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PRESIDENTIAL REGULATION OF PRIVATE EMPLOYMENT: CONSTITUTIONALITY OF EXECUTIVE ORDER 12,954 DEBARMENT OF CONTRACTORS WHO HIRE PERMANENT STRIKER REPLACEMENTS

MICHAEL H. LEROY*

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.

—Justice Robert H. Jackson,
*Youngstown Sheet & Tube Co. v. Sawyer*¹

I. INTRODUCTION

On March 8, 1995, President Clinton issued Executive Order 12,954, authorizing debarment of federal contractors who hire perma-

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¹ 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

nent striker replacements.² He cited the need to promote economy and efficiency in the federal government's procurement of goods and services,³ but undoubtedly, his motivation was to woo organized labor after he strongly supported NAFTA⁴ and failed to persuade Congress to enact a law to ban hiring of permanent striker replacements.⁵ Several prominent employer groups immediately sued to invalidate the order.⁶

This matter has significance for the continuing public policy debate on whether employers should be prohibited from hiring permanent striker replacements. But it has greater significance because it exposes a largely unnoticed phenomenon of presidential regulation of private employment practices. Executive orders in World War II directing federal contractors to end race discrimination are the original source of affirmative action principles. Recently, the Supreme Court subjected some of these principles to strict scrutiny,⁷ while

² Exec. Order No. 12,954, 29 C.F.R. §§ 270.1 to -.23 (1995).

³ *Id.* § 270.2(a).

⁴ See *Labor Berates Clinton Over NAFTA, Seems Cool Toward Reconciliation*, Daily Lab. Rep. (BNA) No. 222, at AA-1 (Nov. 19, 1993) (reporting on the significant rift between unions and the Clinton Administration prompted by the President's support for NAFTA).

⁵ At the AFL-CIO's (national federation of labor unions) strong urging the Workplace Fairness Act was introduced. The bill proposed to amend the National Labor Relations Act ("NLRA") by making it an unfair labor practice for an employer "to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute." H.R. 5, S. 55, 103d Cong., 1st Sess. (1993). President Clinton's election raised unions' hopes that this bill would pass. *Labor's Agenda Seen Rising Under Clinton; Family Leave Legislation Tops List*, Daily Lab. Rep. (BNA) No. 11, at A-6 (Jan. 19, 1993) [hereinafter *Labor's Agenda Seen Rising Under Clinton*]. This would have reversed the bill's misfortunes resulting from President Bush's threatened veto. See *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 117, at A-9 (June 17, 1992); *Administration Policy Statement on S 55 Workplace Fairness Act, June 9, 1992*, Daily Lab. Rep. (BNA) No. 112, at F-1 (June 10, 1992) [hereinafter *Policy Statement on S 55*]. But the bill failed on a Senate vote to cutoff a threatened filibuster. *Senate Vote to End Filibuster on Striker Replacement Fails 53-47*, Daily Lab. Rep. (BNA) No. 132, at AA-1 (July 13, 1994) [hereinafter *Senate Vote Fails*]; *Defeat of Striker Replacement Bill a Victory for Business Coalition*, Daily Lab. Rep. (BNA) No. 133, at AA-1 (July 14, 1994) [hereinafter *Victory for Business Coalition*]. Three of the four senators from the President's and Vice President's home states voted against the bill, indicating the Administration's failure to swing critical votes for heading off a filibuster. See *Victory for Business Coalition*, *supra*.

⁶ Complaint and Memorandum for the Chamber of Commerce of the United States, *Chamber of Commerce v. Reich*, 886 F. Supp. 66 (D.D.C. 1995) (No. 95-0503), available in *Complaint and Memorandum Supporting Preliminary Injunction Against Executive Order on Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 51, at E-31 (Mar. 16, 1995) [hereinafter *Chamber of Commerce Complaint*].

⁷ *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2112 (1995) (holding that federal affirmative action programs are subject to strict scrutiny and are constitutional only if they redress past discrimination). The case involved an award of a road-building contract funded by the United States Department of Transportation to a prime contractor who received a bonus for letting a

Congress⁸ and California's governor⁹ severely challenged these principles.

Thus, Executive Order 12,954 raises the larger issue of whether a president may regulate private conduct—specifically, employment practices—without intruding on Congress's lawmaking powers. This issue is underscored by the fact that Congress seriously considered a bill to prohibit employers from hiring permanent striker replacements, and defeated it by a narrow margin.¹⁰ By effectively implementing the terms of this bill, Executive Order 12,954 appears to be an end-run around Congress.¹¹ This raises a fundamental constitutional issue: whether the contemporary President and Congress share lawmaking powers, or whether the President's powers are confined to those expressly enumerated in Article II.¹²

subcontract to a minority-owned firm, even though a white-owned firm was low-bidder. This affirmative action program is rooted in an executive order of President Kennedy. See Exec. Order No. 11,114, 28 Fed. Reg. 6485 (1963).

⁸ *The Wall Street Journal* reported on Rep. Charles Canaday's plan to introduce a bill to ban all federal programs that provide for race or gender preferences in hiring, contracting, or any other federally funded benefit. See Paul M. Barrett & Gerald F. Seib, *House Republican Opens Drive to Ban Affirmative Action*, WALL ST. J., May 31, 1995, at B7. If passed, this legislation would effectively repeal Executive Order 11,246, the most comprehensive presidential order implementing affirmative action employment practices for federal contractors. See 30 Fed. Reg. 12,319 (1965).

⁹ See, e.g., G. Pascal Zachary, *Wilson Is Expected to Move to Reduce California Affirmative Action Rules*, WALL ST. J., June 1, 1995, at B6 (reporting on Governor Wilson's plan to issue an executive order abolishing more than 100 advisory panels that encourage state agencies to help minorities and women, change hiring and promotional practices of state agencies, and lower the share of contracting dollars given to minorities by state training agencies).

¹⁰ See *infra* section III.C.

¹¹ Sen. Robert Dole described the order as a "misguided directive" and a "transparent" power grab, as well as a politically inspired end-run around Congress. Deborah Billings, *Striker Replacements: Senate Democrats Keep Clinton Order Alive; Bridgestone/Firestone Seeks Relief in Court*, Daily Lab. Rep. (BNA) No. 51, at AA-1, AA-2 (Mar. 16, 1995) [hereinafter Billings, *Striker Replacements*]. Paul Huard of the National Association of Manufacturers said the order "clearly ignores congressional and judicial intent . . . [by] seeking to 'enact' changes in law that have been consistently rejected [by Congress] And by doing so, the executive seeks to regulate issues clearly delegated to the Congress." Deborah Billings, *Business Groups Slam President Clinton for Issuing Striker Replacement Order*, Daily Lab. Rep. (BNA) No. 66, at A-1 (Apr. 6, 1995). Jeffrey McGuinness, President of the Labor Policy Association, said the order "raises fundamental separation of powers questions under the Constitution. Congress should really look at who is going to set employment policy in this country—the president through executive fiat or the legislative branch through enforcement of laws." Deborah Billings, *Reich Says Replacement Order Could Be Unveiled as Early as Today*, Daily Lab. Rep. (BNA) No. 45, at AA-1 (Mar. 8, 1995).

¹² U.S. CONST. art. II, § 2 (granting the President status as Commander in Chief, and power to grant reprieves and pardons for federal crimes, and with the consent of the Senate, to make treaties, appoint ambassadors, public ministers and consuls, Supreme Court judges and other officers of the United States); *id.* § 3 (granting power to convene or adjourn Congress, and the duty (not a power) to "take Care that the Laws be faithfully executed").

As this Article demonstrates, the stakes here are high because virtually all presidents since Franklin Roosevelt have used their general power over procurement to place conditions on private actors who do business with the United States government.¹³ Some orders have been issued with no congressional authorization,¹⁴ while others, such as Executive Order 12,954, have cited only general and somewhat vague authority.¹⁵

Furthermore, court challenges to these executive orders have been rare, and have succeeded only once.¹⁶ Consequently, there is little jurisprudence providing guidance on congressional delegation of law-making power to validate these orders. The employer lawsuit challenging Executive Order 12,954 provides a rare opportunity for courts to supply this guidance, but this poses a genuine risk to the present balance of power between Congress, the President, and the judiciary.

Thus, if Clinton's order is successfully overturned by the courts rather than by Congress,¹⁷ there would be two important effects. First, because such a ruling would add significantly to a dearth of precedent, it would have broad regulatory implications by exposing to court challenges other executive orders with lawmaking attributes. These might include, in addition to those regulating employment, orders concerning the environment, drug interdiction, nutritional standards, and immigration, among others.¹⁸

The second, and more immediate and certain effect, would be removal of an important protection for workers represented by unions.

¹³ The Clinton Administration argued that under *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218 (1993), the "NLRA . . . does not preempt action by the government when it is acting, as here, as a purchaser of goods or services, rather than as a regulator or policymaker." Memorandum in Support of Defendant's Motion to Dismiss, or, in the alternative, for Summary Judgment and in Opposition to Plaintiff's Motion for Preliminary Injunction, *Chamber of Commerce of the United States v. Reich*, 886 F. Supp. 66 (D.D.C. 1995) (No. 95-0503), available in *Clinton Administration Defense of Executive Order 12,954 on Permanent Replacement of Striking Workers*, Daily Lab. Rep. (BNA) No. 65, at E-1 (Apr. 5, 1995).

¹⁴ See, e.g., Exec. Order No. 8773, 6 Fed. Reg. 2777 (1941).

¹⁵ E.g., Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (1978).

¹⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

¹⁷ Republicans immediately responded to the order by introducing legislation to overturn it. *Senate Faces Another Cloture Vote on Striker Replacement Issue*, Daily Lab. Rep. (BNA) No. 243, at A-4 (Dec. 19, 1995). Referring to the order's possible effect on employer rights to hire permanent striker replacements, Sen. Nancy Kassebaum (R., Kan.) viewed this as a question of whether Congress "is prepared to allow the president to overturn 60 years of labor law with the stroke of a pen." Billings, *Striker Replacements*, *supra* note 11, at AA-1. The bill, H.R. 1176, 104th Cong., 1st Sess. (1995), was approved on a 22-16 vote by the House Economic and Educational Opportunities Committee in June 1995. *House Committee Approves Measure to Nullify Executive Order*, Daily Lab. Rep. (BNA) No. 115, at AA-1 (June 15, 1995) [hereinafter *House Committee Moves to Nullify*].

¹⁸ See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 322 (1936).

Commentators say that growing employer reliance on the striker-replacement doctrine has significantly undermined the effectiveness of federal labor policy in protecting worker interests through collective bargaining.¹⁹ The order affects federal contractors who recently hired or threatened to hire permanent striker replacements, such as Caterpillar,²⁰ Bridgestone/Firestone,²¹ Pirelli Armstrong Tire,²² and Diamond Walnuts,²³ by compelling them to limit their strategy for responding to a strike. Since the order was issued when more employers hired or threatened to hire permanent striker replacements,²⁴ and since it applies to 28,000 employers and their workers,²⁵ its potential effect is considerable.

¹⁹ See, e.g., Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421 (1992) ("[I]t is clear that the *Mackay Radio* decision severely undermined the statutorily protected right of employees to strike."); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 306 (1991) ("[T]he *Mackay Radio* doctrine is an increasingly effective tool with which employers can undermine employees' efforts to organize themselves and to meaningfully bargain with their employer."); Note, *One Strike and You're Out? Creating An Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 674 (1993) ("Employers currently abuse the right of hiring permanent replacements in order to rid themselves of unions, thus destroying the benefits that unions provide.").

²⁰ E.g., *Foreign Commercial Service Opens at U.S. Embassy, Commerce Says*, Fed. Contracts Daily (BNA) (Apr. 3, 1991) (reporting that Caterpillar was awarded a contract to aid in oil field reconstruction); *Lieberman Introduces Bill to Encourage Cooperation Between DOD Labs, Industry*, Fed. Contracts Daily (BNA) (Feb. 26, 1993) (reporting that Caterpillar was working with Lawrence Livermore since 1988 to develop sophisticated earthmoving equipment in order to compete against foreign manufacturers); *Protest Denied Where Low Bid, Protester Needed Major Changes*, Fed. Contracts Daily (BNA), at D-2 (Mar. 21, 1994) (reporting that Caterpillar was awarded a contract for scraper-tractors suitable for air transport by the Defense Logistics Agency).

²¹ In 1994 Bridgestone/Firestone hired replacements, who were eventually given permanent status, for 2300 striking members of the United Rubber Workers. Raju Narisetti, *Bridgestone/Firestone Begins to Hire Permanent Replacements for Strikers*, WALL ST. J., Jan. 5, 1995, at A3. That same year, Bridgestone did \$12 million worth of business as a first-tier federal contractor. *Chamber of Commerce Complaint*, *supra* note 6, at E-33, E-34.

²² *Strike at Pirelli Armstrong Plants Set to End March 13 with Return to Work*, Daily Lab. Rep. (BNA) No. 47, at A-9 (Mar. 10, 1995) [hereinafter *Pirelli Armstrong Strike to End*] (reporting that 850 strikers were permanently replaced after beginning a strike on July 15, 1994, but were later offered reinstatement when the NLRB found that the company's unilateral implementation of contract terms converted this economic strike to an unfair labor practice strike).

²³ *Diamond Walnut Should Be Sanctioned Under Striker Order, Teamsters Say*, Fed. Contracts Daily (BNA), at D-5 (Apr. 25, 1995) [hereinafter *Teamsters Say Diamond Walnut Should Be Sanctioned*] (reporting that this large food processor who permanently replaced 500 strikers has a \$1 million federal contract with the Department of Agriculture to supply walnuts for school lunches).

²⁴ U.S. GEN. ACCOUNTING OFFICE, LABOR-MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970s AND 1980s, at 13 & tbl. II.1 (1991) [hereinafter *GAO STRIKE REPLACEMENT REPORT*] (reporting that employers threatened to hire replacements in one-third of all strikes in the 1980s and hired replacements in one-sixth of all strikes).

²⁵ See Deborah Billings & Alexis Simendinger, *President Issues Order Barring Permanent Replacement of Strikers*, Daily Lab. Rep. (BNA) No. 46, at AA-1 (Mar. 9, 1995).

Section II presents research on 113 executive orders regulating private employment since 1941. These orders comprise two categories: those, like Executive Order 12,954, affecting collective bargaining, and those aiming to end discriminatory employment practices. The latter are relevant because they illustrate that presidents have exercised law-making powers to regulate private employment and, in doing so, have used their control over federal contracting to achieve a social or economic policy goal.

Section II.C presents court challenges to these orders. It shows that courts have rarely intervened in this regulatory arena, and only once have overturned such an order. This discussion explains why the current employer lawsuit challenging Executive Order 12,954 is so unusual and frames the potential significance of this litigation.

Section III examines the elements of Executive Order 12,954 and explores events leading up to the order's issuance. Section III.A briefly traces the evolution of the permanent striker-replacement doctrine, while section III.B presents evidence that replacement strikes occurred more often than before from the 1970s through 1990s. Section III.C presents a history of recent striker-replacement legislation preceding Clinton's order that Congress failed to enact, while section III.D details the provisions of Executive Order 12,954.

Section IV analyzes the constitutionality of Executive Order 12,954. Section IV.A focuses on executive orders during the 1950s to end race discrimination in private workplaces and contrasts this evolution with congressional hostility to desegregation. These orders effectively made law by regulating private employment, even though they were inconsistent with congressional sentiment. They show, therefore, that presidents have used their power to manage government contracts to pursue policy goals opposed by Congress without violating the separation-of-powers doctrine. These precedents support the conclusion that Executive Order 12,954 does not violate that constitutional doctrine.

Section IV.B explains how Clinton acted within the limits that Congress delegated to presidents under the Federal Procurement and Administrative Services Act of 1949 ("FPASA"). Presidents have had broad discretion in placing social or economic policy conditions on federal contracts while pursuing economy and efficiency under FPASA. This section will show that Executive Order 12,954's premise for debarring contractors who hire permanent striker replacements—that this employment practice may lead to problems in product or service quality or timely contract performance—is rational by examining how some recent replacement strikes may have affected government procurement. In addition, my research on 299 replacement strikes shows

that these strikes have lasted much longer in the 1980s and early 1990s than any period analyzed since the 1930s. This evidence supports Clinton's policy assumption that replacement strikes may hinder economical and efficient performance of contracts by exposing government procurement to strike disorder or disruptions for an average of eight months.

Section IV.C addresses the employer argument that Executive Order 12,954 impermissibly intrudes on the National Labor Relations Act's ("NLRA") regulation of strikes. It shows the fallacy of this argument by drawing on executive orders issued by Presidents Nixon, Carter, and Bush that interfered with substantive rights under the NLRA. This section concludes that Clinton's order is supported by, and consistent with, precedents of limited executive intrusion in the private-sector arena of collective bargaining.

The concluding section shows how the employer lawsuit challenging the order affects two important constitutional matters. First, judicial oversight of executive orders is likely to increase if Executive Order 12,954 is struck down. While this Article presents evidence supporting the public policy goals of Executive Order 12,954, it suggests constitutional alternatives to nullify it: Congress may enact a law to repeal it, or voters may elect a president who will void it or not enforce it. Second, invalidation of this order would limit a remarkably effective power that presidents since Lincoln have used to curb majoritarian abuses by Congress and state legislatures while introducing unpopular social and economic change.

II. EXECUTIVE ORDERS PRECEDING EXECUTIVE ORDER 12,954 AFFECTING PRIVATE EMPLOYMENT

This section presents research on 113 executive orders preceding Executive Order 12,954 that regulated private employment.²⁶ These

²⁶ These orders do not include those that regulate the employment relationship between the federal government and its employees. Among the latter, President Kennedy's Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962), established collective bargaining rights for federal employees. In 1969, President Nixon clarified and strengthened these rights in Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (1969). These orders were later codified by Congress when it permitted Presidential Reorganization Plans No. 1 & 2 of 1978 to become law by failing to pass legislation rejecting these plans within a specified time and when it enacted the Civil Service Reform Act of 1978. See 5 U.S.C. §§ 7104-05 (1994) (Plan No. 2, abolishing the Civil Service Commission and replacing it with the Office of Personnel Management and the Merit System Protection Board); 42 U.S.C. § 2000e-4 (1994) (Plan No. 1, transferring enforcement of civil rights, age, equal pay, and disability discrimination from the Civil Service Commission to the EEOC).

In addition, President Ronald Reagan's Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986), imposing drug-free workplace standards on federal employees, led to enactment of the Drug-Free

orders fall into two distinct categories, those affecting private-sector collective bargaining and those aiming to end discriminatory employment practices. Both groups must be considered to evaluate the constitutionality of Executive Order 12,954. On its face, Clinton's order pertains to collective bargaining, but it also resembles employment discrimination orders because many of those orders used contract debarment to penalize noncompliance. The purpose of this analysis is to determine whether Executive Order 12,954 is novel or consistent with earlier executive orders.

Section II.C shows that court challenges to these orders are rare, and except for one extraordinary case, courts have not struck down any order. This section concludes that the current employer challenge to Executive Order 12,954 should be dismissed. Nevertheless, there is more than an abstract possibility that this order will be overturned. During oral arguments appellate judges made comments suggesting they are sympathetic to the employers' position.²⁷ Given this possibility, it is important to realize that such a ruling would establish the first precedent having broad application.

A. *Executive Orders Affecting Collective Bargaining*

President Franklin Roosevelt issued more than 1800 executive orders during his presidency, many of which were purely military in character.²⁸ But many directly regulated private employers and workers, making Roosevelt the first president to exercise this power in this manner. These numerous orders fell into five basic categories: orders creating dispute-settlement machinery to resolve labor-management disputes; orders resulting in government seizure and operation of private workplaces affected by labor disturbances; orders regulating wage rates, including those negotiated through collective bargaining; orders regulating premium-time wages and hours; and orders to end race discrimination in employment.

Workplace Act of 1988. See Pub. L. No. 100-690, tit. V, § 5152, 102 Stat. 4304, 4304 (1988) (codified at 41 U.S.C. § 701 (1994)). This law requires many federal contractors to implement drug-free workplace policies. *Id.*

²⁷ See Bernard Mower, *District of Columbia Circuit Hears Debate over Review of Striker Replacement Order*, Daily Lab. Rep. (BNA) No. 116, at A-1, A-2 (June 16, 1995) (reporting Judge Buckley's characterization of the order as a "Draconian threat" and a "life and death" matter for employers, and Judge Wald's comments suggesting that the district court may have erred in denying an employers' motion to enjoin the order because of lack of ripeness).

²⁸ See, e.g., Exec. Order No. 8143, 4 Fed. Reg. 2179 (1939) (ironically, issued to secure a defensive sea area in and about Pearl Harbor two years before Japan's surprise attack).

Peaceful labor-management relations were deemed essential to win World War II. To this end, Roosevelt issued Executive Order 8716.²⁹ It created the National Defense Mediation Board³⁰ and granted it jurisdiction to settle serious labor disputes by a variety of means.³¹ Exceptional people were named to this Board³² and served not in an honorific capacity, but as roving Solomonic advisors. Frequently the Board dispatched three- or four-person teams, with a representative from labor, management, and the public.³³ For example, a complicated dispute involved International Harvester plants in Illinois, Wisconsin, and Ohio, and several unions. In March and April, an improbable group of mediators—the president of the University of Wisconsin, the publisher of *The Washington Post*, the chairman of the board of Standard Oil Co., and a representative of the American Federation of Labor—brokered an interim agreement and appointed a noted economist from the University of Wisconsin to serve as a fact-finder during subsequent negotiations.³⁴ These important manufacturing plants were kept open and running as a result.³⁵

As the war deepened, Roosevelt took even stronger measures that included seizing manufacturing plants affected by strikes. Executive Order 9017 resulted after the President pressured unions and employers to avoid strikes and lockouts during the remainder of the war.³⁶ It

²⁹ Exec. Order No. 8716, 6 Fed. Reg. 1532 (1941). The policy preamble to the order states, "[I]t is essential in the present emergency that employers and employees engaged in production or transportation of materials necessary to national defense shall exert every possible effort to assure that all work necessary for national defense shall proceed without interruption and with all possible speed"

³⁰ *Id.* § 1(a)–(b) (board composed of three disinterested persons representing the public, and four representatives respectively from unions and employers).

³¹ *Id.* § 2 (authorizing the Secretary of Labor to certify disputes that threaten to obstruct interstate commerce to the board; and authorizing the board to use voluntary arbitration, or other dispute settlement methods, and to investigate issues, conduct hearings, formulate recommendations, and make findings and recommendations public).

³² BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 714, REPORT ON THE WORK OF THE NATIONAL DEFENSE MEDIATION BOARD MARCH 19, 1941–JANUARY 12, 1942 app. C at 53–54 (1942) [hereinafter DEFENSE MEDIATION BOARD REPORT].

³³ See *id.* at 95 (reporting Case No. 3, a dispute between Cornell-Dubilier Corp. and the Electrical Workers, in which a strike was settled on recommendations made by Frank P. Graham, president of the University of North Carolina, Cyrus Ching, vice president of U.S. Rubber Corp., and Thomas Watt, a representative from the American Federation of Labor).

³⁴ See *id.* at 95–97.

³⁵ See *id.* at 96 (parties agreed that "all plants are to be kept open and production for defense maintained pending recommendation for settlement from the Board").

³⁶ Exec. Order No. 9017, 7 Fed. Reg. 237 (1942). The order declared:

[B]y reason of the state of war declared to exist . . . the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war. . . . [A]s a result of a conference of representatives of labor

created the National War Labor Board³⁷ while terminating the mediation board,³⁸ and gave the new board sweeping powers to settle labor disputes.³⁹ In an extraordinary section, the order, without any legislative authority or supporting judicial opinion, declared that a series of national labor laws that were modified by this order were not superseded or in conflict with it.⁴⁰ Because rail employees were subject to a statute that provided an already detailed settlement process, Roosevelt issued a separate executive order tailored to that law.⁴¹

Numerous orders followed providing for the federal government to seize and operate private workplaces. In general, these were issued after a union⁴² or an employer⁴³ refused to be bound

and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes.

Id.

³⁷ *Id.* § 1 (authorizing the President to name four commissioners respectively from labor, management, and the public).

³⁸ *Id.* § 6. This board's work appears in DEFENSE MEDIATION BOARD REPORT, *supra* note 32.

³⁹ See *id.* § 3. The dispute settlement process is specified as follows:

(a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement.

(b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute.

(c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.

Id.

⁴⁰ See *id.* § 7 (providing that "[N]othing herein shall be construed as superseding or in conflict with the . . . Railway Labor Act . . . the National Labor Relations Act . . . the Fair Labor Standards Act . . . or the Act relating to the rate of wages for laborers and mechanics").

⁴¹ See Exec. Order No. 9299, 8 Fed. Reg. 1669 (1943). This order froze employee compensation subject to Exec. Order No. 9250, 7 Fed. Reg. 7871 (1942), but expressly preserved the dispute settlement processes under the Railway Labor Act, such as negotiations resulting in voluntary agreements, or agreements assisted by conciliation and arbitration. *Id.* § 1.

⁴² See, e.g., Exec. Order No. 9108, 7 Fed. Reg. 2201 (1942). The policy preamble premised seizure and operation of the Toledo, Peoria & Western Railroad Co. on a finding that "the National War Labor Board . . . directed the dispute be submitted to arbitration . . . and the representative of the employees have agreed thereto, but the company has refused and continues to refuse to submit the dispute to arbitration, despite urgent requests by the National War Labor Board and by the President." *Id.* § 4.

⁴³ E.g., Exec. Order No. 9340, 8 Fed. Reg. 5695 (1943). The policy preamble premised seizure and operation of various coal mines on a finding that,

the officers of the United Mine Workers of America have refused to submit to the

by settlement terms directed by the National War Labor Board. Roosevelt's earliest seizure order cited no legislative authority for taking this action,⁴⁴ in contrast to those issued near the end of the war.⁴⁵

These orders affected a wide array of industries, including basic manufacturing,⁴⁶ coal production and processing,⁴⁷ motor transportation,⁴⁸

machinery established for the peaceful settlement of labor disputes in violation of the agreement on the part of labor and industry that there shall be no strikes or lockouts for the duration of the war

Id. § 2.

⁴⁴ See Exec. Order No. 9220, 7 Fed. Reg. 6413 (1942) (authorizing the Secretary of the Navy to seize and operate General Cable Company's plant at Bayonne, New Jersey).

⁴⁵ See, e.g., Exec. Order No. 9393, 9 Fed. Reg. 14,877 (1943) (basing seizure of Illinois coal mines on "the authority vested in me by the Constitution and the laws of the United States, particularly the War Labor Disputes Act").

⁴⁶ See Exec. Order No. 8773, 6 Fed. Reg. 2777 (1941) (seizing North American Aviation), *relinquished by* Exec. Order No. 8814, 6 Fed. Reg. 3253 (1941); Exec. Order No. 8868, 6 Fed. Reg. 4349 (1941) (seizing Federal Shipbuilding and Drydock Co.), *relinquished by* Exec. Order No. 9012, 7 Fed. Reg. 145 (1942); Exec. Order No. 8928, 6 Fed. Reg. 5559 (1941) (seizing Air Associates, Inc.); Exec. Order No. 9225, 7 Fed. Reg. 6627 (1942) (seizing S.A. Woods Machine Co.); Exec. Order No. 9229, 7 Fed. Reg. 6630 (1942) (seizing General Cable Corp.); Exec. Order No. 9254, 7 Fed. Reg. 8333 (1942) (seizing Triumph Explosives, Inc.); Exec. Order No. 9351, 8 Fed. Reg. 8097 (1943) (seizing Howarth Pivoted Bearings Co.); Exec. Order No. 9375, 8 Fed. Reg. 12,253 (1943) (seizing Atlantic Basin Iron Works), *relinquished by* Exec. Order No. 9377, 8 Fed. Reg. 12,963 (1943); Exec. Order No. 9399, 8 Fed. Reg. 16,269 (1943) (seizing Remington-Rand Inc.); Exec. Order No. 9395B, 8 Fed. Reg. 16,957 (1943) (seizing leather manufacturing plants in Massachusetts), *relinquished by* Exec. Order No. 9403, 8 Fed. Reg. 16,957 (1943); Exec. Order No. 9400, 8 Fed. Reg. 16,641 (1943) (seizing Los Angeles Shipbuilding and Drydock Corp.); Exec. Order No. 9416, 9 Fed. Reg. 936 (1944) (seizing York Safe & Lock Co.), *relinquished by* Exec. Order No. 9527, 10 Fed. Reg. 424 (1945); Exec. Order No. 9435, 9 Fed. Reg. 4063 (1944) (seizing Jenkins Bros.); Exec. Order 9436, 9 Fed. Reg. 4063 (1944) (seizing Ken-Rad Tube and Lamp Co. & Ken-Rad Transmitting Tube Corp.); Exec. Order No. 9438, 9 Fed. Reg. 4459 (1944) (seizing Montgomery Ward & Co.); Exec. Order No. 9443, 9 Fed. Reg. 5395 (1944) (seizing Hummer Mfg.); Exec. Order No. 9466, 9 Fed. Reg. 10,139 (1944) (seizing several machine shops); Exec. Order No. 9473, 9 Fed. Reg. 10,613 (1944) (seizing International Nickel Co.); Exec. Order No. 9475A, 9 Fed. Reg. 10,943 (1944) (seizing Hughes Tool Co.); Exec. Order No. 9477, 9 Fed. Reg. 10,941 (1944) (seizing Cleveland Graphite Bronze Co.); Exec. Order No. 9480, 9 Fed. Reg. 11,143 (1944) (seizing Twentieth Century BrassWorks, Inc.); Exec. Order No. 9484, 9 Fed. Reg. 11,731 (1944) (seizing Farrell Cheek Steel Co.); Exec. Order No. 9508, 9 Fed. Reg. 15,079 (1944) (seizing Montgomery Ward & Co); Exec. Order No. 9511, 10 Fed. Reg. 549 (1945) (seizing Cleveland Electric Illuminating Co.); Exec. Order No. 9523, 10 Fed. Reg. 2133 (1945) (seizing American Enka Corp.).

⁴⁷ See Exec. Order No. 9320, 8 Fed. Reg. 3687 (1943); Exec. Order No. 9393, 8 Fed. Reg. 14,877 (1943); Exec. Order No. 9469, 9 Fed. Reg. 10,343 (1944); Exec. Order No. 9474, 9 Fed. Reg. 10,815 (1944); Exec. Order No. 9476, 9 Fed. Reg. 10,817 (1944); Exec. Order No. 9478, 9 Fed. Reg. 11,045 (1944); Exec. Order No. 9481, 9 Fed. Reg. 11,387 (1944); Exec. Order No. 9482, 9 Fed. Reg. 11,459 (1944); Exec. Order No. 9483, 9 Fed. Reg. 11,601 (1944); Exec. Order No. 9484, 9 Fed. Reg. 11,731 (1944); Exec. Order No. 9536, 10 Fed. Reg. 3939 (1945).

⁴⁸ See Exec. Order No. 9462, 9 Fed. Reg. 10,071 (1944) (seizing several motor carriers).

railroads,⁴⁹ textiles,⁵⁰ and food processing.⁵¹ Often these orders intoned the President's moral authority as national leader.⁵²

Two orders gave indications that employer hiring of striker replacements prolonged disputes and impeded prosecution of the war. Executive Order 8928's fact-finding in a dispute involving Air Associates found:

[A] controversy arose concerning the terms and conditions of employment between said company and its workers which they have been unable to adjust by collective bargaining and the controversy was duly certified to the National Defense Mediation Board . . . [and] the Board, pending further mediation, recommended that the workers call off the strike and the company return all strikers upon application to their former jobs without discrimination . . . [and] the workers affected . . . have accepted but the company has failed to carry out the Board's recommendation ⁵³

The President then directed the Secretary of War to take possession of the affected airplane parts facility, and to hire employees as necessary, including "a competent civilian advisor on industrial relations."⁵⁴ Executive Order 8773 implicitly indicated a striker-replacement controversy at North American Aviation's Inglewood plant

⁴⁹ See Exec. Order No. 9108, 7 Fed. Reg. 2201 (1943) (seizing the Toledo, Peoria & Western Railroad Co.); Exec. Order No. 9341, 8 Fed. Reg. 6323 (1943) (seizing the American Railroad Co. of Puerto Rico); Exec. Order No. 9412, 8 Fed. Reg. 17,395 (1943) (authorizing seizure of all railroads threatened by a December 30 strike); Exec. Order No. 9516, 10 Fed. Reg. 1313 (1945) (seizing the Bingham & Garfield Railroad Co.).

⁵⁰ See Exec. Order No. 9420, 9 Fed. Reg. 1563 (1944) (seizing Arkwright Corp., Berkshire Fine Spinning, Bourne Mills, Howard Arthur Mills, Richard Borden Mfg., and Sagamore Mfg.).

⁵¹ See Exec. Order No. 9505, 9 Fed. Reg. 14,478 (1944) (seizing Cudahy Bros. meat processing plants).

⁵² See Exec. Order No. 8773, 6 Fed. Reg. 2777 (1941). The policy preamble premised a plant seizure in these terms:

Whereas on the 27th day of May, 1941, a Presidential proclamation was issued, declaring an unlimited national emergency and calling upon all loyal citizens in production for defense to give precedence to the needs of the Nation to the end that a system of government which makes private enterprise possible may survive; and calling upon our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or of capital.

Id.

⁵³ Exec. Order No. 8928, 6 Fed. Reg. 5559 (1941). Background for the dispute appears in DEFENSE MEDIATION BOARD REPORT, *supra* note 32, at 127; and Air Associates, Inc., 20 N.L.R.B. 356, 359 (1940).

⁵⁴ Exec. Order No. 8928, § 6, 6 Fed. Reg. 5559 (1941).

when it found that a strike was occurring,⁵⁵ ordered the Secretary of War to make arrangements to employ workers,⁵⁶ and concluded by directing him "to take such measures as may be necessary to protect workers returning to the plant."⁵⁷

Apart from establishing a super-board to resolve labor-management disputes and seizing and operating numerous workplaces, Roosevelt's orders effectively displaced several statutory schemes for regulating private employment. Citing no statutory authority, Executive Order 9301 established a minimum wartime workweek of forty-eight hours.⁵⁸ It aimed to maximize use of the nation's scarce human resources⁵⁹ by ordering that "[f]or the duration of the war, no plant, factory, or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum workweek therein is less than 48 hours per week."⁶⁰

Enforcement was left ambiguously in the hands of the Chairman of the War Manpower Commission, who was authorized to make appropriate regulations to enforce the order.⁶¹ The order did not contradict the Fair Labor Standards Act, which implicitly prescribed a forty-hour work week by attaching a penalty to employers working employees over this number;⁶² but it forced employers to arrange work schedules so that payment of time-and-a-half wages would occur every week. In a similar vein, Executive Order 9290 virtually required federal contractors working on public works projects to employ their workers more than eight hours a day.⁶³

Roosevelt offset the labor cost of these orders by reducing employer payments for premium-time work. Executive Order 9240 was based on an understanding that many unions had been successful in negotiating premium pay for workers, typically double-time pay for weekend and holiday work.⁶⁴ Blending a heavy hand with a unifying

⁵⁵ Exec. Order No. 8773, § 3, 6 Fed. Reg. 2777 (1941).

⁵⁶ *Id.* § 6.

⁵⁷ *Id.*

⁵⁸ See Exec. Order No. 9301, 8 Fed. Reg. 1825 (1943).

⁵⁹ See *id.* (policy preamble premising the order on the need "to meet the manpower requirements of our armed forces and our expanding war production program by a fuller utilization of our available manpower").

⁶⁰ *Id.* § 1.

⁶¹ *Id.* § 3.

⁶² See 29 U.S.C. § 207(a)(1) (1994) (prohibiting employment more than 40 hours in a week that is not compensated at less than time-and-a-half the hourly wage rate).

⁶³ Exec. Order No. 9290, 7 Fed. Reg. 11,051 (1942) (suspending the Eight-Hour Workday law). Notably, Congress in 1892 provided the President authority to suspend this law upon the existence of an extraordinary emergency. *Id.*

⁶⁴ Exec. Order No. 9240, 7 Fed. Reg. 7159 (1942).

appeal to workers, the order began by observing that "many labor organizations have already adopted the patriotic policy of waiving double time wage compensation or other premium pay for work on Saturday, Sunday and holidays . . . for the duration of the war."⁶⁵

Finding it "desirable and necessary in the prosecution of the war, and to insure uniformity and fair treatment for those labor organizations, employers, and employees who are conforming to such wage policies that this principle be universally adopted,"⁶⁶ the order prohibited such premium pay for the duration of the war, except for anyone working a seventh consecutive day in a regularly scheduled workweek.⁶⁷ The law left intact the statutory requirement to pay daily or weekly overtime,⁶⁸ and carved an exemption allowing premium pay for certain holidays.⁶⁹ The net effect of the order was to turn back premium pay provisions negotiated by unions in collective bargaining agreements reached under the NLRA or the Railway Labor Act ("RLA").

In addition to these notable labor market intrusions, a series of executive orders provided strict government regulation of wages and salaries, along with prices. Unlike many of Roosevelt's orders, Executive Order 9250 was issued pursuant to express statutory authority.⁷⁰ The order created an Economic Stabilization Board, including the Secretary of Labor and Chairman of the National War Labor Board, and empowered it to adopt policies to control prices, rents, wages, salaries, profits, rationing subsidies, and all related matters.⁷¹

Title II of the order applied specifically to wage and salary controls and expressly prohibited any change in pay without approval by the National War Labor Board.⁷² Although this policy subjected wage negotiations, a primary focus of collective bargaining, to government veto, it expressly reaffirmed an earlier policy of encouraging free collective bargaining.⁷³

Although Executive Order 9250 set a general policy of no pay raises, it left room for the War Labor Board to grant exceptions. This leeway, however, proved to be too much. Finding that this exception

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* § 1A(1).

⁶⁸ *Id.* § 1A(2).

⁶⁹ Exec. Order No. 9240, § 1.B, 7 Fed. Reg. 7159 (1942) (exempting work performed on New Year's Day, Fourth of July, Labor Day, Thanksgiving, Christmas and Memorial Day).

⁷⁰ Exec. Order No. 9250, 7 Fed. Reg. 7871 (1942) (policy preamble citing passage of an Act to Amend the Emergency Price Control Act of 1942).

⁷¹ *Id.* at tit. I, §§ 2-3 and tit. III, § 2.

⁷² *Id.* at tit. II, §§ 1-3.

⁷³ *Id.* at tit. II, § 8 (reaffirming this policy as found in Exec. Order No. 9017, 7 Fed. Reg. 237 (1942)).

undermined economic stabilization,⁷⁴ Executive Order 9328 further narrowed the grounds for the Board to approve any pay raise.⁷⁵ In a remarkable extension of federal authority, it essentially prevented workers from changing jobs in order to get a pay raise.⁷⁶ In Executive Order 9370, the President further coordinated decision making by requiring the Chairman of the War Labor Board to report cases of noncompliance to the Director of Economic Stabilization.⁷⁷ The order expanded enforcement powers to include withholding benefits and privileges from noncomplying employers,⁷⁸ and holding compulsory union dues in escrow until compliance was achieved.⁷⁹ Anyone accepting a non-conforming pay raise was subject to cancellation of draft deferment or loss of employment privileges.⁸⁰

The urgency that helped the nation put aside its divisions quickly subsided by the end of the war. Unions, upon whom the nation's war effort vitally depended, launched a strike wave.⁸¹ Like Roosevelt's presidency, Harry Truman's involved many actions taken as Commander in Chief: ending World War II, rebuilding Europe while containing communism, and waging war in Korea. As a result, he issued numerous orders affecting collective bargaining, such as reorganizing the War Labor Board,⁸² continuing wage and price controls,⁸³ partially suspend-

⁷⁴ Exec. Order No. 9328, 8 Fed. Reg. 4681 (1943).

⁷⁵ *Id.* § 2 (authorizing the Board to grant wage increases only if they "are clearly necessary to correct substandards of living"). This section exempted the ceiling on raises for promotions, job reclassifications, merit increases, and incentive pay systems. *Id.*

⁷⁶ *Id.* § 3. This section stated:

The Chairman of the War Manpower Commission is authorized to forbid the employment by any employer of any new employee or the acceptance of employment by a new employee except as authorized in accordance with regulations which may be issued . . . for the purpose of preventing such employment at a wage or salary higher than that received by such new employee in his last employment unless the change in employment would aid in the effective prosecution of the war.

Id.

⁷⁷ Exec. Order No. 9370, 8 Fed. Reg. 11,463 (1943).

⁷⁸ *Id.* § (a).

⁷⁹ *Id.* § (b).

⁸⁰ *Id.* § (c).

⁸¹ Partly because of this activity, a Republican Congress was elected in 1946 and passed sweeping legislation to curb worker rights under the NLRA. This history is reflected in Sen. Taft's speech explaining public sentiment as the Taft-Hartley Act was being debated:

They had been deluged with a series of strikes. They had been deluged with strikes ordered for men who did not desire the strikes. They had been deluged with strikes against companies which had settled all difference with their own men. They had been deluged with strikes in violation of existing collective bargaining agreements . . . [t]here was a demand that we act.

93 CONG. REC. 7536 (daily ed. June 23, 1947) (statement of Sen. Taft).

⁸² See Exec. Order No. 9672, 11 Fed. Reg. 221 (1945) (abolishing the National War Labor Board and reconstituting its functions under the National Wage Stabilization Board).

⁸³ See Exec. Order No. 9697, 11 Fed. Reg. 1691 (1946).

ing the Eight-Hour Law,⁸⁴ and seizing and operating workplaces affected by labor disturbances. Numerous seizures affected basic manufacturing,⁸⁵ textile mills,⁸⁶ slaughterhouses,⁸⁷ coal mines,⁸⁸ refineries,⁸⁹ railroads,⁹⁰ tugboat operations,⁹¹ motor carriers,⁹² and bus lines⁹³ variously affected by threatened or actual strikes.

Truman's orders had no conceptual novelty, but sparked more controversy than Roosevelt's. This was partly due to Roosevelt's colossal stature as a national leader and Americans' more tenuous acceptance of Truman in the same role.⁹⁴ More important, the end of World War II changed social and economic expectations and, implicitly, the American public's tolerance for ambitious executive orders. Unions grew

⁸⁴ See Exec. Order No. 9898, 12 Fed. Reg. 6781 (1947).

⁸⁵ See Exec. Order No. 9542, 10 Fed. Reg. 4591 (1945) (seizing United Engineering Co.); Exec. Order No. 9552, 10 Fed. Reg. 5757 (1945) (seizing Cocker Machine & Foundry Co.); Exec. Order No. 9559, 10 Fed. Reg. 6287 (1945) (seizing Gaffney Mfg. Co.); Exec. Order No. 9574, 10 Fed. Reg. 7435 (June 18, 1945) (seizing Diamond Alkali Co.); Exec. Order No. 9585, 10 Fed. Reg. 8335 (1945) (seizing Goodyear Tire & Rubber Co.); Exec. Order No. 9592A, 10 Fed. Reg. 9703 (1945) (seizing the Los Angeles Shipbuilding and Drydock Corp.); Exec. Order No. 9593, 10 Fed. Reg. 9379 (1945) (seizing Springfield Plywood Corp.); Exec. Order No. 9595, 10 Fed. Reg. 9571 (1945) (seizing United States Rubber Co.); Exec. Order No. 9473, 9 Fed. Reg. 10,613 (1944) (seizing International Nickel Co.); Exec. Order No. 10,340, 17 Fed. Reg. 3139 (1952) (seizing numerous steel mills and plants).

⁸⁶ See Exec. Order No. 9560, 10 Fed. Reg. 6547 (1945) (seizing Mary-Leila Cotton Mills, Inc.).

⁸⁷ See Exec. Order No. 9685, 11 Fed. Reg. 989 (1946) (seizing numerous meat processing plants).

⁸⁸ See Exec. Order No. 9548, 10 Fed. Reg. 5025 (1945) (seizing various coal mines); Exec. Order No. 9758, 11 Fed. Reg. 7927 (1946) (same); Exec. Order No. 9728, 11 Fed. Reg. 5593 (1946) (same).

⁸⁹ See Exec. Order No. 9540, 10 Fed. Reg. 4193 (1945) (seizing Cities Service Refining Corp.); Exec. Order No. 9564, 10 Fed. Reg. 6791 (1945) (seizing Humble Oil & Refining Co.); Exec. Order No. 9565, 10 Fed. Reg. 6792 (1945) (seizing Cabin Creek Oil Field of Pure Oil Co.); Exec. Order No. 9577A, 10 Fed. Reg. 8091 (1945) (seizing Texas Co.).

⁹⁰ Exec. Order No. 9572, 10 Fed. Reg. 7315 (1945) (seizing Toledo, Peoria & Western Railroad); Exec. Order No. 9602, 10 Fed. Reg. 10,960 (1945) (seizing the Illinois Central Railroad Co.); Exec. Order No. 9727, 11 Fed. Reg. 5461 (1946) (seizing numerous railroads); Exec. Order No. 9736, 11 Fed. Reg. 6661 (1946) (seizing the Monongahela Connecting Railroad Co.); Exec. Order No. 9957, 13 Fed. Reg. 2503 (1948) (seizing numerous railroads); Exec. Order No. 10,155, 15 Fed. Reg. 5785 (1950) (seizing numerous railroads throughout the nation); Exec. Order No. 10,141, 15 Fed. Reg. 4363 (1950) (seizing Chicago, Rock Island & Western Railroad Co.).

⁹¹ See Exec. Order No. 9693, 11 Fed. Reg. 1421 (1946) (seizing numerous boat towing companies).

⁹² See Exec. Order No. 9554, 10 Fed. Reg. 5981 (1945) (seizing several motor carriers).

⁹³ See Exec. Order No. 9570, 10 Fed. Reg. 7235 (1945) (seizing the Scranton Transit Co.).

⁹⁴ This is reflected in Truman's underdog status as an incumbent president in the 1946 contest with Governor Thomas Dewey. A Truman biography presents this succinctly: "The dominating strategy of the Dewey campaign, to say as little as possible, was Dewey's own—'When you're leading, don't talk,' he would tell the Republican politicians who came aboard his train." DAVID McCULLOUGH, *TRUMAN* 672 (1992). Truman, in contrast, had to wage a now infamous "Give-'em-hell-Harry" campaign that most observers thought was doomed. *Id.* at 683.

more restive and no longer tried to accommodate industry for the greater good of the nation.⁹⁵

The national coal strikes of 1946 typified the unraveling of the social contract that Roosevelt had knit between labor and management in Executive Order 8773.⁹⁶ In Executive Order 9728 Truman seized struck mines and then entered into a new collective bargaining agreement with the United Mine Workers.⁹⁷ Several months later, Mine Workers president John L. Lewis demanded new negotiations to modify this agreement; but when the government administrator denied this, the Mine Workers declared the contract terminated and walked off their jobs.⁹⁸ With winter approaching, this triggered a national crisis. Truman was successful in enjoining the strike,⁹⁹ but the Mine Workers defied this order.¹⁰⁰ Lewis and his union were then tried on contempt charges and were respectively fined \$10,000 and \$3.5 million.¹⁰¹

But no executive order was more controversial than Executive Order 10,340, directing a nationwide seizure of steel mills and plants. Members of the steelworkers union, in the midst of the Korean War, stayed on their jobs months after their labor agreements had expired; but their patience was exhausted by April 1952, when they announced their intention to engage in a nationwide strike.¹⁰²

⁹⁵ See Benjamin Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 *INDUS. & LAB. REL. REV.* 327, 330 (1958).

⁹⁶ See *supra* notes 55–57 and accompanying text for a discussion of Executive Order 8773.

⁹⁷ See *United States v. United Mine Workers*, 330 U.S. 258, 263 n.1 (1947).

⁹⁸ See *id.* at 264–67.

⁹⁹ See *id.* at 266. The injunction was issued immediately and without notice to the union. *Id.* It barred termination of the agreement, breaching of any obligation under it, and striking. *Id.* at 266 n.12.

¹⁰⁰ See *id.* at 267.

¹⁰¹ *Id.* at 269. The Supreme Court upheld Lewis's criminal contempt fine but substantially modified the union's fine. See *id.* at 304–05.

¹⁰² David McCullough offers this brief summary:

A steel crisis had been a long time coming. Driven by the demands of the war, the mills were producing record tonnage. Profits, too, were on the rise. Yet steel workers, unlike workers in auto and electrical industries, had had no pay raise since 1950. In November 1951, the 650,000 United Steel Workers . . . called for a boost in wages of 35 cents an hour. Management refused to negotiate. The union gave notice that it would strike when its contract expired on December 31. On December 22, Truman referred the dispute to his Wage Stabilization Board, and to maintain production, the union agreed to postpone the strike until April 8. When, after weeks of hearings, the Wage Stabilization Board recommended an hourly raise of 26 cents, and the union quickly agreed, the companies denounced the proposal as unreasonable, unless they could add a hefty increase of \$12 a ton to the price of steel.

Negotiations continued, only to end in deadlock. . . . To Truman, the pay increase proposed by the Wage Stabilization Board seemed both 'fair and reasonable,' and

Citing a series of national security interests,¹⁰³ Truman's order directed the Secretary of Commerce to seize and operate specified steel mills and operations.¹⁰⁴ Steel companies were successful in enjoining this order, and on June 2, 1945, the United States Supreme Court ruled the order unconstitutional in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁰⁵ As a result, steelworkers went on a nationwide strike that began June 2 and ended only after Truman demanded a settlement in personal negotiations with the national union president and president of U.S. Steel.¹⁰⁶

More than two decades later, in response to construction costs escalating at a greater rate than for the rest of the economy, President Richard Nixon issued Executive Order 11,588.¹⁰⁷ The order was unusual because it was based on enabling legislation¹⁰⁸ and was limited to one industry, construction.¹⁰⁹ It preempted unions from negotiating

the most direct way to prevent a strike that would not only be a national emergency but would critically impair the flow of munitions to Korea and to the buildup of NATO forces in Europe, which he saw as crucial.

McCULLOUGH, *supra* note 94, at 897.

¹⁰³ Exec. Order No. 10,340, 17 Fed. Reg. 3139 (1952). The policy preamble stated: [T]he existence of a national emergency which requires that the military . . . defenses of this country be strengthened as speedily as possible. . . [because] American fighting men . . . are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression . . . [and] weapons . . . needed by our armed forces . . . are produced to a great extent in this country, and steel is an indispensable component . . . [and] a controversy has arisen between certain companies in the United States producing and fabricating steel . . . and certain of their workers represented by the United Steel Workers of America . . . regarding terms and conditions of employment . . . [and] the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government . . . and a strike has been called for 12:01 A.M., April 9, 1952. . . .

Id.

¹⁰⁴ See *id.* § 1. Section 3 authorized the Secretary to "determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties . . . shall be operated." *Id.* § 3.

¹⁰⁵ 343 U.S. 579, 589 (1952).

¹⁰⁶ See McCULLOUGH, *supra* note 94, at 901-03.

¹⁰⁷ Exec. Order No. 11,588, 36 Fed. Reg. 6339 (1971) (finding that "wages and prices in the construction industry have tended in recent years to increase at a rate greater than that for the economy as a whole").

¹⁰⁸ See *id.* (policy preamble citing the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, 799-800 (1970)).

¹⁰⁹ See *id.* The Davis-Bacon Act, as amended, requires contractors holding public works contracts in excess of \$2000 to pay prevailing area wages and benefits. 40 U.S.C. § 276a(a) (1994). These rates result from regulations issued by the Secretary of Labor that approximate craft union pay and benefit scales. See 29 C.F.R. § 1.1 (1995). This regulation reduces nonunion contractors' competitive edge by nullifying their cost-savings advantage over contractors already paying their

wages and benefits without direct government intervention.¹¹⁰ A tripartite committee was created, consisting of labor, management, and government officials,¹¹¹ both to review labor agreements in the construction industry¹¹² and to mobilize public opinion against nonconforming agreements.¹¹³

Later in 1971, Nixon expanded this order by imposing general wage and price controls.¹¹⁴ This massive economic intervention was premised on the belief that inflation control was needed "to improve our competitive position in world trade and to protect the purchasing power of the dollar."¹¹⁵ To accomplish this, it froze wages and salaries for ninety days¹¹⁶ and authorized a presidential council to order em-

workers at union rates. To the extent that collective bargaining agreements in the construction industry raise these rates above the cost-of-living index, public projects under the Davis-Bacon Act tend to increase inflation in the economy by increasing workers' purchasing power and accelerating demand for goods and services they purchase.

Executive Order 11,588 refers to the suspension of the Davis-Bacon Act in its policy preamble and further states:

Whereas, the national leaders of labor and management in the construction industry have indicated, since the suspension of the Davis-Bacon Act, that under such an order they will participate with the Government in fair measures to achieve greater wage and price stability; but are unable to agree on any voluntary arrangement . . . [a] Construction Industry Stabilization Committee . . . is hereby established to assure generally conformance of any increase in any wage or salary in the construction industry to the provisions of this order.

Exec. Order No. 11,588, 36 Fed. Reg. 6339, at policy preamble ¶ 5 & § 1(a) (1971).

¹¹⁰ Industrial relations scholars have repeatedly made this fundamental observation. *E.g.*, GEORGE W. TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS 3-4 (1948) ("The National Labor Relations Act was built up on two main premises: (1) the government should assist employees to organize unions as a means of assuring them 'equality of bargaining power'; and (2) except for conciliation activities, no further industrial-relations responsibility or function should be assumed by the government."); *see also* 79 CONG. REC. 7660 (daily ed. May 16, 1935) (Sen. Walsh's statement during consideration of the Wagner Act, "[a]ll the bill proposes to do is to escort [employee representatives] to the door of their employer What happens behind those doors is not inquired into, and the bill does not seek to inquire into it").

¹¹¹ Exec. Order No. 11,588, § 1(b), 36 Fed. Reg. 6339 (1971).

¹¹² *Id.* § 3(a) (directing the committee "to promptly examine every collective bargaining agreement negotiated on or after the date of this order . . . to determine, in accordance with the criteria established in section 6, whether wage and salary increases in the agreement are acceptable and may thus be approved").

¹¹³ *See id.* § 4 (empowering the committee to exercise jurisdiction over nonconforming agreements); *id.* § 5(c) (authorizing the committee to publish their determinations by "specifying the craft and area affected and the wages or salaries deemed unacceptable").

¹¹⁴ Exec. Order No. 11,615, §§ 1-2, 36 Fed. Reg. 15,727 (1971).

¹¹⁵ *Id.* at policy preamble (citing the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, 799-800 (1970)).

¹¹⁶ Exec. Order No. 11,615, § 1(a), 36 Fed. Reg. 15,727 (1971) (ordering "wages, and salaries . . . [to] be stabilized for a period of 90 days . . . at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, [or] firm . . . during the 30-day period ending August 14, 1971, for like . . . services"). If no transactions

employers to maintain, and make available, wage records.¹¹⁷ In a rare departure from presidential orders affecting private employment, Executive Order 11,615 specified criminal punishment.¹¹⁸ This order was continued after ninety days by a succession of other orders.¹¹⁹

Although his presidency was short, President Gerald Ford issued two executive orders affecting private employment. Executive Order 11,849¹²⁰ was minor in scale, objectives, and in its use of federal power. It established a joint labor-management committee in the construction industry with modest government involvement.¹²¹ Its primary purpose was to encourage peaceful settlement of construction labor disputes.¹²²

Though modest compared to others, the order was not trivial. A riotous attack by union members against a large nonunion construction project illustrates the value of peaceful settlement of labor disputes in this setting.¹²³ Also, because some construction contracts involve billions of dollars, and are expressly let to unionized contractors,¹²⁴ labor peace resulting from this order may spare costly overruns and lead to continued preferences for participating employers and unions.

President Jimmy Carter's Executive Order 12,092 resembled Nixon's order to restrain sharply rising inflation.¹²⁵ Citing the need "to encourage noninflationary pay and price behavior by private industry and

occurred in that benchmark period, employers were directed to use the nearest preceding 30-day period in which wage or salary transactions occurred. *Id.*

¹¹⁷ *Id.* § 5.

¹¹⁸ *Id.* § 7 (providing for a maximum criminal fine of \$5000 for each nonconforming transaction).

¹¹⁹ See Exec. Order No. 11,627, 36 Fed. Reg. 20,139 (1971) (creating a Pay Board composed of five representatives respectively of organized labor, business, and the general public); Exec. Order No. 11,640, 37 Fed. Reg. 1213 (1972); Exec. Order No. 11,660, 37 Fed. Reg. 6175 (1972); Exec. Order No. 11,695, 38 Fed. Reg. 1473 (1973); Exec. Order No. 11,723, 38 Fed. Reg. 15,437 (1973) ("During Phase III, labor and management have contributed to our stabilization efforts through responsible collective bargaining . . . [but] [p]rice behavior under Phase III has not been satisfactory."). The wage and price controls were terminated by Exec. Order No. 11,781, 39 Fed. Reg. 15,749 (1974) and Exec. Order No. 11,788, 39 Fed. Reg. 22,113 (1974).

¹²⁰ Exec. Order No. 11,849, 40 Fed. Reg. 14,887 (1975).

¹²¹ See *id.* § 1 (creating the Collective Bargaining Committee, consisting of 10 labor and 10 management members, the Secretary of Labor or a designee, and the Director of the Federal Mediation and Conciliation Service).

¹²² See *id.* § 2(a) (directing the committee to "facilitate the collective bargaining process at the local and area levels . . . encourage peaceful negotiation of responsible local and area agreements, facilitate local coordinated bargaining . . . and seek to resolve particular disputes that cannot otherwise be reasonably resolved").

¹²³ See *BE&K Constr. Co. v. NLRB*, 23 F.3d 1459, 1460 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

¹²⁴ *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218 (1993).

¹²⁵ See Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (1978).

labor,¹²⁶ this order prohibited contractors from raising prices and wages beyond prescribed "noninflationary" limits.¹²⁷ Unions challenged it, fearing that it would prevent them from negotiating wage increases to keep up with rising inflation.¹²⁸

No president had more transparent election motives in issuing executive orders than George Bush. In 1988, the United States Supreme Court ruled in *Communications Workers v. Beck* that unions may compel payment of agency-fee dues only to cover costs of collective bargaining, contract administration, and adjustment of grievances.¹²⁹ This meant that no one could be compelled to pay dues to finance a union's political and lobbying expenses. Some congressmen complained that workers seeking to assert their *Beck* rights were being unduly delayed in NLRB proceedings.¹³⁰

Six months before the 1992 presidential election, Bush issued Executive Order 12,800,¹³¹ intended to improve employee efforts to be free from paying for the political activities of unions representing them.¹³² Citing the need "to promote harmonious relations in the workplace for purposes of ensuring the economical and efficient administration and completion of Government contracts,"¹³³ the order directed all federal contractors, subcontractors, and vendors to notify employees represented by unions of their *Beck* rights.¹³⁴ Upon failing

¹²⁶ *Id.*

¹²⁷ See *id.* § 1-102(b) (defining "noninflationary pay behavior . . . [as] the holding of pay increases to not more than 7 percent annually above their recent historical levels"). The Chairman of the Council on Wage and Price Stability was directed to "[m]onitor company pay and price practices in order to determine compliance with . . . this Order." *Id.* § 1-101(a). The Chairman was then to "[p]ublish . . . the names of individuals or companies which are not in compliance with the standards" and to "take such . . . action as may be necessary and consistent with the purposes of this Section." *Id.* § 1-101(c), (d).

¹²⁸ See *AFL-CIO v. Kahn*, 618 F.2d 784, 786 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979); see also *infra* notes 247-58 and accompanying text (discussing *Kahn* and comparing its underlying facts with those of Executive Order 12,954).

¹²⁹ *Communication Workers v. Beck*, 487 U.S. 735, 745 (1988).

¹³⁰ *President Signs Executive Order Requiring Federal Contractors to Post Beck Rights*, Daily Lab. Rep. (BNA) No. 72, at A-10, A-11 (Apr. 14, 1992) [hereinafter *Beck Rights Executive Order*] (reporting Rep. Tom DeLay's (R., Tex.) contention that the "NLRB wasn't getting cases heard and taken care of").

¹³¹ Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (1992).

¹³² See *White House Fact Sheet on Actions to Enforce Beck v. Communications Workers of America*, Daily Lab. Rep. (BNA) No. 72, at E-1 (Apr. 14, 1992) (equating President Bush's March 20, 1992, statement, "[n]o worker should be forced to have money taken out of his paycheck to fund politicians he or she disagrees with," with President Thomas Jefferson's 1779 statement, "[t]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical").

¹³³ Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (1992).

¹³⁴ *Id.* § 2(a)(1). Section 2(a)(1) requires:

to provide adequate notice, a contractor or vendor would be subject to debarment.¹³⁵

This order was overtly political.¹³⁶ If promptly implemented, it would have resulted in a small number of employees starting a procedure that would deny the use of union dues for campaign expenditures. Because unions opposed Bush's reelection,¹³⁷ the order would benefit the President by diminishing union campaign funds. Its symbolism was probably more important, signalling Bush's distaste for unions¹³⁸ and rallying employers to his candidacy.¹³⁹ Also, the order was not based on any research showing that compulsory union dues adversely affected economical administration of government contracts.

The timing of Executive Order 12,818, issued just days before the 1992 presidential elections, underscored Bush's political use of this presidential power.¹⁴⁰ Citing numerous policy justifications,¹⁴¹ the order

During the term of this contract, the contractor agrees to post a notice, of such size and in such form as the Secretary of Labor may prescribe, in conspicuous places in and about its plants and offices, including all places where notices to employees are customarily posted. The notice shall include the following information . . . :

NOTICE TO EMPLOYEES

Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

For further information concerning your rights, you may wish to contact [the NLRB, with address given].

Id.

¹³⁵ *Id.* § 3.

¹³⁶ See Beck *Rights Executive Order*, *supra* note 130, at A-10, A-11 (reporting the President's press secretary's denial that this order was politically motivated). When asked why Bush waited three years after *Beck* to implement this order, Marlin Fitzwater replied that the president had hoped the NLRB would have addressed this issue sooner.

¹³⁷ *Kirkland Says Bush Order Implementing Beck Will Not Affect Union Political Activity*, Daily Lab. Rep. (BNA) No. 72, at A-13 (Apr. 14, 1992) (reporting that the AFL-CIO officially declared its support for then primary-candidate Bill Clinton the same day Bush issued Executive Order 12,800).

¹³⁸ See Beck *Rights Executive Order*, *supra* note 130, at A-10 (reporting Bush's statement that "[f]ull implementation of this principle will guarantee that no American will have his job or livelihood threatened for refusing to contribute to political activities against his will").

¹³⁹ *Id.* at A-12 (reporting that the National Right-to-Work Committee, an antiunion group that pressed Beck's case before the Supreme Court and was later critical of the NLRB's slow processing of *Beck* complaints, was very supportive of this order).

¹⁴⁰ Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (1992).

¹⁴¹ See *id.* The order stated that the directive was needed

conditioned awarding of government construction projects on open bidding to nonunion as well as union contractors.¹⁴² In spite of its plain campaign appeal, the order accurately reflected the fact that nonunion contractors had been shut out of bidding on huge federally funded construction projects.¹⁴³ The order increased enforcement of the NLRA's prohibition against closed shops¹⁴⁴ by adding the penalty of contract debarment for any contractor violating this provision,¹⁴⁵ and therefore was warmly greeted by the president of the Associated Builders and Contractors, a group representing nonunion contractors.¹⁴⁶

B. Executive Orders Prohibiting Employment Discrimination

Nazi ideology regarding Aryans as a master race and Jews as subhuman posed an ironic problem for American armed forces because they were racially segregated.¹⁴⁷ As the war deepened, its demands on the economy stretched the labor force so thin¹⁴⁸ that racial

in order to (1) promote and ensure open bidding on Federal and federally funded construction projects; (2) increase competition in Federal construction contracts and contracts under Federal grants or cooperative agreements; (3) reduce construction costs; (4) expand job opportunities, especially for small businesses; and (5) uphold the associational rights of workers freely to select, or refrain from selecting, bargaining representatives and to decide whether or not to be union members . . .

Id.

¹⁴² See *id.* § 1(a) (requiring that before awarding any construction contract, an executive agency must "ensure that neither the agency's bid specifications, project agreements, nor other controlling documents . . . [r]equire bidders . . . to enter into or adhere to agreements with one or more labor organizations").

¹⁴³ *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 219 (1994).

¹⁴⁴ As a result, NLRA § 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender . . . periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(b)(2) (1994).

¹⁴⁵ See Exec. Order No. 12,818, § 3(a), 57 Fed. Reg. 48,713 (1992).

¹⁴⁶ In the midst of the election, the president of the Associated Builders and Contractors, Steven D. Westra, noted: "President Bush, by his action, has delivered a strong message to our association and all open shop contractors of his desire to provide an environment in which open shop contractors can work free of discrimination and provide the public with the quality, cost-effective construction they deserve." *President Issues Executive Order to Require "Open Bidding" on Contracts*, Daily Lab. Rep. (BNA) No. 207, at A-13, A-14 (Oct. 26, 1992).

¹⁴⁷ See ALBERT R. BUCHANAN, *BLACK AMERICANS IN WORLD WAR II* 84-88, 98-99 (1977); RICHARD M. DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939-1953* (1969); NEIL A. WYNN, *THE AFRO-AMERICAN AND THE SECOND WORLD WAR* 24 (1976).

¹⁴⁸ The national unemployment rate fell sharply, from 17.2% in 1939, 14.6% in 1940, 10.0% in 1941, and 4.7% in 1942, to 1.9% in 1943 and 0.1% in 1944. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *HANDBOOK OF LABOR STATISTICS*, BULL. No. 916, tbl. A-12 (1947). The Bureau of Labor Statistics did not calculate unemployment rates during this period; however, it reported the estimated number of unemployed people and estimated number of people in the

employment practices imposed harmful barriers to effective utilization of workers. This background helps to explain why President Franklin Roosevelt ordered federal contractors to end discriminatory practices.¹⁴⁹

Race segregation in this period has been well documented.¹⁵⁰ Contemporaneous court decisions reflect the official nature of this discrimination: *Brown v. Mississippi*¹⁵¹ threw out an African American's confession arrived at by a sheriff deputy's severe whipping; *University of Maryland v. Murray*¹⁵² struck down a race restriction for admission to the University of Maryland's law school; *Lane v. Wilson*¹⁵³ invalidated an Oklahoma law granting African Americans only a twelve-day period for registering to vote; and *Smith v. Allright*¹⁵⁴ ruled that exclusively white primaries resulting from political party rules were unconstitutional.

Writing in this period, the eminent sociologist Gunnar Myrdal remarked: "Segregation is now becoming so complete that the white Southerner practically never sees a Negro except as his servant and in other standardized and formalized caste situations."¹⁵⁵ In addition, an African-American novelist, George W. Lee, wrote a poignant novel protesting the tenant-farming system as an extension of slavery.¹⁵⁶ As a civil rights protest movement planned its biggest march on Washington,¹⁵⁷ Roosevelt issued Executive Order 8802.¹⁵⁸

Citing "evidence that available and needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race, creed, color, or national ori-

civilian labor force. I computed unemployment rates by dividing the number of unemployed people by the number of people in the labor force.

¹⁴⁹ See Mary McLeod Bethune, *My Secret Talks with FDR*, in *THE NEGRO IN DEPRESSION AND WAR* 53-65 (Bernard Sternsher ed., 1969).

¹⁵⁰ E.g., CATHERINE A. BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT* (1983); DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969); W.J. CASH, *THE MIND OF THE SOUTH* (1941); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974).

¹⁵¹ 297 U.S. 278 (1936). Responding to a question about how hard he beat the defendant, the deputy replied, "Not too much for a Negro; not as much as I would have done if it were left to me." *Id.* at 284.

¹⁵² 182 A. 590 (Md. 1936).

¹⁵³ 307 U.S. 268 (1939).

¹⁵⁴ 321 U.S. 649 (1944).

¹⁵⁵ MYRDAL, *supra* note 150, at 41.

¹⁵⁶ GEORGE W. LEE, *RIVER GEORGE* (1937).

¹⁵⁷ Shortly before the order was issued, the NAACP approved A. Philip Randolph's plan to organize 100,000 African Americans in a march on Washington, D.C. The goal of the march was to open jobs to these Americans in defense-industry plants. PETER M. BERGMAN, *THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA* 493 (1969).

¹⁵⁸ Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

gin, to the detriment of workers' morale and of national unity,"¹⁵⁹ Roosevelt stated: "I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin" ¹⁶⁰

The order also applied to unions¹⁶¹ because of their importance in creating employment opportunities through hiring halls and closed-shop agreements,¹⁶² and because of their propensity to discriminate against African Americans.¹⁶³ It directed government agencies "concerned with vocational and training programs for defense production . . . [to] take special measures . . . to assure that such programs are administered without discrimination,"¹⁶⁴ and obligated private employers who were under defense contracts not to discriminate on the basis of race, creed, color, or national origin.¹⁶⁵ A simple enforcement procedure was established with creation of the Committee on Fair Employment Practice.¹⁶⁶ The order provided no specific penalty for findings of noncompliance.

Roosevelt added two related orders during the war. Executive Order 9001 fleshed out critical details left vague by Roosevelt's initial order. It mainly dealt with "mak[ing] available for the production of war material all the industrial resources of the Country."¹⁶⁷ To achieve this, the President authorized every facility and plant suitable for supporting the war to be put under contract and thereby converted to public use.¹⁶⁸ In effect, this meant the government was also leasing the millions of workers employed by these plants, "and all contracts [were] deemed to incorporate by reference a provision that the contractor and any subcontractors . . . [were] not [to] discriminate."¹⁶⁹ Since the entire economy was mobilized for war, this effectively placed all private

¹⁵⁹ *Id.* (policy preamble).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 432-33 (1950) (describing closed shops and hiring halls from 1935 to 1947).

¹⁶³ See, e.g., *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 195, 204 (1944) (holding that a union's duty of fair representation bars practices that discriminate on the basis of race).

¹⁶⁴ Exec. Order No. 8802, § 1, 6 Fed. Reg. 3109 (1941).

¹⁶⁵ *Id.* § 2 (providing that "[a]ll contracting agencies of the Government . . . shall include in all defense contracts . . . a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin").

¹⁶⁶ *Id.* § 3 (providing that the "Committee shall receive and investigate complaints of discrimination in violation of . . . this order and shall take appropriate steps to redress grievances which it finds to be valid").

¹⁶⁷ Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941) (policy preamble).

¹⁶⁸ See *id.* at tit. I.

¹⁶⁹ *Id.* § 2.

employers under a duty not to discriminate. Essentially, by the stroke of his pen in 1943, Roosevelt established a rudimentary affirmative action policy.

Executive Order 9346 followed with a broader and more detailed version of Executive Order 8802. It expanded the first order by requiring "[a]ll contracting agencies of the Government of the United States [to] include in all contracts . . . a provision obligating the contractor not to discriminate."¹⁷⁰ The nondiscrimination principle was thus extended beyond the defense industry. Reflecting the Administration's commitment to this principle, the order reconstituted the Committee on Fair Employment Practice¹⁷¹ and widened its enforcement powers.¹⁷²

Victory in the war brought the new Truman Administration an employment policy dilemma. Before the United States was drawn into the war, labor's legislative agenda resulted in passage of a sweeping law partly designed to prevent African Americans willing to work for lower wages from competing for many construction jobs.¹⁷³ The Davis-Bacon Act accomplished this by requiring that wages subsidized on federally funded public works projects be paid at union scale, euphemistically called the prevailing wage rate.¹⁷⁴ The war appeared to do little to change some unions' discriminatory practices.¹⁷⁵ Without a compelling war justification, would Truman continue to promote the progressive nondiscrimination practices begun under Roosevelt's executive orders?

He did, but his orders had only a maintenance quality. He nevertheless made a critical decision to continue fair employment practices into "a peacetime economy."¹⁷⁶ Executive Order 9664 was deceptively modest, consisting of a mere thirteen text-lines titled "Continuing the

¹⁷⁰ Exec. Order No. 9346, § 1, 8 Fed. Reg. 7183 (1943).

¹⁷¹ *Id.*, § 6.

¹⁷² *See id.* § 4 (authorizing the Committee to formulate policies to effectuate the order); *id.* § 5 (authorizing the Committee to "receive and investigate complaints of discrimination forbidden by this Order . . . [and to] conduct hearings, make findings of fact, and take appropriate steps to obtain elimination of such discrimination").

¹⁷³ *See Clinton's Bacon Grease*, WALL ST. J., Apr. 11, 1995, at A20. An editorial observed:

Davis-Bacon's pedigree runs straight back to Jim Crow. Rep. Robert Bacon of New York complained that an Alabama contractor had brought in a largely minority work force to build a federal hospital in his district. He said "the neighboring community was very much upset" and his call to pay "prevailing wages" on all federal projects was joined by the president of the American Federation of Labor, who noted that "colored labor is being brought in to demoralize wage rates."

Id.

¹⁷⁴ The Davis-Bacon Act, ch. 411, § 1, 46 Stat. 1494, 1494 (1931) (codified as amended at 40 U.S.C. § 276a(a) (1994)).

¹⁷⁵ *See, e.g., Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 89-90 (1945) (upholding a New York law forbidding unions from discriminating on the basis of race, and providing for damages, fines, and imprisonment).

¹⁷⁶ Exec. Order No. 9664, 10 Fed. Reg. 15,301 (1945).

Work of the Fair Employment Practice Committee."¹⁷⁷ Its main contribution was assuring continuity of the nondiscrimination principle in federal contracting.

The Korean War and the rising threat of communism stirred Truman to shape more specific employment orders. Executive Order 10,210 continued Executive Order 9001's industrial mobilization policy¹⁷⁸ and contained a provision obligating all contractors and subcontractors not to discriminate.¹⁷⁹ But Truman's order differed from Roosevelt's by lacking a policy preamble voicing a need to create full-employment opportunities through removal of race discrimination. It contained no provision for training victims of discrimination. And tellingly, it lacked any enforcement mechanism. Acknowledging this omission later that year, Executive Order 10,308 was titled "Improving the Means for Obtaining Compliance with the Nondiscrimination Provisions of Federal Contracts," contained the standard prohibition against discrimination, and created the Committee on Government Contract Compliance.¹⁸⁰ By renaming this committee—Roosevelt had named his the Fair Employment Practice Committee—Truman might have been trying to promote change without generating attention. In fact, however, the new name seemed to reflect Truman's vague commitment to equal employment opportunity ("EEO") principles.¹⁸¹ Executive Order 10,308 insulated contractors from adverse action by toning down the investigatory powers of the committee¹⁸² and creating more distance between the committee and the President.¹⁸³

¹⁷⁷ *Id.* (stating that the "Committee shall investigate, make findings and recommendations, and report to the President, with respect to discrimination in industries engaged in work contributing to the production of military supplies or to the effective transition to a peacetime economy" (emphasis added)).

¹⁷⁸ See Exec. Order No. 10,210, § 15, 16 Fed. Reg. 1049 (1951).

¹⁷⁹ *Id.* § 7.

¹⁸⁰ Exec. Order No. 10,308, § 2, 16 Fed. Reg. 12,303 (1951).

¹⁸¹ In this vein, it should be noted that Truman's thinking about race was ambivalent. One of his biographers found that as a young man, Truman reflected the bigoted attitudes of his immediate society, expressing contempt for "coon[s]," "nigger[s]," "bohunk[s]," "Dago[s]," and "Chink[s]." McCULLOUGH, *supra* note 94, at 83. Running for office early in his career, and watching the growing popularity of the Ku Klux Klan, Truman joined that group—but also quit very soon. *Id.* at 164–65. But during his presidency, he delivered an impassioned and supportive speech at a controversial gathering of the NAACP at the Lincoln Memorial, and followed this by forming an unprecedented civil rights commission. See *id.* at 570.

¹⁸² Compare Exec. Order No. 10,308, § 3, 16 Fed. Reg. 12,303 (1951) (authorizing the committee "to examine and study the rules, procedures, and practices of the contracting agencies") with Exec. Order No. 9346, § 5, 10 Fed. Reg. 15,301 (1943) (authorizing the committee to "receive and investigate complaints of discrimination forbidden by this Order" and permitting the committee to "conduct hearings, make findings of fact, and take appropriate steps to obtain elimination of such discrimination").

¹⁸³ Exec. Order No. 10,308, § 3, 16 Fed. Reg. 12,303 (1951) (directing the compliance

A Republican president not noted for activist government reinvigorated the executive order to change employment practices. Perhaps President Dwight Eisenhower's military experiences sensitized him to the morale problems caused by racial segregation.¹⁸⁴ His muted approach to civil rights issues, and more obvious passion for foreign affairs, may have contributed to his unexpected leadership on civil rights issues.¹⁸⁵

In Executive Order 10,479, Eisenhower coined the expression "equal employment opportunity," and this was incorporated in a progressive "policy of the United States Government to promote equal employment opportunity for all qualified persons employed or seeking employment on government contracts because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds."¹⁸⁶ In contrast to Truman's go-slow approach, Eisenhower's order found that "existing practices and procedures of government contracting agencies show that the practices and procedures relating to compliance with the nondiscrimination provisions must be revised and strengthened to eliminate discrimination in all aspects of employment."¹⁸⁷

This order expanded Executive Order 10,308 in several important respects. Truman's order was a de facto military contractor policy because the Director of Defense Mobilization served as the final authority before the President in the compliance process.¹⁸⁸ In contrast, Eisenhower's compliance system expressly designated roles for the Justice and Commerce Departments, implying that some contractors would fall outside the military's enforcement purview.¹⁸⁹ Truman's order in-

committee to "confer and advise" with contracting agencies to "make to the said officers recommendations" for eliminating or preventing objectionable practices). Only "[w]hen deemed necessary by the Committee" was it to "submit any of these recommendations to the Director of Defense Mobilization, and the Director shall, when he deems it appropriate, forward such recommendations to the President, accompanied by a statement of his views as to the relationship thereof to the mobilization effort." *Id.*

¹⁸⁴ The U.S. military was not desegregated until Truman ordered this, but during World War II, General Eisenhower integrated several combat units. 2 ROBERT L. BRANYAN & LAWRENCE H. LARSEN, *THE EISENHOWER ADMINISTRATION 1953-1961*, at 1049 (1971).

¹⁸⁵ His Administration ended desegregation in the District of Columbia and federal government, appointed Earl Warren as Chief Justice, argued in favor of school integration in the landmark *Brown v. Board of Education* decision, overcame a successful filibuster in 1956 to gain passage in 1957 of the first voting rights bill since the Reconstruction era, and ordered troops into Little Rock, Arkansas, to enforce a federal court order to desegregate public schools. 2 *Id.* at 1049-52.

¹⁸⁶ Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953) (policy preamble).

¹⁸⁷ *Id.*

¹⁸⁸ See Exec. Order No. 10,308, § 3, 16 Fed. Reg. 12,303 (1951).

¹⁸⁹ Compare *id.* § 2(a) (naming representatives from "the Department of the Defense, the

tended to keep all but the most vexing compliance problems out of the President's sight, while Eisenhower's required the committee to "make annual or semiannual reports on its progress to the President."¹⁹⁰ Eisenhower's order gave the compliance committee a more proactive role by including a charge to "encourage the furtherance of an educational program by employer, labor, civic, educational, religious, and other voluntary non-governmental groups in order to eliminate or reduce the basic causes and costs of discrimination in employment."¹⁹¹ Truman's order did not require contracting agencies to report complaints to the compliance committee, but Eisenhower's order required "[e]ach contracting agency [to] report to the Committee the action taken with respect to all complaints received by the agency, including those transmitted by the Committee."¹⁹² To emphasize its break from the earlier policy, Eisenhower's order expressly revoked Truman's and abolished its compliance committee.¹⁹³

A year later Eisenhower enhanced this order by prohibiting discrimination in particular types of employment practices as a condition for holding a government contract. Executive Order 10,557 specifically targeted discrimination in "employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship."¹⁹⁴ This policy later served as model language when Congress drafted Title VII's prohibited employment practices.¹⁹⁵

Department of Labor, the Atomic Energy Commission, the General Services Administration, and the Defense Materials Procurement Agency") with Exec. Order No. 10,479, § 3(a), 18 Fed. Reg. 4899 (1953) (naming the same except for the military procurement office, and adding the Departments of Commerce and Justice).

¹⁹⁰ Compare Exec. Order No. 10,479, § 4, 18 Fed. Reg. 4800 (1953) (Committee required to make annual or semiannual reports on its progress to the President) with Exec. Order No. 10,308, § 3, 16 Fed. Reg. 12,303 (1951) (reports to be made to the President only when Director of Defense Mobilization deems it appropriate).

¹⁹¹ Exec. Order No. 10,479, § 6, 18 Fed. Reg. 4800 (1953).

¹⁹² Compare Exec. Order No. 10,479, § 5, 18 Fed. Reg. 4899 (1953) with Exec. Order No. 10,308, § 3, 16 Fed. Reg. 12,303 (1951).

¹⁹³ Exec. Order No. 10,479, § 9, 18 Fed. Reg. 4800 (1953).

¹⁹⁴ Exec. Order No. 10,577, 19 Fed. Reg. 5655 (1954) (policy preamble).

¹⁹⁵ See 42 U.S.C. § 2000e-2(a)(1) (1994) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment"); 42 U.S.C. § 2000e-2(a)(2) (1994) (prohibiting any practice to "limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities"); 42 U.S.C. § 2000e-3(b) (1994) (making it unlawful for a covered entity, including anyone controlling an apprenticeship program, "to print or publish . . . any

The order added another innovation by requiring all contractors "to post hereafter in conspicuous places, available for employees and applicants for employment, notices . . . setting forth the provisions of the non-discrimination clause."¹⁹⁶ Though commonplace today, this EEO notice was undoubtedly controversial in the 1950s because of the growing tension between the federal government and states concerning desegregation.¹⁹⁷

President John Kennedy's Executive Order 10,925 continued the progression of presidential regulation of employment discrimination. Issued twenty years after Executive Order 8802, and no longer having a direct military justification, it was premised more broadly on the idea that "discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States."¹⁹⁸

Kennedy transformed Eisenhower's Committee on Government Contracts into the President's Committee on Equal Employment Opportunity,¹⁹⁹ implying that the President would be personally accountable for its actions. This committee was strengthened by naming the Vice President as its chairman²⁰⁰ and delegating it broad powers.²⁰¹

For the first time, a presidential order used the term "affirmative action,"²⁰² connoting a duty not only to refrain from prohibited discrimination, but "to promote full equality of employment opportu-

notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin").

¹⁹⁶ Exec. Order No. 10,577, § 3, 19 Fed. Reg. 5655 (1954).

¹⁹⁷ As a result of *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (abolishing separate but equal doctrine in provision of public education), a federal judge ordered Little Rock, Arkansas schools to be desegregated, but Governor Orval Faubus resisted, explaining in a telegram to President Eisenhower: "The question in issue at Little Rock at this moment is not integration vs. segregation. Peaceful integration has been accomplished for some time in [some Arkansas schools] . . . It is impossible to integrate some of our schools at this time without violence." 2 BRANYAN & LARSEN, *supra* note 184, at 1120-21. In sending federal troops to implement the court order, Eisenhower replied: "The federal law and orders of a United States district court implementing that law can not be flouted with impunity by any individual or any mob of extremists." 2 *Id.* at 1129.

¹⁹⁸ Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (policy preamble). This preamble continued with the finding, "it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower" and noted, "compliance with existing non-discrimination contract provisions reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity." *Id.*

¹⁹⁹ See *id.* (titled "Establishing the President's Committee on Equal Employment Opportunity").

²⁰⁰ See *id.* § 102(a).

²⁰¹ See *id.* § 103(a)-(e) (providing the committee rule- and procedure-making powers and authorizing it to consider and act on compliance reports while communicating this information to the President).

²⁰² See *id.* § 301(1) ("[t]he contractor will take *affirmative action* to ensure that applicants are

nity."²⁰³ Enlarging on Eisenhower's order to post this policy in conspicuous places, Kennedy's required contractors "in all solicitations or advertisements . . . [to] state that all qualified applicants will receive consideration for employment without regard to race."²⁰⁴ This innovation later appeared in Title VII.²⁰⁵

The order also required contractors to furnish the committee with affirmative action reports, and authorized the committee "access to his books, records, and accounts . . . for purposes of investigation to ascertain compliance with such rules, regulations, and orders."²⁰⁶ Consistent with the new affirmative action concept, contractors and their subcontractors were required "to file . . . Compliance Reports with the contracting agency, which will be subject to review by the Committee."²⁰⁷ The order's reporting requirement of "employment statistics of the contractor and each subcontractor"²⁰⁸ was an innovation that helped to contribute to the complex Title VII issue of proving disparate impact discrimination by statistical evidence.²⁰⁹

The order also strengthened enforcement by authorizing the committee to investigate employment discrimination complaints,²¹⁰ to hold hearings,²¹¹ and to impose the significant penalty of contract debarment.²¹² In addition, it provided authority to enjoin violations of this order.²¹³ Without any legislative authority, Executive Order 10,925 also authorized the Department of Justice to institute "criminal proceedings . . . for the furnishing of false information to any contracting agency or to the Committee as the case may be."²¹⁴

employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin" (emphasis added)).

²⁰³ Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (policy preamble).

²⁰⁴ *Id.* § 301(2).

²⁰⁵ See 42 U.S.C. § 2000e-3(b) (1994).

²⁰⁶ Exec. Order No. 10,925, § 301(5), 26 Fed. Reg. 1977 (1961).

²⁰⁷ *Id.* § 302(a).

²⁰⁸ *Id.*

²⁰⁹ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

²¹⁰ See Exec. Order No. 10,925, § 309(a), 26 Fed. Reg. 1977 (1961).

²¹¹ *Id.* § 310(a).

²¹² See *id.* § 310(b); see also *id.* § 312(d) (authorizing the committee to "[t]erminate, or cause to be terminated, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract").

²¹³ *Id.* § 312(b) (authorizing the Department of Justice to bring appropriate enforcement proceedings, including seeking an injunction, "where there is a substantial or material violation or the threat of substantial or material violation of the contractual provisions"). This innovation was significant because of the extraordinary judicial powers that could be brought to bear on contractors who failed to comply with the order and because discrimination issues could be addressed much more promptly.

²¹⁴ *Id.* § 312(c).

This executive order marked a critical turning point in presidential regulation of private employment. It stated tenets of affirmative action policy that have become early issues in the 1996 presidential election, such as statistical comparisons of demographic groups as a benchmark to measure achievement of EEO goals.²¹⁵ By failing to base its own authority on any legislation, this far-reaching order appeared to usurp Congress's power to regulate such matters. Instead, it cited executive orders for authority,²¹⁶ suggesting that these had become something like a cumulating body of common law for federal procurement. This boldly asserted power also made false affirmative action reporting a crime, without citing any enabling or related legislation. Kennedy widened this regulation in an order pertaining to federally funded construction.²¹⁷ In sum, Kennedy's orders significantly expanded affirmative action requirements for contractors, and in doing so, added to the quasi-legislative character of presidential orders affecting private employment.

President Lyndon Johnson's Executive Order 11,246²¹⁸ is commonly credited for establishing affirmative action,²¹⁹ but his order was mostly a reprise of Executive Order 10,925. One curious aspect was its continued prohibition against "race, creed, color, or national origin" discrimination, because Title VII, enacted a year earlier, contained a broader prohibition against "race, color, religion, sex, and national origin."²²⁰ Executive Order 11,246's omission of sex discrimination is interesting since it suggests that this type of bias was then invisible to policy-makers. Johnson addressed age discrimination²²¹ three years before addressing sex discrimination in Executive Order 11,375.²²² Executive Order 11,246's most important change was to strengthen enforce-

²¹⁵ See Zachry, *supra* note 9 (reporting Gov. Pete Wilson's (R., Cal.) curtailment of state affirmative action principles in his early bid for the presidency); see also Michael K. Frisby, *Clinton Sees Need for Affirmative Action Plans but May Open Set-Aside Programs to Whites*, WALL ST. J., July 14, 1995, at A14.

²¹⁶ Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (policy preamble).

²¹⁷ Exec. Order No. 11,114, 28 Fed. Reg. 6485 (1963). This order expressly extended Executive Order 10,925 to "contracts for construction financed with assistance from the Federal Government." *Id.* (policy preamble). The order applied to any contract with funding administered by any federal agency. *Id.* § 101. Construction contract was broadly defined to include "any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property." *Id.* § 102(a).

²¹⁸ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

²¹⁹ A standard casebook implies this when it discusses only Johnson's orders in an historical discussion of Title VII and affirmative action. MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 232-33 (1994).

²²⁰ See 42 U.S.C. § 2000e-2(a)(1) to (2) (1994).

²²¹ See Exec. Order No. 11,141, 29 Fed. Reg. 2477 (1964).

²²² See Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967).

ment by transferring this function to the Secretary of Labor.²²³ Also, the order extended affirmative action requirements to each contractor's or subcontractor's vendors.²²⁴

President Gerald Ford's Executive Order 11,914 was more significant, prohibiting discrimination with respect to the handicapped in federally assisted programs.²²⁵ It applied to all federal agencies administering any kind of financial assistance under section 504 of the Rehabilitation Act of 1973.²²⁶ That law served as a forerunner to the Americans with Disabilities Act of 1990,²²⁷ an important employment law. Ford's order directed the Secretary of Health, Education, and Welfare to identify discriminatory practices under section 504,²²⁸ to issue rules and regulations to prevent such discrimination,²²⁹ and to secure compliance by suspending or terminating, if necessary, federal financial assistance.²³⁰ Although not directly litigated, the order was cited with approval in a section 504 lawsuit alleging employment discrimination.²³¹ President Carter revoked this order when he issued a technical executive order to consolidate enforcement on nondiscrimination laws under the United States Attorney General.²³²

C. Court Challenges to Executive Orders Affecting Private Employment

Direct challenges to executive orders regulating private employment have been uncommon. *Youngstown Sheet & Tube Co. v. Sawyer*²³³ is the only decision directly overruling an executive order affecting

²²³ See Exec. Order No. 11,246, § 201, 30 Fed. Reg. 12,319 (1965).

²²⁴ See *id.* § 202(7) (ordering government contractors to include in their subcontracts or purchase orders the affirmative action duties stated in this order).

²²⁵ See Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976).

²²⁶ *Id.* § 1 (citing 29 U.S.C. § 794).

²²⁷ 42 U.S.C. § 12101-12213 (1994).

²²⁸ Exec. Order No. 11,914, § 3, 41 Fed. Reg. 17,871 (1976).

²²⁹ *Id.* § 2.

²³⁰ *Id.* § 3(b).

²³¹ *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (holding that a decedent's estate is entitled to recovery of an employment discrimination claim filed under § 504 of the Rehabilitation Act). When the discriminatee lost his job as a rail engineer because his left forearm was amputated, he sued under § 504, alleging he was still capable of performing his job duties. *Id.* at 628. His employer, Erie Lackawanna Railroad, was reorganized into Conrail, and federal funding aided this restructuring. *Id.* at 627, 628. The Court observed that the Department of Health, Education and Welfare, "the agency designated by the President to be responsible for coordinating enforcement of § 504 from the outset has interpreted that section to prohibit employment discrimination by all recipients of federal financial aid, regardless of the primary objective of that aid." *Id.* at 634 (citation omitted). That reasoning defeated the employer's argument that federal aid was not given with a particular employment objective. See *id.*

²³² Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980) (pertaining, inter alia, to § 504 of the Rehabilitation Act (§ 1-201(c)) and expressly revoking Exec. Order No. 11,914 (§ 1-502)).

²³³ 343 U.S. 579 (1952).

private employment, and the Chamber of Commerce's current challenge to Clinton's striker-replacement order cites this exceptional case as a precedent.²³⁴ *Youngstown* is relevant to Clinton's order insofar as it involved an executive order pertaining to private-sector collective bargaining rights. This discussion shows, however, that the facts in *Youngstown* are clearly distinguishable from the facts presented in the Chamber of Commerce suit.

To avert a nationwide strike by the United Steelworkers, President Truman issued Executive Order 10,340 directing the Secretary of Commerce to seize and operate numerous steel mills.²³⁵ Obeying the order under protest, affected companies successfully sought a preliminary injunction.²³⁶ An appeals court promptly stayed the injunction,²³⁷ and the Supreme Court took up the matter.

Justice Black's majority opinion strictly construed the President's constitutional authority to issue a seizure order. He reasoned that "no statute . . . expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied."²³⁸ He dismissed Truman's argument that the order properly derived from the President's constitutional role as Commander in Chief, observing:

Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.²³⁹

Justice Jackson, in a concurring opinion, provided a more flexible approach for determining the constitutionality of an executive order.

²³⁴ *Chamber of Commerce Complaint*, *supra* note 6, at E-47. The complaint argues:

In a leading case involving separation of powers, the Supreme Court held that the President's authority to issue an Executive Order "must stem either from an act of Congress or from the Constitution itself." The President clearly has no inherent constitutional authority to condition participation in the federal procurement program on the forfeiture of rights protected under federal statutes.

Id. (citation omitted).

²³⁵ See *supra* notes 85, 102-06 for a summary of the order and its implementation.

²³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C. 1952), *aff'd*, 343 U.S. 937 (1952).

²³⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 197 F.2d 582, 585 (D.C. Cir. 1952).

²³⁸ *Youngstown*, 343 U.S. at 585.

²³⁹ *Id.* at 587.

The President's authority is at its fullest when an order is expressly or impliedly authorized or delegated by Congress,²⁴⁰ and decreases to its minimum when used incompatibly with the express or implied will of Congress.²⁴¹ This power exists in a zone of twilight when the President acts in the absence of a congressional grant or denial of authority. Thus, "congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility."²⁴²

Jackson's analysis is superior to Black's for evaluating the numerous presidential orders affecting private employment. If Black's approach were applied to all these orders, only a handful pertaining to production of military goods during an officially declared war could be sustained.²⁴³ No others could because they went well beyond the express authority provided in Article II.²⁴⁴ On the other hand, Jackson's approach is more attuned to the realities of presidential power in the twentieth century because it recognizes that the Constitution not only "diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."²⁴⁵ Further, Jackson responded to Black's simplistic notion that the Constitution requires executive and legislative powers be mutually exclusive when he observed that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."²⁴⁶

The executive order challenged in *AFL-CIO v. Kahn*²⁴⁷ is also relevant to Executive Order 12,954 because they have common features.²⁴⁸ The AFL-CIO (a national federation of unions) challenged Executive Order 12,092 by arguing that President Carter lacked authority

²⁴⁰ *Id.* at 635.

²⁴¹ *Id.* at 637-38.

²⁴² *Id.* at 637.

²⁴³ See concluding discussion, *infra* notes 427-31 and accompanying text for an explanation of why Justice Black's functional analysis of executive power should not be applied to Executive Order 12,954.

²⁴⁴ The President's exclusive and express powers are very limited, consisting of serving as Commander in Chief, requiring Cabinet heads to submit reports, granting pardons and reprieves, and appointing interim Senators as vacancies occur. U.S. CONST. art. II, § 2, cl. 1. Other exclusive and express powers include providing Congress information on the state of the union, convening or adjourning Congress under exceptional circumstances, receiving ambassadors, and most controversial in the context of executive orders, "tak[ing] Care that the Laws be faithfully executed. . . ." *Id.* at art. II, § 3. The President shares express power with Congress to make treaties; nominate and appoint ambassadors, public ministers and consuls, and Supreme Court judges; and with congressional delegation, to appoint inferior officers. See *id.* at art. II, § 2, cl. 2.

²⁴⁵ *Youngstown*, 343 U.S. at 635.

²⁴⁶ *Id.*

²⁴⁷ 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979).

²⁴⁸ See *supra* notes 125-128 and accompanying text.

under FPASA to debar federal contractors who reached wage agreements with unions in excess of presidential guidelines. They also argued that the order was invalid because it conflicted with wage and price legislation prohibiting mandatory wage limits, and with the NLRA's policy of removing the federal government from collective bargaining. A district court enjoined the order by concluding *inter alia* that this case was controlled by *Youngstown*,²⁴⁹ and that the President had no authority under FPASA to link procurement to price-control standards.²⁵⁰

In reversing the lower court, the District of Columbia Circuit Court of Appeals determined that Congress granted the President broad authority under FPASA to establish procurement policies.²⁵¹ The court broadly construed FPASA's policy goal of promoting efficiency and economy when it reasoned, "This language recognizes that the Government generally must have some flexibility to seek the greatest advantage in various situations. 'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions."²⁵² The court also noted that Congress has added social and economic objectives not strictly related to cost and efficiency to government procurement programs;²⁵³ and it found that presidents have imposed additional considerations on the procurement process under section 205 of FPASA.²⁵⁴

Unfortunately, in rejecting the argument that Executive Order 12,092 contravened the NLRA and RLA, the court did not explain its reasoning except to say, "Although the Executive Order represents an important external factor in the economic environment surrounding collective bargaining, it does not subvert the integrity of that process."²⁵⁵ This creates ambiguity for any future court reviewing an execu-

²⁴⁹ See *AFL-CIO v. Kahn*, 472 F. Supp. 88, 102 (D.D.C.), *rev'd*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

²⁵⁰ See *id.* at 96.

²⁵¹ See *Kahn*, 618 F.2d at 788 ("We believe that by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies, Congress intended that the President play a direct and active part in supervising the Government's management functions.").

²⁵² *Id.* at 788-89 & n.23 (presenting that part of the FPASA's legislative history in which Congress encouraged procurement officers to consider "need, quality of product, or lower ultimate cost").

²⁵³ *Id.* at 789 n.25 (noting that FPASA also included procurement directives that would benefit small businesses, maintain minimum wage and working condition standards for service employees, and debar contractors who violated certain federal environmental laws).

²⁵⁴ *Id.* at 790.

²⁵⁵ *Id.* at 796.

tive order affecting collective bargaining because it suggests such an order can place a large restraint on negotiations (by setting a cap on pay raises that can be negotiated) while implying that such a restraint is somehow outside the scope of the NLRA. Here the court was simplistic in its reasoning that collective bargaining laws were really unaffected by the order because the order did not alter the processes the laws provide. The most potent right to strike is a nullity if a law sets a limit on pay raises.

Although the order in *Kahn* offers useful comparisons to Executive Order 12,954, it is distinguishable. In the *Kahn* situation, Congress and the President worked in concert to combat intolerable inflation,²⁵⁶ but the relationship between Congress and the President regarding Executive Order 12,954 is more clouded. This is because Clinton issued Executive Order 12,954 only months after the striker-replacement bill's supporters in Congress failed to garner enough votes to overcome a filibuster against the bill, even though a majority in both chambers voted on the record to support it.²⁵⁷ When a minority in the Senate defeats legislation by threatening a filibuster, does this mean that Congress as a body opposed it, or does it mean that the will of Congress cannot be characterized unambiguously?²⁵⁸

D. *Summary of Contributions Made by Executive Orders Regulating Private Employment*

The constitutionality of executive orders affecting employment discrimination and collective bargaining is discussed, respectively, in sections IV.A and IV.B. In contrast, this section briefly summarizes the public policy contributions these orders made.

First, many orders allowed for experimentation in public policies affecting private employment, and some experimented with fundamental economic and social arrangements. Roosevelt's orders creating the National Defense Mediation Board, followed by the National War Labor Board, provided the nation's economy urgently needed, yet adaptable, dispute resolution institutions. The succession of anti-discrimination orders from 1941 to 1975 used workplaces of federal contractors as a laboratory for a variety of policy innovations, ranging from broad nondiscrimination principles to more technical enforcement issues. One remarkable aspect of this experimentation was the

²⁵⁶ *Kahn*, 618 F.2d at 796.

²⁵⁷ *Senate Vote Fails*, *supra* note 5, at AA-1; *Victory for Business Coalition*, *supra* note 5, at AA-1.

²⁵⁸ See *infra* notes 370-71 and accompanying text.

introduction of new protected groups, beginning with African Americans and later extending to older workers, women, and the disabled.

Second, many of these orders served as models for legislation. As a result of their experimentation, they occasionally provided Congress with blueprints for workable and politically feasible legislation. This explains in part why Congress initially focused on race discrimination in enacting the 1964 Civil Rights Act. Presidential orders had focused on this form of discrimination since 1941 and therefore developed a lengthy track record. It is notable that every employment discrimination law regarding race, gender, age, and disability followed rather than preceded a related executive order.

Third, some orders diffused political responsibility for controversial policy innovations. New laws and Supreme Court decisions are widely reported, sometimes with detailed analysis and commentary. In contrast, an executive order tends to be less visible unless a president decides to make it newsworthy. This low visibility may have checked otherwise hostile public opinion on race discrimination orders.

These orders had other diffusing features. Many dealt with federal contract administration, a mundane subject that proved difficult to report with fanfare. In addition, unlike legislation that is often enforced with criminal sanctions, many of these orders specified no sanctions, or the comparatively weak penalty of loss of government contracts. Had these orders relied on criminal sanctions for their enforcement, they would have been more visible because indictments, trials, and sentencing hearings seem to make better news than a contract debarment hearing. By threatening loss of government business, these orders may have deterred undesirable conduct without mobilizing adverse public opinion.

The diffusing feature of still other orders was their lofty character, which may have put them above the plane of political discourse and debate. Roosevelt's orders putting government in the delicate position of effectively approving labor agreements illustrate this point. Rhetorical flourishes filled lengthy policy preambles, putting the nation above seemingly crass self-interest. They also expressed unifying appeals. In short, they were drafted as if to be read from a patriotic pulpit set high above political parties and ordinary politicians. It is hard to imagine legislation with more effective moral incantations than these orders. Their overarching appeals were more suited to the public's recognition of the President, and not the Congress, as *the* national leader.

Fourth, some orders profoundly changed public opinion. Directives to eradicate race discrimination were continually strengthened. The Presidents' party affiliation did not seem to matter. This constancy

probably contributed to a gradual but unrelenting change in public manners and customs.

Here it is important to note that federal power in the 1940s had a limited reach into segregated institutions. Elections, schools, city parks, and community centers were controlled by local boards and public officials, or state parties and legislatures. This left the workplace, an instrumentality of national commerce, as the most available place for federal government inroads against race segregation. Early orders regulating federal contractors were the main instrument to break the stranglehold of localized power structures.

Fifth, some orders provided more nimble responses to economic crises than legislation might have provided. Whether wage and price controls are appropriate policies in a free-market economy is an open question. However, there is less room to debate that these policies require more precise articulation than Congress is usually able to provide, because the kind of compromise often required to enact laws would tend to produce more vague standards. Also, a committee of a few economic experts or labor and management representatives seems able to respond more quickly to changing conditions than Congress. Of course, this process is disconnected from voters, except for presidential elections, and experts can do more harm than good. But this expert-driven policy-making process usually occurred after Congress broadly delegated power to the President to fashion these instruments. It therefore follows that Congress always retained an ultimate check over these insulated elites.

III. REPLACEMENT STRIKES AND EXECUTIVE ORDER 12,954

Executive Order 12,954 blends characteristics of executive orders affecting collective bargaining and race discrimination. It must be grouped with orders affecting private-sector collective bargaining because it limits an employer's right to hire permanent striker replacements. But it stands out in this group for several reasons. Most of these orders were meant to be temporary. Seizure and dispute resolution orders were intended to last only as long as the nation was at war, and wage and price controls only as long as inflation remained too high. Clinton's order, in contrast, is intended as a permanent part of federal procurement.

Many of the other orders imposed extreme measures: taking an employer's private property, running a private business, or placing a strict ceiling on workers' raises. In addition, some employers under seizure orders had much less control over circumstances leading to a

seizure. An unreasonable union could force a seizure simply by threatening to strike or refusing to settle with an employer.

In contrast, an employer under Executive Order 12,954 always remains in control of whether a sanction will be applied. There are many effective employer responses to strikes, including subcontracting work, hiring temporary replacements, contracting with employment agencies who employ workers to perform struck work, and building inventory in advance of a strike. There is no assurance that any of these methods will be superior to settling with strikers, but there is evidence that employers can use these methods indefinitely and profitably.²⁵⁹ In short, prohibiting employers from hiring permanent replacements eliminates only one of several employer responses to strikes and, therefore, is neither a seizure nor an extreme limitation on management rights.

Also, Executive Order 12,954 differs from most other orders affecting collective bargaining because its scope is more limited. Many orders affected virtually every employer whose enterprise had some relationship to the war, even ordinary city bus companies who drove workers to factories.²⁶⁰ In contrast, Clinton's order affects a relatively small minority of employers who do more than \$100,000 of business with the federal government,²⁶¹ and more specifically, a much smaller portion who hire permanent striker replacements.²⁶²

The main enforcement tool in Clinton's order, contract debarment, gives it an unusual character since this is derived from antidiscrimination orders. It also provides employers due process rights set

²⁵⁹ See Robert L. Rose, *Temporary Heaven: A Job at Struck Caterpillar*, WALL ST. J., Nov. 29, 1994, at B1, B7 [hereinafter Rose, *Temporary Heaven*] (reporting Caterpillar's hiring of many temporary replacements for striking UAW workers); see also Robert L. Rose, *Caterpillar and Striking UAW Meet U.S. Mediator; Firm Curbs Agenda*, WALL ST. J., Jan. 10, 1995, at A14 (reporting that Caterpillar had the "upper hand" in responding to a large strike, in part because temporary workers have helped keep their plants open).

In 1994, while Bridgestone/Firestone was struck and operated with 2300 replacements, who were then only temporary hires, sales improved 11% compared to 1993, and profits rose sharply, from \$6 million to \$29 million. *Business Briefs*, THE PLAIN DEALER, Feb. 28, 1995, at 4C. Replacements were not given permanent status until January 1995. See Narisetti, *supra* note 21, at A3.

²⁶⁰ See Exec. Order No. 9570, 10 Fed. Reg. 7235 (1945).

²⁶¹ Although the percentage of employers affected by Executive Order 12,954 is not reported, an upper limit of this percentage can be estimated. Approximately 22% of the labor force and more than 100,000 companies have federal contracts in excess of \$50,000 that are administered by the Labor Department's Office of Federal Contract Compliance. Asra Q. Nomani, *Affirmative Action Agency Is Assailed for Pushing Quotas, Preferential Hiring*, WALL ST. J., June 16, 1995, at B8. Since Executive Order 12,954's \$100,000 threshold is higher, the order would apply to fewer than 100,000 companies and 22% of the labor force.

²⁶² See GAO STRIKE REPLACEMENT REPORT, *supra* note 24, at 13 (estimating that one-sixth of all employers actually hired permanent striker replacements in the 1980s).

forth in these orders. Thus, Executive Order 12,954 is a hybrid of these two types of executive orders.

The constitutionality of Executive Order 12,954 cannot be determined without examining issues raised in this section. In section III.A the origin of the striker-replacement doctrine is reviewed. This inquiry shows that employers' right to hire permanent replacements has dubious roots in a Supreme Court decision that stated this principle as dictum rather than a holding. Employers unquestionably have a right to hire permanent replacements, but as the analysis here shows, the questionable origins of the doctrine have resulted in the NLRB significantly limiting its application. This section calls into question employer suggestions that the right to hire permanent replacements is absolute. That right has significant, well-recognized limits and Clinton's order is consistent with these limits because it applies to a small class of employers who do business with the federal government.

Section III.B presents evidence showing that strikes involving permanent replacements have occurred more frequently since the 1970s. A significant number of these strikes have affected nationally prominent employers, including some federal contractors. Evidence is presented to show that these strikes have usually been bitter and disorderly, and occasionally, dangerously violent. This evidence is relevant to the constitutional analysis of Executive Order 12,954 because the order relies on a statute that broadly empowers presidents to consider matters of economy and efficiency in government procurement. Evidence presented here suggests, without proving, that employers who hire permanent striker replacements encounter serious disruptions to business, incur high turnover among replacements, and are confronted with picket line obstructions. All of these matters may affect the quality of products procured by the government, or the timely delivery of these products. Thus, this section shows a rational nexus between the order's assumptions concerning the external effects of replacement strikes and the procurement needs of the government.

Section III.C presents the history of failed attempts by labor to enact the Workplace Fairness Act, a bill to ban hiring of permanent striker replacements. A careful examination of this history is needed to evaluate the employer contention that Clinton acted unconstitutionally by contradicting the will of Congress. In fact, the striker-replacement bill was supported by a majority in both chambers by the 102d and 103d Congress, but was not enacted because of several technical votes to head off a threatened Republican filibuster. In short, the bill was defeated by a minority in the Senate determined to filibuster the bill. This history shows, therefore, that the will of Congress was not

opposed to the striker-replacement bill. Under these circumstances, it is more accurate to characterize congressional will as ambiguous.

Section III.D reports the elements of Executive Order 12,954, as well as the Clinton Administration's rationale and evidentiary support for the order. This section explains why employers are correct in characterizing this order as a political expedient for the President. Evidence is presented showing that Clinton raised labor's expectation when first elected and then profoundly disappointed this large interest group by advocating NAFTA. Consequently, there developed an unusual rift between the AFL-CIO and a Democratic president.

Employers, therefore, are correct in stating that Clinton's order is an attempt to renew labor's active support for his reelection. But this does not invalidate the order as unconstitutional. By this logic, President Bush's two executive orders on collective bargaining, occurring nearer to a presidential election, would be unconstitutional. The constitutionality of Clinton's order depends, instead, on whether it was issued in a manner consistent with the orders reviewed in sections II.A and II.B, and in accordance with Congress's delegation of procurement power to the President under FPASA.

A. *Striker-Replacement Doctrine Preceding the Order*

Although the Clinton Administration cited a government-procurement rationale for its order,²⁶³ its primary motivation was to limit the striker-replacement doctrine of *NLRB v. Mackay Radio & Telegraph Co.*²⁶⁴ In that 1938 decision, an employer reinstated all but five replaced strikers who offered to return to work unconditionally, and discriminated against these few on the basis of their union activities.²⁶⁵ Although the Court's decision favored the union,²⁶⁶ it also declared in dictum, "[I]t does not follow that an employer, guilty of no act denounced by the [NLRA], has lost the right to protect and continue his business by supplying places left vacant by strikers."²⁶⁷

²⁶³ See Exec. Order No. 12,954, 29 C.F.R. § 270.2(a) (1995).

²⁶⁴ See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

²⁶⁵ *Id.* at 339.

²⁶⁶ See *id.* at 346. The Court stated,

[t]he claim put forward [by the NLRB] is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. . . . Any such discrimination in putting them back to work is . . . prohibited by section 8.

Id.

²⁶⁷ *Id.* at 345. In this passage, the Court specifically referenced § 13 of the NLRA, which

Some scholars have questioned the legitimacy of a doctrine rooted in dictum,²⁶⁸ but an historical analysis suggests that the *Mackay Radio* Court unconsciously reflected a rich accumulation of American and English common law dating to an 1824 English law expressly giving workers the right to induce their fellows to join them in a work stoppage strike, provided that such strikers do not "willfully and maliciously force another" to stop working.²⁶⁹ In so many words, this English law states the basic striker-replacement doctrine: Workers are entitled to withhold their labor and peacefully persuade their fellows to join in, but employers are entitled to continue operations with replacements, and strikers have no right beyond peaceful persuasion to interfere with their work. In short, *Mackay Radio's* striker-replacement doctrine was not as novel as some commentators have suggested; but it should not have been given the precedential value that is usually given on the basis of stare decisis.

In attacking Executive Order 12,954, employers give the impression that *Mackay Radio* conferred upon employers an unlimited right to hire permanent striker replacements.²⁷⁰ Therefore, they argue, a limitation as serious as the one imposed by Clinton's order is contrary to striker-replacement doctrine. But this view is erroneous and misleading because it takes no account of significant restrictions that the Supreme Court and NLRB have imposed on the *Mackay Radio* doctrine.

The first limitation appears in *Mackay Radio's* holding: a striker cannot be permanently replaced when an employer unlawfully dis-

provided, "[n]othing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.* (current version, as amended, available at 29 U.S.C. § 163 (1994)). Thus, the Court did not view hiring of permanent striker replacements as an infringement of the right to strike. *See id.*

²⁶⁸ *See Craver, supra* note 19, at 421; Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 548; Paul Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 388 (1984).

²⁶⁹ Michael H. LeRoy, *Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert and Cartelization*, 34 B.C. L. REV. 257, 274 (1993) (quoting 5 Geo. 4, ch. 95, § 5 (1824)).

²⁷⁰ *Chamber of Commerce Complaint, supra* note 6, at E-49. The complaint states:

[T]he Act confers an affirmative right to hire replacement workers and that right is integral to federal labor policy. Although bills to restrict or eliminate management's right to hire replacement workers have been introduced in Congress over the years—most recently last year, when the so-called "Workers' Fairness Act" was considered—Congress has conspicuously failed to enact any of them.

Id. There is no mention in the entire employer memorandum of significant Supreme Court and NLRB limitations on the striker-replacement doctrine. By discussing only failed legislation to restrict this doctrine, the employer memorandum creates an erroneous impression that the right to hire permanent replacements is virtually unrestricted.

criminate on the basis of protected union activity.²⁷¹ Thus, an employer is not entitled to induce a replacement to take a striker's job by offering a benefit that destroys the right to strike.²⁷² The concept has been broadened to a more general limitation: in an unfair labor practice ("ULP") strike initiated in whole or in part in response to unfair practices committed by an employer, strikers are entitled to immediate reinstatement to their jobs upon offering unconditionally to return to work.²⁷³ My recent research shows the breadth of this limitation on the *Mackay Radio* doctrine. In approximately one in seven replacement strike cases, the NLRB ruled that the dispute involved a ULP strike.²⁷⁴ In addition to these limitations, an employer cannot indefinitely postpone reinstatement of a replaced striker, but rather, must offer that striker reinstatement to her position or an equivalent job when such an opening occurs.²⁷⁵

Thus, while restrictions on an employer's right to hire permanent striker replacements are quite limited and give many employers a considerable advantage over strikers, the striker-replacement doctrine has been narrowed in some important respects since 1938. Clearly, it is not the kind of absolute right portrayed by employers in their suit challenging Executive Order 12,954. In this light, Clinton's order amounts to just another limitation on this employer right. No one would argue today that the ULP doctrine is contrary to *Mackay Radio*, but it vitiates this right in approximately one in seven NLRB cases. Likewise, Clinton's order stands to vitiate this right for approximately twenty percent of those employers who have federal contracts more than \$100,000.²⁷⁶

B. Increase in Replacement Strikes and Violence Preceding the Order

Recent evidence shows that replacement strikes have been occurring more frequently, though the beginning of this upsurge has not been clearly identified. Union leaders and some elected officials be-

²⁷¹ *Mackay Radio*, 304 U.S. at 339.

²⁷² See, e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231 (1963) (ruling that an employer's offer of 20 years super-seniority to replacement workers was inherently destructive of the right to strike because it unlawfully discriminated against strikers engaged in protected activity).

²⁷³ See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *THE DEVELOPING LABOR LAW* 1007-11 (Charles Morris ed., 1983).

²⁷⁴ Michael H. LeRoy, *Employer Treatment of Permanently Replaced Strikers, 1935-1991: Public Policy Implications*, 13 *YALE LAW & POL'Y REV.* 1, 21 (1995).

²⁷⁵ See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

²⁷⁶ See Nomani, *supra* note 261.

lieve that President Reagan's hiring of over 11,000 permanent replacements for striking air traffic controllers in 1981 marked the beginning of this period.²⁷⁷ My research on 299 replacement strikes reaches a preliminary conclusion that replacement strikes began to increase in the mid-1970s.²⁷⁸ Another study and a rare expose indirectly support this finding by presenting evidence of increasing influence of union-busting consultants during the 1970s.²⁷⁹ But the only U.S. government study on replacement strikes adds to the ambiguity of when this trend began. Using a crude research design asking union negotiators to compare this activity for the 1970s and 1980s, the study concluded these strikes occurred more often in the most recent decade.²⁸⁰ Also, case studies suggest that these strikes became significant in the 1980s.²⁸¹

²⁷⁷ See, e.g., *United States v. Professional Air Traffic Controllers*, 525 F. Supp. 820, 822 (E.D. Mich. 1981) (reporting the firing of striking PATCO members); Herbert R. Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984) (presenting a detailed description of this important strike).

Union perceptions that President Reagan's hiring of PATCO striker replacements caused other employers to hire striker replacements appear in *Prohibiting Permanent Replacement of Striking Workers, 1991: Hearing on H.R. 5 Before the Subcomm. on Aviation of the House Comm. on Public Work and Transportation*, 102d Cong., 1st Sess. 39 (1991) (statement of Juliette Lenoir, Vice President, Association of Flight Attendants) ("[M]ost labor unions mark the 1981 action of former President Reagan, when he fired 12,000 striking members of the Professional Air Traffic Controllers, as the contemporary beginning of the use of permanent replacement workers."). In addition, a 1991 House committee report reflected union testimony:

President Reagan's firing and permanent replacement of 12,000 striking air traffic controllers in 1981 had a dramatic impact on the way Americans view strikes, including the view taken by a new generation of corporate managers. . . . President Reagan's action was regarded by many observers as a signal to the business community that it was acceptable to dismiss striking workers. The events surrounding the air traffic controllers' strike ushered in a much more aggressive, and even hostile, employer strategy toward lawful strikes.

HOUSE COMM. ON ENERGY AND COMMERCE, DISCRIMINATION BASED ON PARTICIPATION IN LABOR DISPUTES, H.R. REP. NO. 57, 102d Cong., 1st Sess., pt. 3, at 20 (1991).

²⁷⁸ Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935-1991*, 16 BERKELEY J. OF EMP. & LAB. L. 169, 184-91 (1995) (showing that replacement strikes sharply increased in 1975 and remained at abnormally high levels through the end of the sample period in 1991).

²⁷⁹ See JOHN J. LAWLER, *UNIONIZATION AND DEUNIONIZATION* 94 (1990) ("There is general consensus on all sides that consultant use by employers expanded substantially throughout the 1970s and into the 1980s."); see also MARTIN JAY LEVITT, *CONFESSIONS OF A UNION BUSTER* (1993) (depicting a consultant's personal account).

²⁸⁰ GAO STRIKE REPLACEMENT REPORT, *supra* note 24, at 18.

²⁸¹ A detailed analysis of the meatpacking industry by Charles Craypo shows how one firm's use of striker replacements eventually broke an industry-wide pattern agreement that led competitor firms to adopt this tactic:

Five more rounds of bargaining at Dakota City between 1969 and 1986 completed the process. Each ended in a lengthy dispute, ranging in duration from four to fourteen months. Each arose from IBP's refusal to follow industry pattern settlements and often from its insistence on wage freezes or cuts. Each also ended with

While the beginning of this trend has not been clearly identified, it is more evident that these strikes affected large employers in certain industries. These included meatpacking and food processing (George A. Hormel,²⁸² Monfort of Colorado,²⁸³ Conagra,²⁸⁴ Diamond Walnut,²⁸⁵ and Clougherty Packing Co.²⁸⁶), paper products (Boise Cascade²⁸⁷ and International Paper²⁸⁸), and newspapers (Chicago Tribune,²⁸⁹ New York Daily News,²⁹⁰ Pittsburgh Press,²⁹¹ San Francisco Chronicle,²⁹² and Detroit Free Press²⁹³), coal and copper mines (Phelps Dodge,²⁹⁴ A.T.

the company remaining below the base wages paid by traditional union packers. The union lacked the power to force IBP into pattern bargaining because it could not strike the Dakota City plant effectively against the use of replacement workers and the company's alternative sources of beef production.

Charles Craypo, *Meatpacking: Industry Restructuring and Union Decline*, in *CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR* 63, 72 (Paula Voos ed., 1994).

²⁸² See William Serrin, *Hormel Plant Shuts as Troops Arrive and Strikers Thin Ranks*, N.Y. TIMES, Jan. 22, 1986, at A12; William Serrin, *Hormel Opens Plant As Guardsmen Bar Strikers*, N.Y. TIMES, Jan. 23, 1986, at A12 [hereinafter *Hormel Opens Plant*]; William Serrin, *Hormel Plan Dismisses Hundreds*, N.Y. TIMES, Jan. 28, 1986, at A15; William Serrin, *Strike by Meatpackers Splits Family Loyalties*, N.Y. TIMES, Jan. 25, 1986, at 7; *Hormel Reports Hiring Completed At Strikebound Minnesota Plant*, N.Y. TIMES, Feb. 13, 1986, at B16; see also HARDY GREEN, *ON STRIKE AT HORMEL: THE STRUGGLE FOR A DEMOCRATIC LABOR MOVEMENT* (1990); DAVE HAGE & PAUL KLAUDA, *NO RETREAT, NO SURRENDER: LABOR'S WAR AT HORMEL* (1989).

²⁸³ See Monfort of Colorado, 298 N.L.R.B. 73 (1990).

²⁸⁴ See Joseph S. Stroud, *Strike Spoiling Promise of Carter Plant*, LEXINGTON HERALD-LEADER, Dec. 19, 1993, at 1 (reporting on a replacement strike at Cook Family Foods, a division of Conagra); Sam Adams, *Christmas Will Just Be Another Day for Strikers at Cooks*, THE DAILY INDEPENDENT, Dec. 24, 1993, at 1 (reporting that the strike involved 400 strikers).

²⁸⁵ See Diamond Walnut Growers, 316 N.L.R.B. 36 (1995); Diamond Walnut Growers, 312 N.L.R.B. 61 (1993) (reporting that the employer hired replacements for 500-600 strikers); *Teamsters Say Diamond Walnut Should Be Sanctioned*, *supra* note 23, at D5.

²⁸⁶ See Clougherty Packing Co., 292 N.L.R.B. 1139 (1989) (involving approximately 1000 strikers, some of whom were permanently replaced).

²⁸⁷ See Adrienne Eaton & Jill Kreisky, *Collective Bargaining in the Paper Industry: Developments Since 1979*, in *CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR*, *supra* note 281, at 25, 45 (reporting Boise Cascade's hiring of 342 replacements in a 1986 strike).

²⁸⁸ See Adrienne Bierecree, *Capital Restructuring and Labor Relations: The International Paper Strike*, in 1 *INTERNATIONAL CONTRIBUTIONS TO LABOUR STUDIES* 59, 72-73 (Gerald Berk ed., 1991).

²⁸⁹ See Chicago Tribune Co., 304 N.L.R.B. 259 (1991).

²⁹⁰ See *Permanent Replacement Workers Called Key Issue as Daily News Strike Continues*, Daily Lab. Rep. (BNA) No. 210, at A-13 (Oct. 30, 1990).

²⁹¹ See Michael deCourcy Hinds, *Pittsburgh Papers Publish, But Strikers Block Trucks*, N.Y. TIMES, July 29, 1992, at A8; see also *Pittsburgh Press Co. v. Preate*, 797 F. Supp. 436, 444 (W.D. Pa.), *aff'd*, 981 F.2d 1248 (3d Cir. 1992).

²⁹² See *San Francisco Papers Threaten to Replace Striking Employees*, Daily Lab. Rep. (BNA), at A-5, A-6 (Nov. 7, 1994).

²⁹³ See Nichole M. Christian, *Deadline Pressure: Detroit Newspapers Face an Ugly Standoff with Striking Unions*, WALL ST. J., Aug. 9, 1995, at A1, A5 (reporting on the Detroit Free Press's plans to hire permanent replacements for 2500 strikers).

²⁹⁴ See JONATHAN ROSENBLUM, *THE COPPER CRUCIBLE* (1994); see also *United Steelworkers v.*

Massey,²⁹⁵ Pittston Coal Group²⁹⁶), airline and bus carriers (Continental Airlines,²⁹⁷ United Airlines,²⁹⁸ TWA,²⁹⁹ Eastern,³⁰⁰ and Greyhound³⁰¹), tire makers (Bridgestone/Firestone³⁰² and Pirelli Armstrong³⁰³), assorted manufacturers (Colt Industries,³⁰⁴ Ravenswood,³⁰⁵ and Caterpillar³⁰⁶), and major league sports (major league baseball umpires).³⁰⁷

Phelps Dodge Corp., 833 F.2d 804 (9th Cir. 1987); *End Nears for Copper Strikers*, CHI. TRIB., July 7, 1985, at 5A.

²⁹⁵ See Tall Timber Mine and United Mine Workers, District 17, Local Union 1440 (Mar. 24, 1992) (LeRoy, Arb.) [hereinafter A.T. Massey] (unpublished decision on file with author).

²⁹⁶ After Pittston hired permanent striker replacements, picket line violence broke out, notwithstanding the Mine Workers' efforts to use civil disobedience as a means of protest, and as a result, a local court levied a \$64 million coercive civil contempt fine. See International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552 (1994); see also B. Drummond Ayers, Jr., *Coal Miners' Strike Hits Feelings That Go Deep*, N.Y. TIMES, Apr. 27, 1989, at A16; Michael deCourcy Hinds, *Bitter Strike May Be At An End*, N.Y. TIMES, Dec. 23, 1989, at A17; *Ratification of Pittston Contract Hailed by Union Leaders, Secretary Dole*, Daily Lab. Rep. (BNA) No. 35, at A-7, A-10 (Feb. 21, 1990).

²⁹⁷ See *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990); *O'Neill v. Air Line Pilots Ass'n*, 886 F.2d 1438 (5th Cir. 1989).

²⁹⁸ See *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992); *Air Line Pilots Ass'n v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986).

²⁹⁹ See *TWA v. Independent Fed. of Flight Attendants*, 489 U.S. 426 (1989).

³⁰⁰ See *Air Line Pilots Ass'n v. Eastern Airlines*, 869 F.2d 1518 (D.C. Cir. 1989); *Eastern Airlines Inc. v. Air Line Pilots Ass'n*, 744 F. Supp. 1140 (S.D. Fla. 1990).

³⁰¹ *Proposed Greyhound Settlement Includes \$22 Million in Back Pay*, Daily Lab. Rep. (BNA) No. 210, at A13 (Apr. 21, 1990).

³⁰² See Narisetti, *supra*, note 21, at A4; Raju Narisetti, *Bridgestone/Firestone Begins to Hire Permanent Replacements for Strikers*, WALL ST. J., Jan. 5, 1995, at A3.

³⁰³ See *Pirelli Armstrong Strike to End*, *supra* note 22, at A-9 (reporting that 850 strikers were permanently replaced after beginning a strike on July 15, 1994, but were later offered reinstatement when the NLRB found that the company's unilateral implementation of contract terms converted this economic strike to an unfair labor practice strike).

³⁰⁴ See *NLRB Administrative Law Judge Finds Colt Strike Caused Unfair Labor Practices*, Daily Lab. Rep. (BNA) No. 177, at A-11 (Sept. 14, 1989); *Colt Told To Rehire 800 Strikers; Back Pay Is To Be in Millions*, N.Y. TIMES, Sept. 13, 1989, at B3.

³⁰⁵ *Special Report: Anatomy of A Corporate Campaign*, 46 Union Lab. Rep. (BNA) No. 18, at 144 (May 7, 1992).

³⁰⁶ In 1992, Caterpillar threatened to hire thousands of permanent striker replacements, and came close to succeeding before the UAW called off its strike. See Philip Dine, *Job Seekers Besiege Caterpillar; Strikers Resist Urge to Give Up*, ST. LOUIS POST-DISPATCH, Apr. 8, 1992, at 10A; Gregory A. Patterson & Robert Rose, *Labor Makes A Stand in Fight for Its Future at Caterpillar, Inc.*, WALL ST. J., Apr. 7, 1992, at A1; Robert L. Rose, *Thousands Respond to Caterpillar Ads to Replace Striking Workers in Illinois*, WALL ST. J., Apr. 8, 1992, at A3; Bob Secter, *Caterpillar, UAW Agree to Talks but Cling to Demands*, L.A. TIMES, Apr. 11, 1992, at A20. In 1994 the UAW renewed its strike, but Caterpillar responded by hiring temporary replacements. See Robert L. Rose, *Work Week*, WALL ST. J., May 23, 1995, at A1 (reporting that 5600 temporary workers and retirees were filling in for strikers); see also Stephen Franklin, *He's Not One to Give In Easily*, CHI. TRIB., May 21, 1995, at B1.

³⁰⁷ See Jerome Holtzman, *Umps' Strike Is Almost At An End*, CHI. SUN-TIMES, May 20, 1979, at 120.

What is more remarkable, these strikes have been much more disorderly and violent than nonreplacement strikes. Replaced strikers in diverse industries have threatened replacements and customers,³⁰⁸ littered roads with tire-puncturing jackrocks³⁰⁹ and blocked work entrances,³¹⁰ damaged cars transporting replacements to work³¹¹ and attempted to force these cars off the road while giving chase,³¹² and less frequently, rioted,³¹³ shot,³¹⁴ bombed,³¹⁵ burned,³¹⁶ assaulted,³¹⁷ and

³⁰⁸ See, e.g., *International Ass'n of Machinists v. Eastern Air Lines, Inc.*, 121 B.R. 428, 431 (S.D.N.Y. 1990) (describing replaced strikers calling passengers "'scab' and 'cheap ass' while telling them to have a shit flight, [and] that they would be 'killed' and not to forget their 'body bag'"); *Keco Industries, Inc.*, 276 N.L.R.B. 1469, 1474 (1985) (reporting a replaced striker who struck with a rock a car of an employee crossing a picket line to work, and who confronted the driver by yelling, "I'll blow your fucking heads off").

³⁰⁹ See, e.g., *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2563 (1994) (overturning \$52 million in civil coercive contempt fines against the union for, inter alia, littering county highways with jackrocks); *Mine Workers Chief Says Pittston Strike Underscores Need for Overhaul of Labor Law*, Daily Lab. Rep. (BNA) No. 160, at A-9, A-11 (Aug. 21, 1989) (reporting a Pittston Official's account that striker jackrocks had punctured over 3000 tires since the strike began).

³¹⁰ See, e.g., *Domsey Trading Corp.*, 310 N.L.R.B. 777, 778 (1993) (replaced strikers blockade bus carrying replacement workers); Ayers, *supra*, note 296, at A16 (reporting mass numbers of replaced strikers laying down before trucks at entrances to coal processing plants).

³¹¹ See, e.g., *Circuit-Wise, Inc.*, 308 N.L.R.B. 1091, 1108 (1992) (reporting replaced striker damaging with a pipe a car crossing the picket line); *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1091 (1990) (reporting replaced strikers spraying replacements' cars with paint solvent as they crossed the picket line).

³¹² See, e.g., *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1303 (1993) (replaced striker tries to force replacement worker's car off the road); *Coal Striker Gives Alford Plea*, DAILY INDEPENDENT, Dec. 24, 1994, at 7 (Ashland, Ky., copy on file with author) (reporting a striker's conviction for wanton endangerment after attempting to drive replacements off the road).

³¹³ See, e.g., *Hormel Closes Plant Again*, N.Y. TIMES, Feb. 1, 1986, at 54; *Hormel Reports Hiring Completed at Strikebound Minnesota Plant*, N.Y. TIMES, Feb. 13, 1986, at B16 (reporting rioting by hundreds of replaced strikers).

³¹⁴ See, e.g., *Shots Fired at Cook's; No Injuries Reported*, GRAYSON-JOURNAL ENQUIRER, Dec. 22, 1993, at 1 (Grayson, Ky., copy on file with author); *Two Striking Greyhound Drivers Arrested on Federal Firearms Charge*, Daily Lab. Rep. (BNA) No. 72, at A-4, A-5 (Apr. 13, 1990) (reporting that two replaced strikers were arrested on federal charges in connection with two shooting incidents near St. Louis).

³¹⁵ See, e.g., *Report from the Picket Lines: Rubber Strike Starting to Burn*, LAB. TRENDS, Dec. 3, 1994, at 1 (reporting a striker was charged with bombing the home of a replacement in Polk County, Iowa).

³¹⁶ See *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 246 (7th Cir. 1992).

³¹⁷ See, e.g., *Diamond Walnut Growers*, 312 N.L.R.B. 61, 64 (reporting that a replacement worker was "severely beaten" by two to three men, who were probably replaced strikers); *Union-Represented Driver Killed During Strike at San Francisco Papers*, Daily Lab. Rep. (BNA) No. 214, at A-9 (Nov. 8, 1994) (reporting that strikers pulled a replacement driver from a truck and beat him—death reported in headline was an accidental electrocution); *San Francisco Newspaper Employees Ratify Five-Year, Strike Ending Pacts*, Daily Lab. Rep. (BNA) No. 218, at A-12, A-13 (Nov. 15, 1994) (later reporting that guard was stabbed in the abdomen).

killed.³¹⁸ Occasionally, replacement workers have been violent.³¹⁹ A federal appeals court found that violence is so inherent in replacement strikes that it rejected an NLRB doctrine permitting unions to obtain a list of names and addresses of striker replacements.³²⁰

In sum, there has been relatively little research on replacement strikes, but this much has become clear: these strikes became more common during the past twenty years without showing any sign of diminishing. The fact that they clustered in particular industries suggests that they have a contagious quality. Unquestionably, they generated conflict and serious law-enforcement problems for affected communities. Employers may be correct in stating that hiring replacements enabled them to be more competitive by lowering labor costs,³²¹ but this ignores two potentially harmful aspects that the Clinton Administration addressed in Executive Order 12,954. Disruptions in production and delivery occasioned by these strikes since the 1980s raise a

³¹⁸ See, e.g., *Williams Calls for Quick Legal Action in Picket Line Deaths in Alabama Strike*, Daily Lab. Rep. (BNA) No. 173, at A-5, A-6 (Sept. 9, 1993) (reporting on a replacement strike in Alabama in which two strikers were killed by tractor-trailer crossing the picket line at a high-rate of speed); *Shooting Investigation*, THE CHAMPAIGN-URBANA NEWS-GAZETTE, July 24, 1993, at A-8 (copy on file with author) (reporting the shooting death of a striker replacement as he crossed a picket line to work for Arch Mineral Corp. in West Virginia).

³¹⁹ See, e.g., *International Paper Co.*, 309 N.L.R.B. 31, 31 (1992) (nonstriker attacks replaced striker with baseball bat); *United Steelworkers v. Phelps Dodge Corp.*, 833 F.2d 804, 807 (9th Cir. 1987) (reporting that replacements attacked strikers by slashing their tires, breaking a striker's jaw with a rifle butt, and making threatening calls to a striker's wife).

³²⁰ See *Chicago Tribune Co.*, 965 F.2d at 247. Judge Posner rejected the Board's "clear and present danger" test for granting a union's request for names of striker replacements by reasoning:

The pattern of violence that marked the strike was bound to arouse concern in [the replacement workers'] minds about their personal safety should their names be disclosed. It is not as if the union had stood virtuously aloof from the violence: after a riot outside one of the company's facilities the union was enjoined from engaging in violent picketing. . . .

Where the Board got the idea that a union's demand for the names of replacement workers is to be handled not like any other discovery request but by placing on the company an insuperable burden of proving that the union will in fact use the information to harass the workers beats us.

Id.

³²¹ See *United Steelworkers v. NLRB*, 983 F.2d 240, 242 (D.C. Cir. 1993) (involving employees who went out on strike and were permanently replaced after their employer, who specifically disclaimed financial inability to agree to union proposals for modest increases, unilaterally slashed wages 30% and medical and vacation benefits 50%); *Curtis Industries, Inc. Employees Return to Work April 26, Ending Four-Year Walkout*, Daily Lab. Rep. (BNA) No. 79, at A-4, A-5 (Apr. 26, 1994) [hereinafter *Curtis Industries Walkout to End*] (reporting on a replacement strike that lasted four years in which the employer demanded over 50 contract concessions, including revocation of retiree health benefits).

legitimate concern for federal government procurement, and the violence these strikes engender are contrary to a federal policy of resolving labor disputes through peaceful negotiations.

C. Failed Striker-Replacement Legislation Preceding the Order

During the three Congresses preceding Executive Order 12,954, unions made passage of a striker-replacement ban their top legislative priority.³²² Their bill, eventually titled the Workplace Fairness Act, proposed to amend the RLA and NLRA by making two employer practices unlawful: hiring any permanent replacement for a striker,³²³ and granting any permanent replacement an employment preference over a replaced striker.³²⁴ If enacted, the bill would have repealed *Mackay Radio*³²⁵ and *TWA v. Independent Federation of Flight Attendants*,³²⁶ thereby

³²²Appealing to U.S. senators, AFL-CIO President Lane Kirkland called the bill "the most important labor law initiative to come before the Congress in more than a decade." Muriel Cooper, *Labor Mobilizes for Final Push on S. 55*, AFL-CIO NEWS, July 8, 1991, at 1. Three years later, with the bill still not passed, Kirkland reaffirmed its great importance when he said, "We will spare no resource to ensure that permanent replacements are never permanent and that employers who resort to this approach are marked in their community as unworthy of patronage by decent citizens." Michael Byrne, *S.55 Defeat Shows Need for Political Action*, AFL-CIO NEWS, Aug. 8, 1994, at 4.

³²³The centerpiece of the bill would have made it unlawful for an employer "to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute." H.R. 3936, 101st Cong., 2d Sess. (1990).

³²⁴The second part of the bill would have made it unlawful for an employer: to otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who—

(A) was an employee of the employer at the commencement of the dispute;

(B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and

(C) is working for, or has unconditionally offered to return to work for, the employer.

Id.

³²⁵See H.R. REP. NO. 57, *supra* note 277. The report notes:

Some opponents of [the bill] suggested that the right to hire permanent replacements would not destroy the right to strike because, under the *Mackay* doctrine, strikers who do not get their jobs back after a strike retain a preferential right to be hired for vacancies which arise in the future. Experience in the airline industry suggests that this right to preferential rehire is often illusory.

Id. pt. 1, at 5.

³²⁶See *id.* pt. 2, at 4 (observing that in *TWA v. Independent Fed. of Flight Attendants*, 489 U.S. 426 (1989), "the Supreme Court extended the doctrine first espoused in *Mackay*. . . . This case applies only to workers covered under the RLA; however, many labor lawyers predict that it will be extended to NLRA cases as well").

limiting employer responses to strikes. Employers and their congressional supporters vigorously contended that this law would significantly harm the American economy,³²⁷ but failed to note that employers would continue to have a right to employ temporary replacements indefinitely, as Caterpillar has done with notable success.³²⁸

The bill died in 1990 when it failed to be reported out of a Senate subcommittee.³²⁹ It came closer to passage in 1992 when, despite President Bush's veto promise,³³⁰ it passed in the House but was defeated on a cloture motion in the Senate.³³¹ It was promptly reintroduced when the 103d Congress convened,³³² and seemed more likely to pass

³²⁷ See 140 CONG. REC. S8537-01 (July 12, 1994) (statement of Sen. Dole) ("Without the prospect of permanent striker replacement, unions will resort to the strike weapon more and more frequently. Consumer prices will rise, jobs will be lost, communities will plunge into chaos."); *Preventing Replacement of Economic Strikers: Hearing on S. 2112 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 101st Cong., 2d Sess. 126 (1990) (statement of James P. Melican, senior vice president of International Paper) ("Why does an employer hire permanent replacements? Usually it is because the only alternative is to shut down the operation. Very few employers can keep an operation running for any sustained period of time utilizing supervisory personnel, and temporary replacements are frequently impossible to come by.").

³²⁸ Faced with a second massive strike since 1991, this employer pulled back from its earlier threat to hire permanent replacements and used numerous temporary replacements instead. See Rose, *Temporary Heaven*, supra note 259, at B1, B7 (reporting Caterpillar's engagement with an employment agency that supplied the company with many temporary striker replacements). This practice would have remained entirely lawful under the Workplace Fairness Act. While employing temporary replacements, Caterpillar profits climbed 35% in the second quarter of 1995, and the company credibly reported that the on-going strike was having no impact on their business. See *Caterpillar Inc.: Second Period Net Climbed 35% on 17% Revenue Rise*, WALL ST. J., July 20, 1995, at B4.

³²⁹ See *Strike Replacement Bill Introduced by Rep. Clay*, Daily Lab. Rep. (BNA) No. 24, at A-7 (Feb. 5, 1990) (reporting introduction of the first bill to ban hiring of permanent striker replacements); *Rep. Clay Chides Employers for Refusing Invitation to Testify on Strike Bill*, Daily Lab. Rep. (BNA) No. 185, at A-9 (Sept. 24, 1990) (reporting that the bill died in subcommittee).

³³⁰ The House passed the bill on a recorded vote, 247-182, on July 17, 1991, but was sidetracked by a threatened filibuster. *Striker Replacement Bill Faces Uncertain Future in Senate*, Daily Lab. Rep. (BNA) No. 143, at A-17 (July 25, 1991). Consequently, the bill was not brought before the full Senate until nearly a year later. President Bush dampened prospects for passing the bill when he threatened to veto it. See *Policy Statement on S 55*, supra note 5, at F-1. He stated the bill "would destroy a prime component of the economic balance between labor and management in collective bargaining." *Id.* As the bill was being readied for Senate debate, Sen. Robert Packwood offered a compromise version that would have limited an employer's right to hire permanent replacements if a union refused to submit to its dispute to an advisory fact-finding panel and went out on strike. See *Senate Fails To Invoke Cloture on Striker Replacement Bill*, Daily Lab. Rep. (BNA) No. 114, at A-10 (June 12, 1992); *Text of Substitute Version of S 55, Including the Packwood Amendment*, Daily Lab. Rep. (BNA) No. 115, at D-1, D-2 (June 15, 1992).

³³¹ On June 16, 1992, the bill and its proposed amendments failed on a 57-42 vote to limit debate. *Senate Kills Bill to Restrict Use of Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 117, at A-17 (June 17, 1992).

³³² See *Striker Replacement Bill Introduced by Rep. Clay*, Daily Lab. Rep. (BNA) No. 3, at A-10,

with a newly elected president who expressed support for it,³³³ but failed again on a Senate cloture motion.³³⁴ Election of a Republican Congress committed to employer interests³³⁵ nullified any prospect for reintroduction of the Workplace Fairness Act.

D. *Executive Order 12,954*

1. Political Motivation

There can be little doubt that the order was politically inspired, but this hardly makes the order unique. President Bush issued two orders directed against unions three years earlier, and they too were politically motivated.³³⁶

First, President Clinton has been personally involved in replacement strikes to an unusual extent.³³⁷ As a presidential candidate, he stood with striking Caterpillar workers who were then threatened with permanent replacement.³³⁸ After assuming office, he personally effected a settlement when American Airlines flight attendants went on strike just before Thanksgiving in 1993 and were threatened with permanent replacement.³³⁹ In a different matter, his Secretary of Labor, a close personal friend and confidant, became embroiled in a workplace safety dispute with Bridgestone/Firestone.³⁴⁰ Later, when the

A-11 (Jan. 6, 1993) (reporting Rep. Clay's introduction of the striker-replacement bill that failed in the previous Congress).

³³³ *Labor's Agenda Seen Rising Under Clinton*, *supra* note 5, at A-6.

³³⁴ *Senate Vote Fails*, *supra* note 5, at AA-1; *Victory for Business Coalition*, *supra* note 5, at AA-1.

³³⁵ See *Hearings in House, Senate Will Open Debate over Davis-Bacon Repeal or Reform*, Daily Lab. Rep. (BNA) No. 30, at A-7 (Feb. 14, 1995) (reporting a Republican bill to curb prevailing wage legislation favored by unions); *Selected Statements Before Senate Labor and Human Resources Committee on Teamwork for Employees and Managers Act (S 295)*, Daily Lab. Rep. (BNA) No. 28, at E-1 (Feb. 10, 1995) (reporting a Republican bill to ease NLRA restrictions on employee involvement activities controlled by employers).

³³⁶ See *supra* notes 131-46 and accompanying text.

³³⁷ Frank Swoboda, *President Treads New Ground, Congress Wonders if It Should Follow Suit*, WASH. POST, Feb. 9, 1995, at D2 (reporting that more than any other president, Clinton has been personally involved in a dozen strikes).

³³⁸ See *Senators Urge Role in Caterpillar Strike*, PHILA. INQUIRER, Apr. 9, 1992, at C10 (reporting presidential candidate Bill Clinton's address before thousands of replaced striker outside the gates of Caterpillar's East Peoria plant: "It's not good business to replace workers. The way to resolve a strike is not to replace workers. They have a right to strike and shouldn't risk losing their jobs over it.").

³³⁹ See Tom Yancy & Tom Fielder, *Airline Strike Ends, with Clinton's Nudge American's Chief Agrees to Arbitration*, DETROIT FREE PRESS, Nov. 23, 1993, at 1A (reporting that with two phone calls to American Airlines Chairman Robert Crandall, the President settled a strike in which the employer threatened to hire replacements for 21,000 flight attendants).

³⁴⁰ See Jonathan Gaw, *OSHA Action Brings Closure of Tire Plant, 350 Dayton Tire Co. Employees*

United Rubber Workers went out on strike against the same firm and were permanently replaced, the Secretary sought a meeting with Bridgestone/Firestone's CEO, but his overture was rebuffed.³⁴¹ As this transpired, the President became involved in a replacement strike involving the professional baseball players and proposed unprecedented legislation³⁴² to settle the strike by requiring the parties to submit to an arbitration panel that he would select.³⁴³

2. Elements of Executive Order 12,954

The executive order sets forth a procedure empowering the Department of Labor to take measures to debar certain federal contractors who hire permanent striker replacements. The process begins when the department investigates whether a covered employer has permanently replaced lawfully striking workers.³⁴⁴ Its jurisdiction is established by a contract between the Government as buyer and a seller who furnishes supplies or services (including construction), involving job orders, task orders, letter contracts, and orders such as purchase orders.³⁴⁵ The minimum contract threshold is \$100,000.³⁴⁶

Upon finding that a contractor has hired permanent striker replacements, the agency may make a finding to terminate the contract for convenience.³⁴⁷ To accomplish this, the department must transmit its finding to the head of any department or agency that contracts with the employer.³⁴⁸ Termination of the contract is not automatic, however, because the contracting agency is permitted to challenge this determination.³⁴⁹ If the affected agency does not object, the labor department

Sent Home in Oklahoma City, THE PLAIN DEALER, Apr. 19, 1994, at 1C. Secretary of Labor Robert Reich personally delivered an OSHA citation to a tire factory at which a worker was killed by a machine that crushed his head. *Id.* At the factory gates, Reich fumed: "I came to Oklahoma City today to personally deliver these citations because I find this case particularly outrageous and the action of Bridgestone/Firestone offensive and unjustifiable." *Id.*

³⁴¹ *Clinton in Illinois, Touts His Proposals on Job Training, Tax Breaks*, BOSTON GLOBE, Jan. 11, 1995, at 7.

³⁴² See *supra* note 110.

³⁴³ See Swoboda, *supra* note 337.

³⁴⁴ Exec. Order No. 12,954, 29 C.F.R. § 270.11 (1995).

³⁴⁵ *Id.* § 270.1(c) (1995).

³⁴⁶ *Id.* § 270.2(c) (1995).

³⁴⁷ *Id.* § 270.14(a) (1995).

³⁴⁸ *Id.* § 270.15(b) (1995).

³⁴⁹ Exec. Order No. 12,954, 29 C.F.R. § 270.14(c) (1995). Although the order says no more about this, it is conceivable that the contracting agency, for example, the Department of Defense, would present evidence showing that no immediate or suitable substitute could be found to replace the affected contractor, and that debarment would pose a risk to national security.

may finalize the debarment process, thereby making the contractor ineligible to receive government contracts.³⁵⁰

The order also contains significant and unusual limits not found in other employment orders having a debarment sanction. Reflecting recent replacement strikes involving large employers with numerous subsidiaries,³⁵¹ the order limits its sanction to the organizational unit of a federal contractor that permanently replaces lawfully striking workers.³⁵² In addition, the order has an ironic limitation: debarment is temporary, lasting no longer than the underlying labor dispute.³⁵³ Nothing in the order requires an employer to dismiss permanent replacements, and it is not unusual for settlements of these particular strikes to include provisions for continuing the employment of replacements.³⁵⁴ Like other orders providing debarment, Executive Order 12,954 provides targeted employers procedural due process.³⁵⁵

Like other presidential employment orders having broad economic policy goals³⁵⁶ or a political motivation,³⁵⁷ this order is based on the FPASA. The order was justified on the grounds that hiring permanent striker replacements is inconsistent with the "economical and efficient administration and completion of contracts."³⁵⁸ The Administration explained, "In order to operate as effectively as possible, by receiving timely goods and services, the Federal Government must assist the entities with which it has contractual relations to develop stable relationships with their employees."³⁵⁹

³⁵⁰ *Id.* § 270.15(c) (1995).

³⁵¹ See *Solar Turbines, Inc.*, 302 N.L.R.B. 660 (1991) (involving a replacement strike at a Caterpillar subsidiary).

³⁵² Exec. Order No. 12,954, 29 C.F.R. § 270.12(b) (1995).

³⁵³ *Id.* § 270.15(b)(2).

³⁵⁴ See *Curtis Industries Walkout to End*, *supra* note 321, at A-6 (providing for retention of some striker replacements); A.T. Massey, *supra* note 295.

³⁵⁵ Exec. Order No. 12,954, 29 C.F.R. § 270.12(d) (1995) (requiring the agency to notify the employer of a proposed debarment and to provide the employer 15 days to respond in person, or in writing, or through a representative).

³⁵⁶ See *supra* notes 247-54 and accompanying text (discussing Exec. Order No. 12,092).

³⁵⁷ See *supra* notes 140-46 and accompanying text (discussing Exec. Order No. 12,818).

³⁵⁸ Exec. Order No. 12,954, 29 C.F.R. § 270.11 (1995).

³⁵⁹ *President Clinton's Executive Order Sanctioning Federal Contractors That Hire Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 46, at E-2 (Mar. 9, 1995). The policy statement continued:

An important aspect of a stable collective bargaining relationship is the balance between allowing businesses to operate during a strike and preserving worker rights. This balance is disrupted when permanent replacement employees are hired. It has been found that strikes involving permanent replacement workers are longer in duration than other strikes. In addition, the use of permanent replacements can change a limited dispute into a broader, more contentious struggle, thereby exac-

The Administration downplayed the likelihood of enforcing the order often. It estimated that in 1994, 454 employers were affected by strikes but only thirty hired replacements, and among these, only "a small handful" involved federal contractors.³⁶⁰ The first list of contractors targeted for investigation included Bridgestone/Firestone, Pirelli Spa of Italy and Pirelli Armstrong, Mosler, Inc., and Cook Family Foods.³⁶¹

IV. CONSTITUTIONALITY OF EXECUTIVE ORDER 12,954

Employers immediately denounced Clinton's order³⁶² and attacked it on two fronts. At their urging, Republicans in Congress immediately introduced legislation to block the order. This included efforts to attach an override of the order to spending bills,³⁶³ and more generally, to achieve the same result through a bill introduced in the House Economic and Educational Opportunities Committee.³⁶⁴ In addition, the Chamber of Commerce and other plaintiffs sued to enjoin the

erbing the problems that initially led to the strike. By permanently replacing its workers, an employer loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees. These circumstances then adversely affect the businesses and entities, such as the Federal Government, which rely on that employer to provide high quality and reliable goods or services.

Id. (policy statement).

³⁶⁰ Billings & Simendinger, *supra* note 25, at AA-1.

³⁶¹ *Teamsters Say Diamond Walnut Should Be Sanctioned*, *supra* note 23, at D5.

³⁶² For example, Dan Barney, senior vice president for the American Trucking Association, said the mere issuance of the order would have a chilling effect on employers during contract negotiations because the order takes "away a tool that has been a counterweight." Billings, *Striker Replacements*, *supra* note 11, at AA-1. He predicted the order will lead to more strikes and inflationary wage agreements. *Id.* Quentin Riegel, attorney for the National Association of Manufacturers, said the order will give unions a "double-barreled" reason for targeting federal contractors who are not unionized, because the order gives more protection to employees who would otherwise fear going out on strike and losing their jobs to permanent replacements. *Id.*

³⁶³ Republicans attached the defense department's appropriations bill to a supplemental bill, H.R. 889, 104th Cong., 1st Sess. (1995), barring use of any funds for the current fiscal year to implement or enforce Executive Order 12,954. *Proponents of Clinton Executive Order Voice Optimism on Legislative Showdown*, Daily Lab. Rep. (BNA) No. 48, at AA-1 (Mar. 13, 1995). The House bill passed. *Clinton Administration Seeks Dismissal of Challenge to Striker Executive Order*, Daily Lab. Rep. (BNA) No. 65, at AA-1 (Apr. 5, 1995). The Senate version, however, was defeated by a narrow margin after Democrats threatened to a filibuster. Billings, *Striker Replacements*, *supra* note 11, at AA-1. But this setback was only temporary since Republican leaders promised to add this override in a future conference committee budget bill. Sen. Trent Lott (R., Miss.) said that the override would be tied to disaster relief funding appropriated for California. *Senate Spending Cut Package Will not Include Ban on Striker Replacement Order*, Daily Lab. Rep. (BNA) No. 57, at A-19 (Mar. 24, 1995).

³⁶⁴ Rep. William Goodling introduced H.R. 1176, 104th Cong., 1st Sess. (1995), a bill to nullify the order, the same day the order was issued. *Clinton Administration Seeks Dismissal of Challenge to Striker Executive Order*, Daily Lab. Rep. (BNA) No. 65, at AA-1 (Apr. 15, 1995). The

order on constitutional grounds, and a group of lawmakers separately sued, claiming that their constitutional powers had been usurped.³⁶⁵

This multipronged attack against an executive order affecting employment is unprecedented. Congressional efforts to override the order, however, appear to raise no constitutional issues³⁶⁶ for two reasons. Because Clinton's order derives from a broad delegation of legislative power, Congress has power to restrict that delegation or revoke an application of it. Moreover, Executive Order 12,954 is unlike certain orders regulating defense contractors only for a military purpose, and therefore does not implicate the President's Article II power as Commander in Chief.

The order could be voided in a less confrontational way, with election of a president who chooses not to enforce it or even to rescind it. Given that several Republican presidential candidates have made public their opposition to any curbing of the *Mackay Radio* doctrine,³⁶⁷ this is more than an abstract possibility. In the long-run, then, the order appears unlikely to effect the kind of long-term change in private employment practices as have nondiscrimination orders.

This controversy is vitally important because of what is more likely to happen in the meantime. Courts will decide its constitutionality and, in doing so, will be put in an extraordinary position to define the modern contours of executive lawmaking powers. These courts must understand that they are deciding more than the appropriateness of a striker-replacement ban to achieve certain government procurement goals. If they strike down the order, they will make presidential efforts to regulate private employment through the medium of federal contracting more difficult. In short, they will likely establish a precedent for mounting successful attacks on policies as far-ranging as race discrimination and wage and price controls because Clinton's order is so closely related to executive orders that have regulated these subjects. The lengthy evidence presented in this Article showing the conceptual relatedness of Executive Order 12,954 to two broad classes of presidential orders affecting private employment suggests that try as they might

bill was approved on a 22-16 vote by the House Economics and Educational Opportunities Committee in June 1995. *House Committee Moves to Nullify*, *supra* note 17, at AA-1.

³⁶⁵ See *Judge Blocks Suit by Five Congressmen Challenging Striker Replacement Order*, Daily Lab. Rep. (BNA) No. 119, at AA-1 (June 21, 1995) (reporting that *Doolittle v. Clinton*, No. 95-874 (D.D.C.) was dismissed on June 21, 1995).

³⁶⁶ *Accord id.* (Judge Gladys Kessler declared "democratically elected members of Congress should be deciding [this issue], rather than the courts").

³⁶⁷ See Billings, *Striker Replacements*, *supra* note 11 (reporting statements of Sen. Dole).

to narrow their holding in this case, courts would find it very difficult to craft a decision that would have limited precedential value.

A. *The Order Does Not Violate the Separation-of-Powers Doctrine*

Employers contend that Executive Order 12,954 is unconstitutional because it amounts to presidential lawmaking. In their view, no president has authority to issue an executive order that conflicts with the will of Congress.³⁶⁸ Applying this principle, they contend that Executive Order 12,954 resulted from impermissible lawmaking because it violates the will of Congress, expressed when the striker-replacement bill failed in the Senate in July 1994.³⁶⁹ This argument fails on three grounds.

First, this separation-of-powers argument erroneously interprets the will of Congress by ignoring the fact that a majority of lawmakers in the 103d Congress voted on the record to approve this legislation and were thwarted by forty-seven senators who supported a motion to filibuster the bill.³⁷⁰ This unusual legislative outcome—majority support on recorded votes in the Senate and House, defeated by a threatened filibuster—must be interpreted as an ambiguous rather than a negative expression of congressional will. Since Executive Order 12,954 neither conflicts nor comports with congressional intent, it falls into Justice Jackson's middle-ground of uses of presidential power.³⁷¹

³⁶⁸ *Chamber of Commerce Complaint*, *supra* note 6, at E-49, E-50. The complaint stated that the order:

contravenes the will of Congress expressed in the Labor Management Relations Act, which is the NLRB's enabling legislation. Congress gave the NLRB exclusive jurisdiction to administer and enforce the NLRA. In doing so, the intent of Congress was plainly to deny the President any role in regulating labor-management relations under the NLRA beyond nominating NLRB Members and proposing, signing, or vetoing labor legislation. The Order contradicts the unambiguous intent of Congress inherent in the creation of the NLRB, however, by regulating labor-management relations under the NLRA.

Id. (citations omitted). It must be noted that this argument points to no authority indicating that Congress intended to foreclose all presidential regulation of private-sector collective bargaining. If Congress intended this, the *Kahn* court was not presented with this argument. That court ruled that President Carter's wage and price controls affecting collective bargaining were not unlawful. *See AFL-CIO v. Kahn*, 618 F.2d 784, 796 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

³⁶⁹ *See Chamber of Commerce Complaint*, *supra* note 6, at E-45. The complaint observes, "Numerous legislative attempts have been made over the years to eliminate the practice of hiring permanent replacements, most recently last year when the current administration introduced legislation to overturn *Mackay Radio*. Not one of the anti-replacement bills, however, was enacted." *Id.*

³⁷⁰ *See Senate Vote Fails*, *supra* note 335.

³⁷¹ *See supra* notes 240-46 and accompanying text.

Second, this employer argument fails to make a necessary distinction between the Workplace Fairness Act's absolute and general prohibition on hiring striker replacements and Executive Order 12,954's much more limited and conditional application. In short, Congress considered imposing a general ban on employer hiring of permanent striker replacements under the Workplace Fairness Act, whereas the Clinton Administration determined that the same principle, when applied to the much smaller group of federal contractors, serves valid government procurement interests.

Executive Order 12,954 has no bearing on roughly eighty percent of employers who have no federal contracts, or whose contracts are less than the order's \$100,000 threshold.³⁷² Moreover, a regulated employer does not lose its *Mackay Radio* rights, as employers contend. Rather, they are presented a cost-benefit choice. They must choose whether to forego the cost-savings achieved by hiring permanent striker replacements or lose their federal contracts.

Employers allege that this is a Hobson's choice, but their argument is exaggerated. Bridgestone/Firestone, now at risk of losing a \$12 million government contract, had 1994 sales of \$5.67 billion.³⁷³ Thus, Executive Order 12,954 presents Bridgestone/Firestone this financial choice: whether it should dismiss approximately 2300 permanent replacements while returning former strikers who are now awaiting *Laidlaw* reinstatement,³⁷⁴ or lose its twelve million dollar contract, which represents .002% of its total sales. Diamond Walnut, another targeted contractor, stands to lose a one million dollar school lunch contract, but had record sales in 1993 of \$204 million.³⁷⁵ Thus, the largest worldwide producer of walnuts³⁷⁶ is risking less than one percent of its total sales if it does not settle its continuing labor dispute.

In sum, employer arguments do not reflect the economic realities of the debarment proceedings about to commence. The amount of government contracts for employers who hire permanent striker replacements is a pittance of total sales. In other words, the financial impact of this government regulation is close to nil. And this fact has

³⁷² See Nomani, *supra* note 261.

³⁷³ See *Business Briefs*, *supra* note 259.

³⁷⁴ See *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (providing that replaced strikers remain employees who are entitled to full reinstatement upon the departure of replacements).

³⁷⁵ Mark Arax, *Strikers Reap Harvest of Bitterness*, L.A. TIMES, May 10, 1994, at 3 (reporting that sales growth occurred while the company cut wages \$146 million over a three-year period). More recent sales figures could not be found.

³⁷⁶ Peter Kilborn, *The Party's Over at Diamond Walnut*, SAN DIEGO UNION & TRIB., Apr. 24, 1994, at C7.

constitutional significance because Executive Order 12,954's impact on the economy appears to be close to zero.

Third, the separation-of-powers argument ignores the historical development of executive power exercised to promote policies opposed by Congress. The contrast between Eisenhower's orders to desegregate contractors' workplaces and Congress's general opposition to desegregation underscores this point.

No branch of the federal government in the 1950s was more hostile to the principle of integrating African Americans than Congress. Federal district judges were often the only public actors in the South to act against segregation.³⁷⁷ Certainly, they were motivated by a series of Supreme Court rulings invalidating segregationist practices.³⁷⁸ Although he was sharply criticized for being weak on civil rights, Eisenhower nevertheless strengthened affirmative action provisions for federal contractors and ordered federal troops into Little Rock, Arkansas to enforce a court order requiring desegregation of schools.

Congress, in contrast, was the last branch to do something to end segregation, and its 1957 legislation was limited compared to *Brown v. Board of Education* and Eisenhower's executive orders.³⁷⁹ Throughout this pivotal decade, Congress was manifestly hostile to the concept of desegregation.

Ninety-six lawmakers signed a manifesto, the Declaration of Constitutional Principles, calling for "all lawful means" to resist integration.³⁸⁰ They sharply criticized the Supreme Court for its landmark desegregation ruling, stating, "This unwarranted exercise of power by the court, contrary to the Constitution . . . is destroying the amicable

³⁷⁷ See J.W. PELTASON, *FIFTY-EIGHT LONELY MEN* (1971).

³⁷⁸ *NAACP v. Alabama*, 357 U.S. 449 (1958) (invalidating state law designed to discourage associational rights by requiring the NAACP to reveal names and addresses of its members and agents); *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting arguments that state and local officials have no duty to comply with federal desegregation orders); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (invalidating city ordinance restricting certain golf courses and parks to whites); *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (invalidating segregated beaches and bathhouses); *Muir v. Louisville Park Ass'n*, 347 U.S. 971 (1954) (per curiam) (ruling that a private association leasing a public facility has no right to discriminate on the basis of race); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling separate-but-equal doctrine in provision of education); *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating a South Carolina practice permitting a local, white association from controlling the state's primary elections, thereby disenfranchising African-American voters).

³⁷⁹ Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (securing the right to vote for African Americans and establishing a federal civil rights commission). This act passed three years after the Supreme Court acted in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³⁸⁰ Alvin Schuster, *96 in Congress Open Drive to Upset Integration Ruling*, N.Y. TIMES, Mar. 12, 1956, at 1.

relations between the white and Negro races that have been created through ninety years of patient effort by people of both races."³⁸¹ While the President and most federal judges understood that the end of the Jim Crow era was at hand, this large segment of Congress argued for returning to *Plessy v. Ferguson's* separate-but-equal doctrine.³⁸²

The Congressional Record from this period shows congressmen rationalizing the status quo.³⁸³ Debate on the 1957 Civil Rights Act elicited a range of segregationist arguments in the Congress.³⁸⁴ As if to emphasize congressional failure to respond to race issues, the 1960 United

³⁸¹ *Text of 96 Congressmen's Declaration on Integration*, N.Y. TIMES, Mar. 12, 1956, at 19 [hereinafter *96 Congressmen's Declaration*].

³⁸² 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). The 1956 declaration stated:

Though there has been no constitutional amendment or act of Congress changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.

96 Congressmen's Declaration, *supra* note 381, at 19.

³⁸³ Congressional opponents to desegregation argued that Southern Negroes saw no need for this reform. For example, Georgia's Representative E.L. Forrester stated:

The price paid for the philosophies on this bill are too high. In order to appease the leftwing groups in this country, our leaders integrated our Armed Forces. It was a terrific price, for some day you will all learn that you cannot keep good men in our Armed Forces when integration is practiced. These men refuse to adopt a profession where they are made guinea pigs for social experiments that they know are detrimental.

103 CONG. REC. 16,089 (daily ed. Aug. 27, 1957).

³⁸⁴ It was common to argue that this type of federal legislation was oppressive: "[T]his legislation will turn back the clock to the days of tyranny and despotism. Tyrants and despots through the ages have sought to do by tyrannical fiat things no worse than this bill does by legislative enactment." 103 CONG. REC. 16,102 (daily ed. Aug. 27, 1957) (statement of Rep. Flynt). This legislation was also opposed on grounds that it violated states' rights:

[T]oday we are facing Armageddon. If we pass this so-called civil rights bill we are at the point of no return. We are relinquishing the last vestige of States rights and are saying to the mythical Great White Father in Washington, "We expect you now to solve all of our problems including local law enforcement."

Id. at 16,105 (statement of Rep. Matthews). Another view held that progress was being made without legislation, and laws would actually aggravate race problems:

Progress is being made in my State and in other States in the South. People of good will in both races have been doing great work toward better race relations; however, I must confess that such legislation as this is causing suspicion and distrust where it did not exist before.

Id. at 16,101-02 (statement of Rep. Grant). Other opponents argued that the legislation was too advanced given American customs and mores:

This [legislation] does not contemplate the fact that in many areas of our country the courthouses are not equipped for both men and women. In many areas the hotels are not equipped, nor willing, to serve both races at the same table and both races realize the realities of this situation.

Id. at 16,104 (statement of Rep. Hemphill).

States Civil Rights Commission implied that the executive ranch was better equipped than the Congress to enact necessary reforms.³⁸⁵

This history is relevant to Executive Order 12,954 because the Chamber of Commerce contends that Justice Black's view of separation-of-powers in *Youngstown* should be applied to invalidate this order.³⁸⁶ By this reasoning, Eisenhower's orders desegregating the workplaces of federal contractors were unconstitutional. Clearly, Congress in the 1950s was more hostile to the goals behind Eisenhower's executive orders than the last Congress was opposed to the principle of banning permanent striker replacements. By increasing pressure on federal contractors to end discriminatory practices, Eisenhower made law no less than Clinton did in Executive Order 12,954. But no one argues today that Eisenhower's orders were unconstitutional.

It follows, therefore, that the constitutionality of an executive order is not determined by its popularity with Congress. But this popularity test is precisely the kind of simple equation that the Chamber of Commerce is suggesting in its separation-of-powers argument. Experience shows that a president's control over federal contracting can promote broad policy goals that Congress opposes. If the President has acted against the will of Congress, it remains to that body, and not the courts, to restrict or repeal an offensive executive order.

*B. Executive Order 12,954 Is a Valid Exercise of Executive Power
Delegated by Congress Under FPASA*

The Chamber of Commerce contends that Executive Order 12,954 cannot be sustained under the FPASA because that statute "does not

A South Carolina congressman's opposition cut through the veneer of respectable-sounding arguments on government powers:

The native southerner for generations has borne a major burden. He has been responsible for tutoring and nurturing a completely dissimilar race. In the light of all history, we all must admit that he has done his job well. . . . There were times when he was tempted to move away and start life anew where there was no race problem. To his everlasting credit, let it be said that he stayed there through adversity, poverty and occupation and brought the minority race a standard of living and a civilization that this race has never known anywhere else in the world.

Id. at 16,096 (statement of Rep. Dorn).

³⁸⁵ Its first policy recommendation stated, "[T]he Federal Government, either by executive or, if necessary, by congressional action; [should] take such measures as may be required to assure that funds . . . are disbursed only to such publicly controlled institutions of higher education as do not discriminate on grounds of race . . ." U.S. COMM'N ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 267 (1960).

³⁸⁶ See *Chamber of Commerce Complaint*, *supra* note 6, at E-47 (stating, "In a leading case involving the separation of powers, the Supreme Court held that the President's authority to issue an Executive Order 'must stem either from an act of Congress or from the Constitution itself.'").

authorize the President to issue orders that are contrary to other federal statutes."³⁸⁷ This is a strawman argument because few if any laws grant presidents authority to issue orders that negate other laws. The employers' argument here is simply another way of restating their main contention that Clinton's order is contrary to the *Mackay Radio* doctrine under the NLRA.

In addition, the Chamber's argument is uninformed in a crucial respect: most executive orders affecting private employment have cited no statutory authority. In light of this history, the Chamber's argumentative statement that the "order cites but one statute as authority" is silly.

Moreover, the Chamber fails to consider the FPASA's special delegation of power to the President. The *Kahn* court carefully reviewed the history of this law and concluded that even though Congress meant for the President to be guided by considerations of economy and efficiency in making procurement policies, it granted broad discretion in arriving at these policies.³⁸⁸

This is not to say that sham justifications for procurement policies can satisfy the FPASA's grant of authority. While the President has flexibility in determining how to achieve economy and efficiency, the *Kahn* court stated that there must be "a sufficiently close nexus" between these considerations and the procurement program established by an order.³⁸⁹

The Chamber contends that Clinton's order fails this rational nexus test,³⁹⁰ and erroneously argues that to invoke the FPASA, "the President was obligated to make explicit findings against which judicial review of the lawfulness of his actions can be judged."³⁹¹ This is erroneous not only because the Administration published these findings in announcing the order,³⁹² but also because the FPASA does not

³⁸⁷ *Id.*

³⁸⁸ See *supra* notes 250-253 and accompanying text.

³⁸⁹ See *AFL-CIO v. Kahn*, 618 F.2d 784, 796 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

³⁹⁰ *Chamber of Commerce Complaint*, *supra* note 6, at E-48.

³⁹¹ *Id.* There is no such requirement under the FPASA or any other law. This contention stands on an assertion by the *Kahn* court that "otherwise, the FPASA would essentially 'write a blank check for the President to fill in at his will.'" *Id.* (quoting *Kahn*, 618 F.2d at 793).

³⁹² As the Administration announced the order on March 8, 1995, the Department of Labor stated its factual justification for it. See *Labor Department Information Sheet on Clinton Executive Order*, Daily Lab. Rep. (BNA) No. 46 at E-3 (Mar. 9, 1995). The Department stated:

The firing of the PATCO strikers in 1981 set off a series of destructive strikes and permanent replacement of strikers at Greyhound, International Paper, Continental Airlines, and other companies, and it killed Eastern Airlines after a long, bitter strike.

Since the economical and efficient administration and completion of federal government contracts requires a stable and productive labor-management environ-

impose such a fact-finding duty on the President. Ironically, the Chamber made its fact-finding argument before the Administration had time to complete its solicitation of public comment pursuant to publishing its Notice of Proposed Rulemaking.³⁹³

Aside from these procedural points, there is a rational nexus between the order's ban on hiring of permanent striker replacements and government procurement interests. This Article presents additional support for this connection in two forms. It reviews permanent replacement strikes involving employers who currently or recently were government contractors and explains how these strikes potentially impaired production or delivery of government goods, and it presents new evidence from my research on replacement strikes showing that these strikes are lasting longer than replacement strikes in any other period since 1935.

1. The Potential for Impairing Production or Delivery of Government Purchases

A review of several recent replacement strikes shows that Executive Order 12,954 meets the *Kahn* court's rational nexus test. Some of these strikes have been violent and unusually disruptive and also have involved products, such as guns, coal, copper, and packaged meats, procured by the federal government. Based on this evidence, one can reasonably presume that product quality or delivery would be compromised by such strikes, to the detriment of the government as purchaser.

When George A. Hormel, a large meatpacker, hired more than 1000 permanent striker replacements, its facility in Austin, Minnesota was besieged by riot.³⁹⁴ As the strike continued, anonymous callers contacted Minneapolis stores to report that Hormel products had been sabotaged.³⁹⁵ If Hormel had been a federal food contractor supplying schools³⁹⁶ or the military during this period, one can reasonably imag-

ment, the federal government has a strong interest in its role as a purchaser of goods and services in prohibiting the use of permanent replacements. The use of replacement workers affects efficiency and economical production in several ways:

Research has found that strikes involving permanent replacements last *seven times* longer than strikes that don't involve permanent replacements.

Id.

³⁹³ The Chamber's suit is dated March 15, two days after the order was announced in the *Federal Register*, and before the Administration's publication of its Notice of Proposed Rulemaking on March 27, 1995.

³⁹⁴ Serrin, *Hormel Opens Plant*, *supra* note 282, at 12.

³⁹⁵ *Jail Sentences of 2 Hormel Strikers Stayed*, CHI. TRIB., Feb. 5, 1986, at 4.

³⁹⁶ *Cf. Teamsters Say Diamond Walnut Should Be Sanctioned*, *supra* note 23.

ine these institutions would have treated these calls seriously. There likely would have been expense in checking to make sure that sabotage did not occur, and there can be little doubt that some end-users would lose confidence in these products. The federal government would have had a legitimate product-quality interest in procuring unquestionably safe food for soldiers and school children to eat.

When the Pittston Coal Group hired 1700 permanent replacements,³⁹⁷ strikers disrupted production by forcibly seizing a preparation plant.³⁹⁸ They also engaged in mass demonstrations blocking access to mines and processing plants, set jackrocks on public highways to puncture tires on trucks delivering Pittston coal, and organized slow convoys ahead of such trucks in mountain roads where passing is difficult under ordinary conditions.³⁹⁹ If Pittston had been a federal contractor—supplying, for example, a military base that operated its own power generator—it is reasonable to suppose that these strike-related disruptions would have posed problems for the efficient operation of such a plant.

After Colt Industries, the main supplier of M-16 assault rifles for the United States Army,⁴⁰⁰ hired permanent replacements, its strike lasted more than forty-three months. Mass picketing blocked entrances to Colt plants and led to disorderly conduct, including vandalism and rock-throwing.⁴⁰¹ It is reasonable to suppose that the Army would have concerns about the quality and timely delivery of M-16s manufactured and shipped under these conditions.

In short, while the FPASA does not require the President to prove a justification for his procurement policies, neither does it permit him to make arbitrary assumptions about how these policies serve the federal government. Evidence presented here shows that the government has a reasonable basis to support its concern about the quality and timely delivery of purchases from contractors who hire permanent striker replacements.

In this vein, it should also be noted that Clinton's order does not necessarily benefit unions and their members. One possible outcome

³⁹⁷ *Proposed Settlement of Charges in Pittston Strike Agreed to by NLRB, Mine Workers*, Daily Lab. Rep. (BNA) No. 29, at A-5, A-6 (Feb. 12, 1990).

³⁹⁸ *Federal Judge Holds UMW in Contempt for Occupation of Pittston Facility*, Daily Lab. Rep. (BNA) No. 182, at A-8 (Sept. 21, 1989).

³⁹⁹ *United Mine Workers v. Bagwell*, 244 Va. 263, 267-70 (1993), *rev'd*, 114 S. Ct. 2552, 2553 (1994).

⁴⁰⁰ *Christianson v. Colt Indus., Inc.*, 486 U.S. 800, 804 (1988).

⁴⁰¹ *NLRB Administrative Law Judge Finds Colt Strike Caused by Unfair Labor Practice*, Daily Lab. Rep. (BNA) No. 177, at A-11, A-12 (Sept. 14, 1989).

under the order is to divert government purchasing to nonunion suppliers who are unaffected by a strike.⁴⁰² This observation is important because it underscores that the order places economic and efficient contract administration ahead of the betterment of unions and their members. The Chamber of Commerce overlooks this possibility by suggesting that the order would always benefit unions.⁴⁰³

2. Fighting the Trend Toward Longer Strikes

The Administration also expressed concern that strikes involving permanent replacements are lengthy disputes and, therefore, raise doubts about contractors' abilities to deliver goods and services as promised. The employers' lawsuit questioned this part of the order, stating that it lacked substantiation.⁴⁰⁴ This is a dubious argument, however, because not one of the 113 executive orders appearing in this Article expressly incorporated an economic or sociological research finding.⁴⁰⁵ In fact, earlier executive orders made certain labor market assumptions that some economists would strongly challenge.⁴⁰⁶ This argument, therefore, imposes an unprecedented requirement on Executive Order 12,954.

There is statistical evidence, albeit limited, supporting the order's premises. Professors John Schnell and Cynthia Gramm expanded a study performed by the Government Accounting Office on strikes

⁴⁰² See Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (1992) (providing for open bidding to nonunion, as well as unionized, contractors).

⁴⁰³ See *Chamber of Commerce Complaint*, *supra* note 6, at E-48 (stating that "[f]or many years federal contracting agencies have been required to remain impartial concerning any dispute between labor and management").

⁴⁰⁴ *Id.*

⁴⁰⁵ Cf. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) (citing "evidence that available and needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race, creed, color, or national origin, to the detriment of workers' morale and of national unity"). But Roosevelt's order contained no citation to actual studies, or other authorities, to support this general claim. See *id.*

⁴⁰⁶ Cf. Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943) (creating a new Committee on Fair Employment Practice in the belief that such a committee would "promote the fullest utilization of all available manpower, and [would] eliminate discriminatory employment practices"); GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 57-58 (1971). Becker states:

Many serious errors have been committed because of a failure to recognize that market segregation and market discrimination are separate concepts referring to separate phenomena. Market discrimination refers to the incomes received by different groups and ignores their distribution in employment; market segregation refers to their distribution in employment and ignores their incomes. Market segregation can occur without market discrimination . . . ; market discrimination can occur without market segregation . . . and quite often they occur together.

BECKER, *supra*, at 57-58.

occurring in 1985 and 1989, and concluded that "strikes are longer . . . when the employer hires permanent replacements than when the employer does not . . . [and] simply announcing the intent to permanently replace strikers is associated with longer strikes."⁴⁰⁷

In the absence of any government compilation of statistics about replacement strikes from 1935 through the present, I have developed a database of these strikes as reported in NLRB and federal court decisions. My research⁴⁰⁸ differs from Schnell and Gramm's because they compared duration of replacement strikes to ordinary strikes (where no replacements are hired); and their data, although more detailed than mine, covered only two years. My data not only come exclusively from replacement strikes, and therefore offer no comparison to nonreplacement strikes, but also cover a fifty-seven-year period.

This information is relevant because it provides additional empirical support for the order's premise that replacement strikes are lasting longer. In addition, this evidence is new in the sense that no other research compares strike duration within the class of strikes involving permanent striker replacements.

My research shows that replacement strike duration has been steadily increasing since 1960. From 1960-1969, average (mean) duration was 121 days, but increased to 155 days from 1970-1979, and then sharply increased during 1980-1992 to 229 days.

These results are significant in several respects. If, in fact, replacement strikes lasted only several days, or at the most a few weeks, there would be more room to argue that Executive Order 12,954 exaggerates the potential harm to government procurement interests. But since these disputes are not resolved quickly, they indicate that the government's exposure to strike-related disorder during unsettled replacement strikes is substantial. The data do not establish that product quality and timely delivery problems resulted from these strikes, since these variables could not be measured. But the finding for the most recent period, when read in conjunction with the various replacement strikes in the 1980s in which violence and disorder occurred,⁴⁰⁹ adds to the Clinton Administration's assertion that these strikes pose legitimate concerns for a purchaser.

⁴⁰⁷ John F. Schnell & Cynthia L. Gramm, *The Empirical Relations Between Employers' Striker Replacement Strategies and Strike Duration*, 47 INDUS. & LAB. REL. REV. 189, 199 (1994).

⁴⁰⁸ For more information about this study's research methodology, see LeRoy, *supra* note 278, at 182-84; and LeRoy, *supra* note 274, at 39-43. Invariably, there is a lengthy lag between the date a replacement strike begins and the date it is adjudicated by the NLRB or a federal court. Hence, strikes most recently reported began in the early 1990s or late 1980s. This accounts for the fact that 1992 is the most recent strike-initiation year in my sample.

⁴⁰⁹ See *supra* notes 282-320 and accompanying text.

In addition, the results indicate a growing problem that merits the attention of the federal government, as a procurer of goods and services, and also as enforcer of a national policy to promote peaceful labor dispute settlements. My research shows that replacement strike duration decreased until the 1960s, when the current upward trend began. That trend has been consistent and is clearly at odds with the national public policy of promoting settlement of labor-management disputes.⁴¹⁰

The Chamber of Commerce speciously contends that Executive Order 12,954 tilts the balance of bargaining power in these disputes and biases the government's role in favor of unions.⁴¹¹ But there are many weapons in an employer's strike-response arsenal, including hiring temporary replacements, that Executive Order 12,954 does not regulate; and firms have actually increased profits while employing temporary replacements.⁴¹² Furthermore, the employers' suit offers no evidence to support this sweeping assertion.

It is possible, however, that the order will hasten some negotiations and thus promote more expeditious strike settlements. Just as employers overstate the argument that Executive Order 12,954 improperly interferes with free collective bargaining, the Administration probably overstates the order's ability to promote settlements. In reality, this would tend to occur only when an employer depended on government contracts to a considerable extent. Nevertheless, considering that some replacement strikes now last several years,⁴¹³ this part of the order has a legitimate objective. Thus, the order is likely to further two government interests: diminishing its currently long exposure to potentially disruptive strikes, and fostering more expeditious strike settlements.

C. Clinton's Use of Executive Power Has Ample Precedent

In attacking the order, employers mention only two other executive orders affecting private employment.⁴¹⁴ These were probably the most controversial and highly contested of all such orders. To mention only these orders creates an erroneous impression that such orders are extremely rare and are also suspect. Viewing the 113 employment

⁴¹⁰ See 29 U.S.C. § 171(a) (1994) (stating, "[i]t is the policy of the United States that sound and stable industrial peace and the advancement of the general welfare . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining").

⁴¹¹ See *Chamber of Commerce Complaint*, *supra* note 6, at E-42.

⁴¹² See *supra* note 258 and accompanying text.

⁴¹³ See, e.g., *Curtis Industries Walkout to End*, *supra* note 321, at A-5. (reporting settlement of a replacement strike that lasted four years).

⁴¹⁴ These are President Truman's Steel Seizure order (Exec. Order No. 10,340), and President Carter's wage and price control order (Exec. Order No. 12,092).

orders examined here, this part of the employers' suit is uninformed when it argues that Clinton's order lacks precedent. An overwhelming majority of these orders were never subjected to a court challenge, and when they were, they were upheld with rare exception.

The employer challenge to Executive Order 12,954 not only overlooks these numerous uses of presidential power, but also fails to account for the enormous accretion of this power in regulating private employment since the 1940s. Clinton's order cannot be fairly judged without comparing it to this history.

Executive Order 12,954 is not novel compared to orders regulating collective bargaining. It threatens contract debarment as its ultimate sanction, just as two of Bush's orders did.⁴¹⁵ Obviously, Bush's orders were directed against unions while Clinton's favors strikers, but the validity of an executive order cannot depend on whom it benefits. Moreover, the last order that significantly affected collective bargaining was Carter's order capping wages that a union could negotiate. That order expropriated the superior bargaining power of certain unions who, without the order, would likely have negotiated better raises. In addition, Carter's order affected all collective bargaining agreements, while Executive Order 12,954 affects a much smaller fraction of bargaining relationships involving a federal contract over \$100,000. Nevertheless, Carter's order, Executive Order 10,292, was upheld.

The debarment feature in Executive Order 12,954 is nothing new. The same sanction can be found in several employment discrimination orders.⁴¹⁶ What the Chamber of Commerce suit does not show is that Clinton's order is milder than the EEO orders. It has no provision for enforcement through an injunction,⁴¹⁷ and contains no criminal penalty.⁴¹⁸ In addition, it defines employer noncompliance as a temporary occurrence.⁴¹⁹

In sum, Clinton's order draws on ample precedent for presidential intrusion in otherwise free collective bargaining and in prescribing debarment as a penalty. Yet in its lawsuit, the Chamber of Commerce compares this order to Truman's infamous Steel Seizure order.⁴²⁰ The dissimilarities in these orders are too great—one takes private property,

⁴¹⁵ Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (1992); Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (1992).

⁴¹⁶ See Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (first appearance of debarment sanction).

⁴¹⁷ *Id.*

⁴¹⁸ See *id.*

⁴¹⁹ See *supra* note 353.

⁴²⁰ See *Chamber of Commerce Complaint*, *supra* note 6, at E-47.

and the other rescinds a procurement contract—to warrant a serious comparison.⁴²¹

V. CONCLUSION

Executive Order 12,954 stands at the convergence of two constitutional currents. One involves the President's power to manage federal contracts while pursuing a social or economic goal. Executive Order 12,954 is modeled after scores of orders dating to World War II that effectively regulated private employment by rewarding and punishing government contractors. The recent decision in *Adarand Constructors v. Peña*⁴²² does not attack the original source of this powerful tool of employment regulation, because Congress eventually enacted legislation to conform with presidential orders requiring federal agencies to administer affirmative action programs. But *Adarand's* effect is to subject federal contracting programs incorporating certain affirmative action principles, and enforced by contract debarment,⁴²³ to strict scrutiny. *Adarand* clearly means that courts will play a more active role in reviewing federal contracting. Consequently, this increases the likelihood that courts will review a president's use of federal contracting for other social or economic goals.

The second constitutional current involves the President's power to use federal contracts to regulate private-sector collective bargaining when the NLRA occupies this field. *Chamber of Commerce v. Reich* raises important questions about this regulation.⁴²⁴ It characterizes Executive Order 12,954 as a new law and challenges a presidential act that appears at first glance to contradict Congress's recent rejection of a similar measure.

Before striking down this order, a court should carefully consider the following possible consequences.

⁴²¹ *Accord* Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) (stating the well-established presumption that "the Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases").

⁴²² 115 S. Ct. 2097 (1995).

⁴²³ In 1994, these programs included: the Small Business Administration's \$4.4 billion award of federal contracts to 5400 minority-firms; the Defense Department's set-aside of \$2.8 billion in procurement contracts to minority contractors; the Justice Department's expenditure of at least 10% of local law-enforcement grant funds on contracts to businesses owned by minorities or females; the State Department's expenditure of at least 10% of contracts to build or guard embassies to minority contractors; and the Department of Transportation's expenditure of at least 10% of a \$151 billion budget on minority contractors. Paul M. Barrett, *Supreme Court Ruling Imperils U.S. Programs of Racial Preference*, WALL ST. J., June 13, 1995, at A1, A10 (tbl., cols. 1-2).

⁴²⁴ 57 F.3d 1099 (D.C. Cir. 1995).

First, the separation-of-powers argument likely to sustain such a ruling is based on Justice Black's compartmentalized view of executive power.⁴²⁵ His colleagues challenged this view because they thought it underestimated the constitutional powers of the modern presidency.⁴²⁶ By Justice Black's reasoning, Congress would not have had power to enact legislation taking custody of President Nixon's papers,⁴²⁷ or to delegate its power to define criminal sentences to a commission in the judicial branch,⁴²⁸ or to delegate legislative power to restrict the sale of arms and munitions to other nations to the President,⁴²⁹ because none of these derived from an express constitutional power.

Second, overturning Executive Order 12,954 would effectively undermine the basis for many of the 112 employment orders that stand apart from the Steel Seizure order. In short, such a ruling would create a precedent much broader than the *Youngstown* case for invalidating other orders.

⁴²⁵ See *Chamber of Commerce Complaint*, *supra* note 6, at E-47 (quoting Justice Black's *Youngstown* statement that an executive order "must stem either from an act of Congress or from the Constitution itself").

⁴²⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (Frankfurter, J., concurring). Justice Frankfurter stated that "the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Mr. Justice Black has written." *Id.* (Frankfurter, J., concurring). Justice Jackson's concurrence rejected Black's functional approach by noting, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Id.* at 635 (Jackson, J., concurring). Justice Clark's concurrence implicitly rejected Black's static view of separation-of-powers when he stated: "The limits of presidential power are obscure. However, Article II, no less than Article I, is part of a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *Id.* at 661 (Clark, J., concurring) (internal quote omitted). In contrast to Black's static view, Clark viewed the Constitution as conferring fluid executive power that would increase to its maximum during national emergencies:

In describing this authority I care not whether one calls it "residual," "inherent," "moral," "implied," "aggregate," "emergency," or otherwise. . . . [W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but . . . in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation.

Id. at 662 (Clark, J., concurring).

⁴²⁷ See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). Writing for a 7-2 majority, Justice Brennan noted that the Court had rejected the view that "the Constitution contemplates a complete division of authority between the three branches" and instead adopted a "more pragmatic, flexible approach." *Id.* at 442, 443.

⁴²⁸ See *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding Congress's delegation of power to U.S. Sentencing Commission). Justice Blackmun's majority opinion observed that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, . . . [Congress] simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* at 372.

⁴²⁹ See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

In the employment arena, future presidents would have more difficulty sustaining emergency wage and price control orders. Opponents would be more likely to prevail by arguing that very specific legislation to deregulate sectors of the economy⁴³⁰ trumps a vague grant of emergency economic powers delegated by Congress. Proper authorization of the President would therefore require a detailed delegation of power, but during such crises, Congress might be too fragmented to agree on the scope and phrasing of this delegation. In short, the strict constructionist logic embodied in the attack on Executive Order 12,954 would prevent Congress from expediently turning to the President to manage an economic crisis.

But the threat to presidential authority would probably extend beyond employment regulation. For example, some executive orders, including a recent one to improve fishing opportunities nationwide, regulate the environment by citing Congress's general delegation of authority.⁴³¹ Conceivably, this regulation would result in a controversial agency action concerning use of water resources. A ruling to overturn Executive Order 12,954 based on the employer argument that Clinton usurped a power reserved to Congress would put this environmental regulation on more dubious footing.

Third, a successful attack on Executive Order 12,954 would have significant implications for the present balance of power between the coordinate branches of federal government. Clearly, federal judges would be in a more commanding position to review, and possibly overturn, presidential orders. Thus, a ruling against Executive Order 12,954 would increase the likelihood of a serious confrontation between the judicial and executive branches.

This Article shows that many presidential orders affecting private employment have been highly controversial, but nevertheless have been implemented without challenge. Many were unpopular and forced unwanted change on institutions, customs, peoples, and individuals. The exigencies of war explain some, but certainly not most of the

⁴³⁰ See, e.g., The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 U.S.C.) (deregulating freight-hauling prices).

⁴³¹ See, e.g., Exec. Order No. 12,962, 60 Fed. Reg. 30,769 (1995). Executive Order 12,962 cites the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act, the National Environmental Policy Act of 1969, and The Magnuson Fishery Conservation Act as authority for directing federal agencies to take a series of actions to increase recreational fishing opportunities nationwide. See *id.* While the order states a goal to "improve the quantity, function, sustainable productivity, and distribution of U.S. aquatic resources," the means for achieving this is left to federal agencies authorized here to develop a five-year plan; and while the order directs federal agencies to cooperate with state, local, and tribal authorities, one can foresee a conflict among these authorities in determining a water-use policy. See *id.* In such a case, Executive Order 12,962 would appear to stand on similar ground to Executive Order 12,954.

nation's acquiescence. Ultimately, all but one were accepted because the American public recognized that the Presidents who conceived them were exercising a legitimate lawmaking power.

Fourth, an adverse ruling would undermine a constitutional power that has enabled the nation to deal with explosive political issues. This Article shows a succession of presidents, Democrats and Republicans, who issued employment discrimination orders to fill a void created by numerous Congresses indisposed to deal with mounting race-segregation problems. They invoked a moral tone reminiscent of Lincoln's controversial exercise of power to defeat slavery.⁴³²

Lincoln's Emancipation Proclamation and Roosevelt's Executive Order 8802 are kindred orders. Stripped to its essentials, Lincoln's proclamation legislated slavery out of existence.⁴³³ No one can reasonably argue that this was not a usurpation of legislative powers; Congress had been deadlocked for years in legislating this matter.⁴³⁴ More than that, Lincoln's fiat violated the Constitution,⁴³⁵ because that document institutionalized slavery.⁴³⁶

⁴³² Compare The Emancipation Proclamation, 12 Stat. 1268, 1269 (1863), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 420-21 (Henry Steele Commager & Milton Cantor eds., 1988) (concluding "[a]nd upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God") with Exec. Order No. 10,479, 18 Fed. Reg. 4800 (1953) (stating that it is "the policy of the United States Government to promote equal employment opportunity for all qualified persons employed or seeking employment on government contracts because such persons are entitled to fair and equitable treatment in all aspects of employment").

⁴³³ See The Emancipation Proclamation, 12 Stat. 1268, 1269 (1863) ("I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages."), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 432, at 420-21.

⁴³⁴ See, e.g., DOCUMENTS OF AMERICAN HISTORY, *supra* note 432, at 319 (discussing Sen. Henry Clay's resolution of Jan. 29, 1850, resulting in the Compromise of 1850, U.S. Senate Journal, 31st Cong., 1st Sess., p. 118 ff).

⁴³⁵ See Mark E. Neely Jr., *Emancipation Proclamation*, in 2 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 551 (Leonard W. Levy & Louis Fisher eds., 1994) (stating: "The proclamation was a presidential order freeing the slaves in areas of rebellion against the United States."). Ironically, Lincoln revoked General Fremont's freeing of slaves in Missouri in 1861, and remarked: "Can it be pretended that it is any longer the government of the U.S.—any government of Constitution and laws,—wherein a General, or a President, may make permanent rules of property by proclamation?" *Id.* Also see the ironic resolution of the Illinois legislature, condemning the proclamation on constitutional grounds:

Resolved: That the emancipation proclamation of the President of the United States is as unwarrantable in military as in civil law; a gigantic usurpation, at once converting the war, professedly commenced by the administration for the vindication of the authority of the constitution, into a crusade for the sudden, unconditional and violent liberation of 3,000,000 Negro slaves.

Resolution of Illinois State Legislature, *reported in* ILLINOIS STATE REGISTER, Jan. 7, 1863, *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 432, at 422.

⁴³⁶ The full passage reads:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers,

Like Lincoln's edict, Roosevelt's acted on an untouchable race issue. Not only did it lack congressional authorization; it ran against a deep grain in the nation. That part of Roosevelt's order equating a successful war effort with integrating private workplaces compares to Lincoln's explicit direction that Union forces admit freed slaves into their ranks.⁴³⁷

Even if changing political customs and experience brought on by a civil war, a world war, and a cold war account for much of this accretion of executive lawmaking, it is also true that the framers of the Constitution, and their inspirational theoretician, anticipated that the President would exercise this power. John Locke's *Second Treatise of Civil Government* was emulated by the framers.⁴³⁸ While Locke viewed legislative power as supreme, and executive power as subordinate to it, paradoxically he believed that "the good of society requires that several things should be left to the discretion of him that has executive power"⁴³⁹ and "this power to act according to the discretion for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative."⁴⁴⁰ He elaborated by describing prerogative as a trust characterized by "an arbitrary power in some things left in the prince's hand" provided that it is used "to do good, not harm to the people."⁴⁴¹ There scarcely is a better modern usage of Locke's executive prerogative than executive orders to eradicate race as an employment criterion.

The Federalist expressed no view corresponding to Locke's notion of executive prerogative. It spoke, however, to conditions prompting some of the orders examined in this Article. The framers recognized that government must protect minorities from majority tyranny.⁴⁴² Madison

which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.

U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend XIV, § 2.

⁴³⁷ Compare The Emancipation Proclamation, 12 Stat. 1268, 1269 (1863) ("I further declare and make known that such persons of suitable condition will be received into the armed service to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service."), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 432, at 420-21 *with* Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) (policy goal identified as ending race discrimination in the defense industry).

⁴³⁸ Cf. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (Thomas Peardon ed., 1952). Locke describes establishment of the legislature as "the supreme power of the commonwealth," *id.* § 134, and creation of executive power as "visibly subordinate and accountable to" legislative power, *id.* § 152, but also provides that the executive may be "vested in a single person, who has also a share in the legislative [power]" in which case "that single person in a very tolerable sense may also be called supreme." *Id.* § 151.

⁴³⁹ *Id.* § 159.

⁴⁴⁰ *Id.* § 160.

⁴⁴¹ *Id.* § 210.

⁴⁴² THE FEDERALIST No. 10 (James Madison).

observed that in republican governments it is the legislative branch that predominates and therefore threatens liberty. Quoting Jefferson's *Notes on the State of Virginia*, Madison recounted:

All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one, One hundred and seventy-three despots would surely be as oppressive as one.⁴⁴³

Numerous executive orders aimed to reverse de jure segregation.⁴⁴⁴ The official status of this discrimination amounted to majority tyranny. Without the lawmaking characteristic of the executive order, one can only imagine how much the Warren Court alone would have checked this majoritarian abuse.

The fate of Executive Order 12,954 will help to define the twenty-first century presidency. Federal courts must now choose whether these presidents will be cabined to strictly limited roles as Commander in Chief, drafter of treaties, and ministerial executor of laws, or will be permitted to follow in the traditions of Roosevelt, Eisenhower, and Kennedy in using the government's vast purchasing power to lead the nation.

⁴⁴³THE FEDERALIST NO. 48, at 195 (James Madison) (Benjamin Fletcher Wright ed., 1966) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA).

⁴⁴⁴See *supra* notes 150-54.