejecting the notion that paid union organizers should not be afforded the same protection under the NLRA as other employees, found “serious problems” with the employer’s arguments that were directly applicable to the present issue.\textsuperscript{202} Accordingly, the dissent found no legitimate and substantial business justifications for the discrimination against Miller and Munoz.\textsuperscript{203}

The full court of the Ninth Circuit then vacated the panel’s judgment and ordered that the case be reheard \textit{en banc}.\textsuperscript{204} A divided ten judge panel held that while no reasonable business justifications existed for discriminating against Munoz,\textsuperscript{205} the employer was justified in not allowing Miller to return to her previous position.\textsuperscript{206}

In regard to Munoz, the court agreed that a generalized fear of violence fails to constitute a legitimate concern; instead, a “concrete threat to [the] strikers” must exist.\textsuperscript{207} The court noted that measures should be taken against those who threaten the violence rather than the potential victims.\textsuperscript{208} Similarly, the court found that fear of sabotage did not rise to the level of a substantial business justification.\textsuperscript{209} Any time a returning striker returns to work while the strike is ongoing,

\begin{itemize}
\item \textsuperscript{199} \textit{Id.} at 495-501 (Wald, J., dissenting).
\item \textsuperscript{200} Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 496 (D.C. Cir. 1996) (Wald, J., dissenting), \textit{vacated and reh’g en banc granted}, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.} at 501.
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} Diamond Walnut Growers, Inc. v. NLRB, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Id.} at 1266.
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.} at 1267.
\end{itemize}
there will be some risk of sabotage.\textsuperscript{210} Citing to \textit{Town & Country}, the court noted that if Munoz did engage in forklift sabotage, the employer would likely find out and disciplinary action could be taken.\textsuperscript{211}

However, unlike \textit{Diamond Walnut I}, a majority of the \textit{en banc} panel found that Diamond possessed a legitimate and substantial business justification for discriminating against Miller.\textsuperscript{212} The court determined that if Miller were allowed to resume her job as a quality control assistant, where final visual inspection of walnuts is made prior to leaving the plant, she would have a unique opportunity and little risk of detection to make the Union's claims of tainted walnuts come true.\textsuperscript{213}

The court analogized the economic consequences of tainted walnuts during an economic strike to a nuclear bomb.\textsuperscript{214} In both cases, "the unpleasant effects will long survive the battle."\textsuperscript{215} Furthermore, because Miller could commit sabotage with little risk of discovery, the remedies contemplated in \textit{Town & Country} would be inadequate.\textsuperscript{216} Therefore, the combination of a "special motive, a unique opportunity and little risk of detection to cause severe harm" created an extraordinary risk, amounting to a legitimate and substantial business justification.\textsuperscript{217}

Seven members of the ten judge panel dissented and concurred in part to the majority decision.\textsuperscript{218} Three judges argued that Diamond was justified in discriminating against both Miller and Munoz.\textsuperscript{219} According to Judge Henderson, the placement of workers in a lower paying job is not sufficient to establish a \textit{prima facie} case of discrimination as required by \textit{Great Dane} since it could not have discouraged pro-

\begin{itemize}
\item \textsuperscript{210} \textit{Id.} at 1266.
\item \textsuperscript{211} Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259, 1266 (D.C. Cir. 1997) (en banc).
\item \textsuperscript{212} \textit{Id.} at 1267.
\item \textsuperscript{213} \textit{Id.} at 1269.
\item \textsuperscript{214} \textit{Id.} at 1267.
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.} at 1269. "There is no remedy that might lie against Miller that could compensate Diamond for the type of damage even a moment's lapse on her part could cause." Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259, 1269 (D.C. Cir. 1997) (en banc).
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} See \textit{id.} at 1270 (Wald, J., concurring and dissenting); see also \textit{id.} at 1279 (Henderson, J., concurring and dissenting).
\item \textsuperscript{219} \textit{Id.} at 1279.
\end{itemize}
tected activity. Furthermore, even if a *prima facie* case was established, Diamond’s actions were still justified because, as a forklift operator, Munoz possessed access to the finished product without any supervisors present. Thus, Munoz was just as able to engage in product tampering as was Miller.

Four other judges also dissented in part, claiming Diamond was not justified in discriminating against Miller. Just as the majority required specific evidence to validate concerns over Munoz, they argued that established labor policy required Diamond to produce specific evidence to validate the fear of product tampering as well. Furthermore, the dissenting judges argued that by allowing Diamond to use the protected activity of product disparagement as grounds for discrimination, the majority restricted the ability of employees to utilize public appeals.

III. IDENTIFICATION OF THE PROBLEM

The following hypothetical illustrates the potential problems raised by *Diamond Walnut*.

In 1995, a union composed predominately of middle class workers with low skills went on strike in an effort to gain increased wages. Because the jobs required lower skills, it was possible for the employer to hire permanent replacement workers to keep the plant in continual operation. After six months of striking, negotiations between the union and employer were breaking down and an election was to be held in order to determine if the union would continue as the em-

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220. *Id.* at 1282. “In determining whether Diamond’s placement of the returning strikers could have discouraged protect activity, we must examine more than differing wages as the majority has done.” *Diamond Walnut Growers, Inc. v. NLRB* (Diamond Walnut II), 113 F.3d 1259, 1282 (D.C. Cir. 1997) (en banc).

221. *Id.* at 1284.

222. *Id.*

223. *Id.* at 1279 (Wald, J., concurring and dissenting).

224. *Id.* at 1272. See *Medite of New Mexico, Inc. v. NLRB*, 72 F.3d 780, 790 (10th Cir. 1995) (“an employer’s determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct” (quoting *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763, 765 (10th Cir. 1982))).

225. *Diamond Walnut Growers, Inc. v. NLRB* (Diamond Walnut II), 113 F.3d 1259, 1273 (D.C. Cir. 1997) (en banc) (Wald, J., concurring and dissenting). It was predicted that future employers would exploit this holding by refusing to place returning employees in product quality positions if the union engaged in product disparagement. *Id.* at 1279.
For replacement workers, their experience with unions to this point had been negative. They were yelled at by union workers every day they went work, and there were rumors of harassing phone calls. Some workers who crossed the picket line described the union as an organization which does nothing for employees except to take money for dues. In order to inform the replacements of the potential benefits of the union, some strikers decided to cross the picket line and return to work, hoping that a less adversarial atmosphere would allow for increased communication.

The employer is not sure of these strikers' motivation for returning. Although the strikers have not questioned the quality of the replacement workers' product, the returning strikers would have the opportunity to commit acts of sabotage if they returned to their previous positions. Furthermore, the employer fears the potential for violence since some of the replacement workers have strong feelings against the union and its strikers. Additionally, the employee realizes that if the union loses the election, she will no longer have an obligation to bargain with them.

This hypothetical demonstrates the unanswered questions left by Diamond Walnut. For example, what evidence does the employer need to present in order to prove its claim of a legitimate and substantial business justification? If the employer does decide to discriminate against the returning strikers, will it be possible that its actions will be found to be inherently destructive, thus making its business justification irrelevant? And when, if ever, can a union activist cross the picket line in order to inform replacement workers of the benefits of representation? Currently, Diamond Walnut is the only case where this new tactic has been reviewed, and, unfortunately, little to no guidance is offered to future employers, unions, or courts facing this situation.

IV. ANALYSIS

A. Inherently Destructive v. Comparatively Slight

1. The Discriminatory Effect of the Employer's Act

One avenue unexplored by the NLRB, Diamond I, and Diamond II was whether the employer's action constituted
an inherently destructive act. The NLRB found it unnecessary to make this distinction since no substantial and legitimate business justifications existed for the discriminatory act; the act constituted an unfair labor practice regardless of whether it had an inherently destructive or comparatively slight impact on protected activity.\textsuperscript{226} The \textit{Diamond I} court interpreted the NLRB’s absence of a decision as a concession that the act was classified as having a comparatively slight impact.\textsuperscript{227} Subsequently, the \textit{Diamond II} court found that this issue was not raised before the Board and, thus, the court would not consider the argument.\textsuperscript{228}

A careful reading of the NLRB’s decision, however, demonstrates the potential for the act to be classified as inherently destructive. The Diamond’s discriminatory act was found to be serious enough to warrant the setting aside of the representation election, even though only a small number of employees were involved out of a bargaining unit that consisted of almost 1300 employees.\textsuperscript{229} Consequently, the NLRB found the conduct to involve “serious violations of section 8(a)(3) in which employees were denied jobs solely because of their protected strike activity, while at the same time being placed in positions that were among the lowest paying in the plant.”\textsuperscript{230} Additionally, replacement employees would likely notice that the employer did not look favorably upon those who took leading roles on behalf of the Union, thus discouraging future employees from engaging in similar conduct.\textsuperscript{231}

2. Does Discriminatory Job Placement Have an

\begin{itemize}
\item \textsuperscript{226} Diamond Walnut Growers, Inc., 316 N.L.R.B. 36, 42 (1995), \textit{enforcement denied in part}, Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259 (D.C. Cir. 1997) (en banc).
\item \textsuperscript{227} Diamond Walnut Growers, Inc., 80 F.3d at 489. “The Board appears to concede that Diamond’s conduct had at most a comparatively slight adverse effect on protected activity.” \textit{Id.}
\item \textsuperscript{228} See Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259, 1265 (D.C. Cir. 1997) (en banc). Although the majority decision refused to address the issue, Judge Henderson’s dissent actually argued the discrimination did not reach the comparatively slight discrimination standard. \textit{Id.} at 1279 (Henderson, J., concurring and dissenting).
\item \textsuperscript{230} \textit{Id.} (referring to 29 U.S.C. § 158(a)(3) (1994)).
\item \textsuperscript{231} \textit{Id.}
Inherently Destructive Adverse Effect on an Employee's Protected Activity?

If Diamond's acts had been found to be inherently destructive, an unfair labor practice could be found despite the existence of legitimate and substantial business justifications. Acts found to be inherently destructive generally fall into one of the following categories: (1) acts that create a cleavage between employees that would endure after they return to work; or (2) acts that make employees feel as if collective bargaining is futile.

Discriminatory job placement of returning strikers does not create the requisite cleavage between employees. In order for there to be such a division, those strikers who were discriminated against would need to stand in a worse position after the strike than those who remained on the picket lines. For example, the offer of super-seniority in NLRB v. Erie Resistor Corp. would have operated as a reward for those who crossed the picket line and its effects would have lasted once the strike was over by dividing the employees into two camps: "[1] those who stayed with the union[,] and [2] those who returned before the end of the strike and thereby gained extra seniority." In Diamond Walnut, the discriminatory treatment would presumably end at the conclusion of the strike, thus causing no lasting division between workers.

By placing replacement workers in well supervised positions, an employer may discourage collective bargaining among employees. In Diamond Walnut, the company's actions affected Miller and Munoz, employees who were strongly affiliated with the union. For example, both the Diamond I and Diamond II courts found it significant that Miller and Munoz had participated in a tour urging a national boycott of Diamond products, a protected activity under the NLRA. However, it is probable that many striking

233. See supra Part II.A.3.
234. See supra Part II.A.3.
237. Id. (numerals added).
238. See NLRB v. International Bhd. of Elec. Workers, 346 U.S. 464 (1953) (establishing the standard for when an employee's disparaging statements to-
employees realize the financial burdens created during a strike and the future possibility of having to return to work in order to make ends meet. To ensure that they will not be confused with those returning to promote the union, employees may feel compelled to take less active roles. This could translate into less participation in protected activities, such as tours or other methods beyond striking aimed at putting economic pressure upon the employer. Furthermore, the bargaining power of the union could be diminished, resulting in employees being more hesitant to participate in future strikes. Therefore, Diamond's actions may have been inherently destructive of protected rights.

Yet, this argument is speculative and not entirely supported by the facts of Diamond Walnut. Both Miller and Munoz returned to work for the specific purpose of speaking with replacement workers. Additionally, not only did they participate in a bus tour, but Miller and Munoz submitted letters from the Union attorney announcing their purpose. They also instructed Diamond to communicate with Union attorneys instead of themselves. Thus, the employer's actions could more accurately be viewed as discriminating against Union members who cross the picket line at the direction of the union, and whose primary objective is something other than working, rather than viewed as discriminating against Union supporters.

Taking this view, the employees' participation in the bus tour would become irrelevant since it would not be the basis for the discrimination. Viewed this way, it is the union that controls the effects, if any, on collective bargaining; the union can choose to either have those least active in the Union cross the picket line or it could direct no one to crossover. This is not to say that an employer's actions could never amount to anything more than comparatively slight discrimination or that discrimination never be considered discriminatory. Instead, Diamond's actions did not meet the higher standard of inherently destructive discrimination, a classification that is, as the Ninth Circuit points out, wards an employer's products becomes unprotected activity).

239. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 486 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
240. See supra note 155.
241. Diamond Walnut Growers, Inc., 80 F.3d at 487.
“relatively rare.”  

B. Substantial and Legitimate Business Justifications

In holding that Diamond established substantial and legitimate business justification for Miller, but not for Munoz, the Diamond Walnut II court cited to the Supreme Court's decision in *NLRB v. Town & Country Electric, Inc.* Specifically, in terms of the fear of sabotage, the court found alternative remedies existed, other than discrimination, for the action taken towards Munoz, but not for Miller.

In concluding that Diamond’s concerns of sabotage and violence were valid, the Diamond Walnut I court specifically rejected the application of the rationale used in *Town & Country*. The court limited *Town & Country* to its specific holding, that a paid union organizer is an employee under the NLRA, despite an employer’s fear of sabotage. The dissent, however, found the rationale in *Town & Country* to be directly applicable, justifying a finding that no legitimate and substantial business justifications existed.

1. Fear of Sabotage

In refusing to adopt the *Town & Country* rationale, the Diamond Walnut I court made the distinction that the risk of sabotage was raised to argue that paid union organizers were not meant to be included as “employees” under the NLRA, as opposed to assert a *Fleetwood* defense. Using the rationale of *Town & Country*, the Diamond Walnut II court focused on whether the employer had alternative remedies. However,

242. Loomis Courier Serv. v. NLRB, 595 F.2d 491, 495 (9th Cir. 1979).
243. See Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259, 1269 (D.C. Cir. 1997) (en banc).
245. Id.
246. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 490 n.9 (D.C. Cir. 1996), vacated and reh’g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam). “Judge Wald read far too much into *Town & Country*. There the Supreme Court simply confirmed what this Court had previously held . . . . A paid union organizer can be an ‘employee’ protected by the Act.” Id.
247. Id. at 498 (Wald, J., dissenting).
248. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 490 n.6 (D.C. Cir. 1996), vacated and reh’g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
249. See Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II), 113 F.3d 1259, 1269 (D.C. Cir. 1997) (en banc).
these applications of the *Town & Country* rationale are flawed since the courts fail to recognize the entire sabotage argument.

The complete argument made by the employer in *Town & Country* can be broken down into the following three step inference: (1) a paid union organizer's loyalty is split between the union and the employer; (2) because of this split, there is the risk that the organizer may try to harm or sabotage the company; (3) since there is the risk of sabotage, paid union organizers were not meant to be included as “employees” under the NLRA.\(^\text{250}\) The *Town & Country* court, in rejecting this argument, concluded that the inference from step one to two, the potential for sabotage, failed from “several serious problems.”\(^\text{251}\) First, there was no evidence to suggest that the employer would lose control over the union organizer.\(^\text{252}\) Second, just as a union organizer may hurt the company, so may any one of a number of other categories of employees.\(^\text{253}\) Third, if a union organizer engaged in unwanted activity, the law provides for alternative remedies.\(^\text{254}\)

Therefore, because the argument fails at step number two, step number three in the analysis becomes irrelevant, thus making the court's distinction in *Diamond Walnut I* erroneous.

By breaking down Diamond's sabotage argument into the following similar three step analysis, the appropriateness of the application of *Town & Country* becomes increasingly clear: (1) a union activist who crosses the picket line in support of the union has his or her loyalty split between the union and the employer; (2) because of this split, there is the risk that the union activist may try to harm or sabotage the company; (3) since the risk of sabotage exists, there are legitimate and substantial reasons for discriminating against the employee.\(^\text{255}\) The only significant difference between the *Town & Country* analysis and the *Diamond Walnut* analysis is that in *Diamond Walnut*, step one involves a crossover


\(^{251}\) Id. at 456.

\(^{252}\) Id.

\(^{253}\) Id.

\(^{254}\) Id. at 457.

\(^{255}\) Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut II) 80 F.3d 485, 491 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
employee instead of a paid union organizer.\textsuperscript{256} Therefore, if the three "serious problems" are as equally applicable to returning strikers as to paid union organizers, fear of sabotage is not a substantial and legitimate concern.

\textbf{a. Loss of Control}

First, the facts of \textit{Diamond Walnut} do not suggest that "acts of disloyalty were present, in kind or degree, to the point where the company might lose control over the worker's normal workplace tasks."\textsuperscript{257} To substantiate Diamond's fear of sabotage, the court was only able to point to the employee's participation in a bus tour where leaflets claiming that replacement workers were producing inferior products were handed out.\textsuperscript{258} Once allowed to return to work, it was argued that former strikers could make the accusations in the leaflets come true.\textsuperscript{259} However, as the \textit{Diamond} dissent points out, both the bus tour and the distribution of negative information constituted protected activity under the NLRA.\textsuperscript{260} It is completely illogical for a single act of an employee to simultaneously constitute a protected activity under the NLRA as well as justification for discrimination.

Furthermore, the \textit{Diamond Walnut} courts failed to recognize the distinction between the general role of a striker and the role of a union activist who returns to work. While it is true that strikers generally attempt to put economic pressure on their employers,\textsuperscript{261} this goal ceases to exist when a crossover employee returns prior to a representation election. The new purpose, as articulated in the letter presented to Diamond, was to allow "replacement workers \ldots [to] have an opportunity to hear from Union sympathizers."\textsuperscript{262} It is very improbable that an employee, in an effort to increase support for the Union, would attempt to contaminate nuts or damage the inside of a plant with an 11,000 pound lift truck. Instead, "logic would suggest that a striker returning with the express intent of wooing replacement workers to support the

\textsuperscript{256} Although step number three is significantly different, it is irrelevant once step number two fails.
\textsuperscript{258} Diamond Walnut Growers, Inc., 80 F.3d at 491.
\textsuperscript{259} Id. at 492.
\textsuperscript{260} Id. at 497 (Wald, J., dissenting).
\textsuperscript{261} See COX ET AL., supra note 7, at 468-74.
\textsuperscript{262} Diamond Walnut Growers, Inc., 80 F.3d at 487.
Union would go out of [their] way to minimize the possibility of reflecting poorly on the Union.\textsuperscript{263}

b. "Argument Proves Too Much"

In classifying union organizers as employees, the Supreme Court found that the sabotage argument "proves too much,"\textsuperscript{264} since a myriad of groups could commit the same type of acts that the employer feared the organizer would commit.\textsuperscript{265} In other words, just because certain employees might attempt to harm the employer does not mean that they should be afforded fewer rights. The same logic applies to crossover employees. It is possible, for example, that a striker who returns for economic reasons would be more prone to committing acts of sabotage than a union activist. After all, this type of employee has been forced to return to a job where conditions were so poor, he or she felt compelled to strike. This does not mean that an employer can discriminate against employees who are forced to cross the picket line in order to feed their families.

c. Other Legal Alternatives

Lastly, just as "the law offers alternative remedies for [an employer's] concerns [of sabotage], short of excluding paid or unpaid union organizers from all protection under the Act,"\textsuperscript{266} there are remedies short of discrimination in regard to job placement. For example, if an employer is concerned that the returning striker will return to the picket line immediately after the representation election, the employer can "offer its employees fixed-term contracts, rather than hiring them 'at will.'"\textsuperscript{267} Furthermore, if the employee does engage in any form of inappropriate activity, the employer can then take appropriate disciplinary actions, including termination.\textsuperscript{268} Therefore, because the rationale of \textit{Town & Country} applies in the context of \textit{Diamond Walnut}, and each of the serious problems articulated in \textit{Town & Country} were present, fear of sabotage should not constitute a substantial and

\textsuperscript{263} \textit{Id.} at 498 (Wald, J., dissenting).
\textsuperscript{265} \textit{Id.}
\textsuperscript{266} \textit{Id.}
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.}
legitimate business concern under Fleetwood.

2. Fear of Violence

a. Relevance of Town & Country

The second justification put forth by Diamond for establishing substantial and legitimate business justifications for its discriminatory actions was the potential of unrest and violence. Strike related violence, threats, and vandalism occurred early on in the strike and replacement workers continued to harbor resentment. As with fears of sabotage, the dissent of Diamond I appeared to apply the Town & Country analysis. The appropriateness of a Town & Country application and analysis, however, is not as clear in the violence context.

To determine the appropriateness of the Town & Country analysis, it is helpful to return to the three step analysis of the argument disapproved of in Town & Country: (1) an employee who crosses the picket line in support of the union has his or her loyalty split between the union and the employer; (2) because of this split, there exists the risk that the organizer may try to harm or sabotage the company; and (3) since the risk of sabotage exists, there are legitimate and substantial reasons for discriminating against the employee. If, as with the risk of sabotage, the fear of violence breaks down into a similar analysis, a Town & Country application would be appropriate.

However, an employer's fear of violence between crossover employees and replacement workers cannot be broken down into a comparable three step analysis. The distinguishing factor preventing such an application is the origin of the employer's fear of violence. Step 1 demonstrates that in the sabotage context, the origin of the employer's fear is the split of loyalty experienced by paid union organizers (as well

269. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 491 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).

270. Id.

271. Id. at 499 (Wald, J., dissenting). It "appears" that the dissent applied a Town & Country analysis since Judge Wald specifically addressed alternative legal remedies to potential violence. Id. However, the other Town & Country elements were not addressed. See generally id.

as strikers who cross the picket line to support the union), allowing for the inference of the potential disloyalty found in step 2. By contrast, the fear of violence does not stem from a dual allegiance, but instead results from the potential for conflict during a strike between replacement workers and strikers. Thus, it becomes apparent that the rationale used in *Town & Country* is not applicable to the fear of violence.

**b. Relevance of Curtin Matheson Scientific**

While *Town & Country* is not relevant to the fear of violence analysis, the Supreme Court's decision in *NLRB v. Curtin Matheson Scientific, Inc.* offers some helpful insight. In *Curtin Matheson*, the Court decided whether or not an employer may presume that replacement workers oppose the union.

This is directly relevant to the *Diamond Walnut* analysis, where the issue presented was whether an employer may presume that replacement workers would oppose crossover strikers who support the union to such an extent that violence was a likely outcome.

In order to fully understand the relevance of *Curtin Matheson*, it is helpful to break down the employer’s arguments into the following inferential steps: (1) the interests of the union strikers and permanent replacements are diametrically opposed; and (2) because they are opposed, it is appropriate to assume that replacement workers do not wish to be represented by the union. In support of the proposition found in step 1, the employer in *Curtin Matheson* asserted that since the union usually demands that replacements be discharged so that strikers can be rehired, the interests of replacement workers directly conflict with those of the union strikers. However, in striking down this argument, the court presented several factors invalidating the employer’s presumption. First, some replacement workers may support unions and desire their benefits, but seek employment

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274. See discussion *supra* Part II.C.
277. *Id.*
278. *Id.* at 789-92.
as a result of their current economic position. Next, a union may not possess the needed bargaining power to force an employer to discharge the replacement workers. Thus, "many if not all of the replacements justifiably may not fear that they will lose their jobs at the end of the strike." Additionally, these strikers may even desire union representation after the strike in order to process grievances and monitor the employer's actions.

The logic of the Supreme Court supports the general proposition that an employer may presume that violence will likely result from the interaction of replacement workers and strikers prior to a representation election. In order to demonstrate this, it will be helpful to break down this argument into the following chain of inferences: (1) the interests of strikers and replacements are diametrically opposed; and (2) therefore, if an employer allows union activists to return to work to promote the union, violence may erupt. This assumption of conflict in step 2 is based on the presumption of step 1, that the replacement workers and strikers are opposed. This assumption, for the reasons articulated in Curtin Matheson, cannot be made by an employer. Thus, the general proposition that an employer may presume a likelihood of violence fails to be a legitimate and substantial business justification.

In Diamond Walnut, however, the employer did not make a blind assumption of violence. Instead, Diamond was able to demonstrate that when the strikers returned to work, they were resented by the replacement workers, presumably because of earlier strike-related violence. For example, Diamond's Director of Human Resources testified that upon learning of the return of the strikers, replacement workers were heard to make comments such as "[G]ee, what happened if they fell down in the rest room or in the locker

279. Id. at 789.
280. Id. at 790.
281. Id.
283. Id. at 789-92.
285. Id. at 491.
room” and “Boy, I bet you won’t send them back to bulk storage.” Additionally, a replacement worker sent a letter to co-workers in an effort to urge calmness, arguably because of the disruption the replacement workers caused. Therefore, the issue became whether an employer’s presumption of violence can be valid in light of specific evidence of resentment.

In Curtin Matheson, the Court addressed the relevancy of picket line violence and statements by replacement workers by embracing the rationale of two specific NLRB decisions. First, in I T Services, the strikers subjected replacement workers to a wide variety of threats and intimidation on almost a daily basis, including throwing beer bottles and rocks at employees and management as well as slashing car tires. Furthermore, strike replacements stated that they did not wish the Union to represent them. Second, in Stormor, Inc., a similar situation existed. Replacement workers expressed their desire not to join the union and the strike was plagued with violence, including physical assaults and death threats. In both cases, the NLRB found these acts to substantiate the employer’s good faith belief that the replacement workers did not support the union.

In terms of the two step analysis of Curtin Matheson articulated above, these cases stand for the proposition that the assumption of step 2, that replacement workers do not wish to be represented by the union, can be reached so long as the employer produces objective evidence establishing a “good-faith” belief. This logically implies that only if Diamond can produce objective evidence of the potential for vio-

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286. Id.
287. Id.
288. See supra note 195.
291. Id. at 1187-88.
292. Id. at 1185.
293. Id. at 1186.
295. Id. at 861-63.
296. Id.
298. See supra note 276 and accompanying text.
lence, thus establishing a good-faith belief, would legitimate and substantial business justifications exist.

Like Stormor and I T Services, the facts of Diamond Walnut support the inference that the employer possessed a good-faith belief of potential violence based on objective evidence.299 The beginning of the strike involved continual unrest, including death threats, physical assaults, verbal attacks, and vandalism of property including residences.300 Replacement workers became angry when the union activists returned, prompting a letter urging workers to remain calm.301 The letter is especially significant since it was written by a replacement worker who was presumably in a position to accurately determine the sentiments of co-workers.302

Although the dissent in Diamond I felt that these isolated comments were inadequate to justify discriminatory treatment, especially since neither Miller nor Munoz were shown to be involved in the violence,303 it must be recognized that an employer cannot poll replacement workers to determine how many of them may physically assault or otherwise attempt to harm returning workers. Instead, the employer is forced to make a good-faith determination of the workplace environment based on adequate circumstantial evidence, which is exactly what Diamond did.

V. PROPOSAL

A. The Need for a Consistent Approach

As unions attempt to utilize innovative organizing techniques, the NLRB and federal courts will face the challenge of resolving the legal consequences of these innovations. What must be avoided are ad hoc decisions that only resolve the fact specific issue presented. While it is impossible to develop an approach for every new tactic, courts should, at a minimum, follow some guiding principles.

Currently, no approach distinguishes between the

299. Diamond Walnut Growers, Inc. v. NLRB (Diamond Walnut I), 80 F.3d 485, 491 (D.C. Cir. 1996), vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
300. See supra note 194.
301. See supra note 194.
302. Diamond Walnut Growers, Inc., 80 F.3d at 491, vacated and reh'g en banc granted, 88 F.3d 1064 (D.C. Cir. 1996) (per curiam).
treatment of returning strikers who return for economic concerns and a union activist who desires to speak with replacement workers. Realistically, attempting to draw such a distinction is extremely difficult, if not impossible, especially where an employee returns for several legitimate reasons. However, employers are more likely to see increasing numbers of returning strikers attempting to educate replacement workers prior to a representation election. Some employers will have legitimate concerns regarding the return of the workers, while others will want to inhibit this type of behavior in hopes that the union will lose the representation election.

In order to maintain a consistent approach to labor law, the relevant rationales of Supreme Court decisions in prior labor law cases should be borrowed. For example, when an employer's discriminatory action towards returning strikers is based on fears of sabotage, courts should recognize and apply the logic of the unanimous Town & Country decision. Second, the employee's right to be free from discriminatory treatment must be balanced against an employer's legitimate concern of workplace violence. This can best be accomplished by allowing employers to place returning strikers in well supervised positions only when the employer has a good-faith belief that violence is probable. In establishing a good-faith belief, the employer cannot rely on general tensions between strikers and replacements, but must instead point to objective factors such as strike related violence and the specific sentiment of replacement workers. By adopting the Supreme Court's rationale, guiding principles will be offered to future courts, employers and unions.

**B. The Use of Salting in the Strike Context**

By having crossovers speak with replacements, unions may be able to persuade enough voters to allow for continued representation. However, in order to ensure maximum effectiveness, future unions must improve on the tactics used by the union in Diamond Walnut. This can be accomplished by following the tactic of salting more accurately. For example, when a paid union organizer attempts to be hired by an employer, he or she does not present the employer with a letter

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304. See *supra* note 11 and accompanying text.
from the union stating the purpose of the application. Instead, the organizer is presented as a legitimate job applicant, indistinguishable from other applicants.

This same process should be utilized by union activists. If union activists do not state their purpose, it will be practically impossible for an employer or replacement worker to distinguish between those returning for economic reasons and those returning to promote the union. Therefore, if the employer were to attempt to make such a distinction, it would most likely be based on the employer's knowledge of the employee's strong union ties. Thus, any discrimination against the crossovers would be based strictly upon the degree of union membership and not on the fact that the employee was returning for a purpose other than work. As previously discussed, it is very likely that this type of discrimination could be found to be inherently destructive, thus allowing for a finding of an unfair labor practice, even where business justifications exist.305

VI. CONCLUSION

The Diamond Walnut court failed to follow basic guiding principals when it did not recognize the applicability of Town & Country as well as Curtin Matheson. Just as fears of sabotage do not cause a paid union organizer to no longer qualify as an "employee" under the NLRA, fears of sabotage do not justify an employer's discriminatory acts.306 Furthermore, if employers are to make presumptions pertaining to strikers and replacement workers, they must establish a good faith belief in order for those presumptions to qualify as a reasonable and legitimate business justification.307 By making an ad hoc determination of the case, the court in Diamond Walnut failed to recognize settled guidelines of labor law established by the Supreme Court—a mistake that future courts hopefully will avoid.

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305. See discussion supra Part IV.A.2.
306. See discussion supra Part IV.B.1.
307. See discussion supra Part IV.B.2.