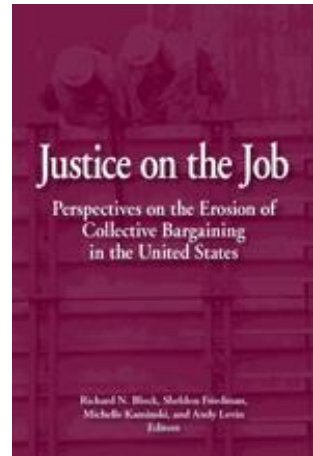

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Law and Collective Bargaining Power

An Experiment to Test Labor Law Reform Proposals

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Labor law reform is passionately debated among union activists and officials, labor economists, and industrial relations scholars. Some who are concerned that the decline in union membership in the United States threatens workers' rights and working conditions believe labor law is an impediment to union success. Others believe that changes in employment structures and innovations in human relations methods mean unions and collective bargaining are no longer needed by today's workers.

In addition, for decades most of the focus of labor law reform has been on organizing, with scant attention given to collective bargaining. Organizing new members is important, but organizing campaigns alone cannot succeed in increasing union membership. Workers join unions to improve their working conditions. Improved working conditions come from collective bargaining. The fact is that organizing does not matter if unions have no bargaining power. Furthermore, increased union bargaining power should make unions more attractive to the unorganized. Union success at the bargaining table affects organizing success, and the degree of organization affects bargaining success.

These debates are passionate despite—or perhaps because of—the lack of empirical evidence as to how a law reform proposal would oper-

ate. We believe that there is a great deal to be gained by using empirical methodology as one way to examine how a proposed labor law is likely to work, and that there should be more focus on the relationship between law and collective bargaining.

We have used an experiment here in order to explore one discrete aspect of collective bargaining to examine whether law affects perceptions of bargaining power. We first discuss how law can be used by unions and employers as a resource to bolster bargaining power. We then outline the methodology we used to test whether different legal regimes affected perceptions of the bargaining power of unions and employers. We end the chapter with a discussion of our results and conclusions.

LAW AS A RESOURCE

Many laws—both statutory and judge-made—control or potentially affect collective bargaining. We hypothesize that the laws that determine how bargaining impasses are handled have a shadow effect on parties' conduct preceding impasse. In other words, impasse laws are more than mere rules on how to handle deadlock. Each party will have taken a measurement of how and whether an impasse helps or hinders it and its bargaining partner. While that consideration will include economics and the parties' continued relationship, it will also depend on how the law treats an impasse. The parties will adjust their behavior based on their actual or perceived relative bargaining power based on the law. Furthermore, experienced bargainers will also shape their conduct based on their bargaining partner's anticipated assessment and response.

There are many different theories about the constituents and operation of bargaining power. Among the many factors that can collectively affect bargaining power are its economic context, state of the industry, bargainers' knowledge and abilities, degree of union organization, community sentiment and support, and law. Each can be seen as a resource, unevenly distributed between the bargainers in any one negotiation. Although some resources, such as degree of union solidarity, that strengthen one side will weaken the other, not all factors will have that

effect. Unlike commercial bargaining, collective bargaining concerns parties whose fates are profoundly intertwined. Thus, a poor economy or a decline in an industry may weaken both parties. Strong leadership may lead to better outcomes for both sides. Engaging in a scorched earth policy may destroy both sides. Bargainers can potentially enlist these resources through strategies to make the best use of each in order to achieve their individual and mutual goals. Having more resources strategically employed should increase a party's bargaining power. Having fewer resources or an inability to make use of one's resources should decrease bargaining power. Certainly, the call for labor law reform manifests a belief that law plays an important role in bolstering or undermining union power.

We have taken up that challenge by setting up a social science experiment to explore some discrete aspects of the question whether law matters to collective bargaining, specifically, features of law that can affect bargaining power. The results reported here are only part of a larger experiment, and that experiment is the first part of a multiphase study. Results from that larger experiment are reported in Dannin and Singh (2004).

Three Impasse Regimes: Implementation on Impasse, Interest Arbitration, and Economic Power

We tested three regimes with different ways of resolving bargaining impasses based on the current private sector system (Regime A); interest arbitration, commonly used in the public sector and advocated as a reform for the private sector (Regime B); and the bargaining system created under the National Labor Relations Act before judges created the doctrines of striker replacement and implementation upon impasse (Regime C).

We chose these three legal regimes for a number of reasons. First, we theorized that if law affects the process and substance of collective bargaining, these laws are sufficiently distinctive that we should see different responses, including different perceptions of bargaining power.

We also chose these legal regimes because each currently presents unique practical and theoretical issues connected with collective bargaining. Therefore, an examination of these three methods for resolving impasses should be helpful as an initial step toward law reform. Briefly,

Regimes A and B currently are laws affecting actual bargaining. Regime C provides an interesting alternative to Regime A, if the NLRA were stripped of judicial amendments and returned to the way Congress initially intended the NLRA operate.

Regime A (permanent striker replacement and employer implementation on impasse) is based on current private sector impasse law. The NLRA was enacted with no provisions concerning the specifics of how to conduct bargaining. It said nothing about the use of weapons or how to resolve impasses. The courts almost immediately began to create legal doctrines that applied to bargaining and to the weapons employers, employees, and unions were allowed to use (Budd 1996; Dannin, Wagar, and Singh 2001; *McClatchey Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C. Cir 1997; *Sam M. Jackson*, 34 NLRB 194 (1941); *Westchester Newspapers, Inc.* 26 NLRB 630 (1940)). Employees were forbidden from using partial strikes and sit-down strikes; and employers were permitted to permanently replace strikers and to implement their final offers upon reaching an impasse. Judges have added to and tinkered with the use of these weapons over the years (Dannin 1997, 2004).

Regime A focuses on the two key private sector impasse methods created by judicial decisions: the employer's right to permanently replace strikers and the employer's right to implement its final offer when the employer and union reach an impasse in bargaining. The latter doctrine is not as widely explored in industrial relations research but has been described in Dannin (1987, 1997). The doctrines of implementation upon impasse and striker replacement have been criticized as violations of human rights (Dannin 2004; Dannin, Wagar, and Singh 2001; Human Rights Watch 2000).

Under Regime A, at impasse, an employer may implement its final offer. No party is required to make concessions. If a union strikes, the employer may hire permanent replacements but may not fire strikers. When a strike ends, strikers may be recalled as positions become available. If an employer bargains in bad faith, the penalty is to be ordered to bargain in good faith (Dannin 1987, 1997; Dannin and Singh 2002; Dannin and Wagar 2000; Stolzenburg 2002).

We theorize that an employer in Regime A is likely to behave in a particular strategic way. When unemployment is high and/or if there is low employee solidarity, an employer is likely to assert an extreme position and not concede any demand. The employer has an incentive

to reach impasse, because then it can implement its final offer, permanently replace strikers, and, perhaps, de-unionize. The union's strategy is to make concessions to avoid impasse and thus implementation and a strike, and to accept poor offers because other alternatives are so unappealing. Thus, a union is likely to move toward the employer's position but not vice versa. As a result, the law moves the union's bargaining power a notch lower than it would otherwise be in given economic or social circumstances (cf. Regime C). We propose, therefore, that under Regime A the employer's bargaining power is strengthened and that of the union is weakened.

Regime B (interest arbitration) is based on public sector bargaining law. Strikes and lockouts are illegal. At impasse, the parties submit final offers to interest arbitration. The arbitrator chooses the best proposal based on the evidence offered. Interest arbitration is significant for law reform because it is being proposed to resolve first contract impasses in the private sector (U.S. Commission on the Future of Worker-Management Relations 1994).

We hypothesize that, with strike and lockout leverage removed, both parties must rely on persuading the other to accede to a proposal. Part of that persuasion is an awareness of how an arbitrator will react. Thus, both the employer and union are encouraged to make proposals that will be seen as reasonable and move toward the middle. We propose, therefore, that under Regime B, neither the employer nor the union is favored in terms of bargaining power.

Regime C (economic power) is Regime A without implementation or striker replacement. Strikes and lockouts are legal, but replacements may not be hired. At impasse no terms can be changed until agreement is reached. Regime C provides a method for resolving impasses that gives the employer and union the same or reciprocal rights when an impasse is reached. It also can be argued that this is the method closest to that originally enacted, without the judicial interpretations of striker replacement and implementation upon impasse that have transformed its operation. Regime C leaves it to each party to resolve impasses by deciding whether the proposals made are satisfactory to it.

We theorize that, under Regime C, the role law plays is to make negotiation more attractive than strategies such as trying to reach an impasse and avoid negotiation. Under Regime C the parties have un-

fettered and equal use of strikes and lockouts as resources to create bargaining power.

We predict that under Regime C employers and unions will frame their strategies based on their perceptions of their own and their bargaining partner's bargaining power. So if the employer sees union power as low because unemployment is high, its strike fund is depleted, and there is low union solidarity, the employer will be less likely to make concessions. If, on the other hand, the employer sees the union as having high bargaining power because unemployment is low, the strike fund is adequate, and there is high solidarity, the employer is more likely to believe the union will stick to its demands, so the employer will make concessions to avoid a strike. The union should make similar calculations. The Regime C employer cannot count on reaching impasse to get its way, and the union would not have to make concessions solely to avoid an impasse, since only agreement would change the status quo. Thus, we propose that neither the employer nor the union would be favored in bargaining strength as a result of the law.

One way of thinking about the degree to which each legal regime would affect bargaining power is to consider the following scenario. If a party was told to maximize its chances of attaining its bargaining goals and could choose to be either an employer or a union and also choose which regime to bargain under, we argue it would choose to be an employer under Regime A (EA). Put another way, if a party could choose the role it most wanted to avoid in order to minimize the chances of not being able to achieve its bargaining goals, it should choose to avoid being a union under Regime A (UA). Or if one rank ordered the six roles based on degree of bargaining power, the end points would be EA and UA. All other roles and regimes would be somewhere in the middle.

METHODOLOGY

Subjects were 120 students who were attending a large public university and a small private law school on the West Coast of the United States. Our sample consisted of 43 business and 77 law students. Forty males and 80 females participated in the study. The average age of the respondents was 27 years old (s.d. = 7.52). Twenty-eight percent of the

students who participated in the study had previous negotiation experience, although not collective bargaining or labor law experience.

The administration of the study followed the guidelines of the Committee on the Protection of Human Subjects (at both institutions), which mandated voluntary participation, informed consent, and subject anonymity. All subjects received remuneration of \$30 each for the two hours they participated. The recruitment message invited students to participate in a two-hour research project on collective bargaining. It was e-mailed to the law students and read to a random selection of business classes (management, accounting and finance, and marketing). Nothing specific about the research project was mentioned in the advertisements. The studies were administered in groups of approximately 20–30 participants in each session.

When participants arrived at their scheduled session, they were randomly assigned to a two-person group. In a few cases, when we had an odd number of participants, we had a three-person group. Each caucus was seated some distance from other caucuses, so they could not overhear other discussions.

Each group was randomly assigned to one of six different caucuses: union caucuses UA, UB, or UC, or employer caucuses EA, EB, or EC. The participants were first told to read a one-page sheet. The sheet for all caucuses contained the following information:

Owen Corporation produces computer components. It is about to begin negotiating a collective bargaining agreement with the United Employees Association. The UEA represents hourly production, plant clerical, quality control, shipping, warehouse, and clerical workers—approximately 256 employees. Employees are exposed to many chemicals used to produce the computer components. The union is concerned that these may be hazardous and may cause health problems. Several workers compensation claims are now pending involving cases of pancreatic, throat, and lung cancer and various respiratory and skin ailments. In addition, this past year, several workers had babies with serious defects.

The union proposes 1) an across-the-board raise of 2 percent a year in each of the next three years, 2) installing a system to monitor levels of toxic substances in the workplace, 3) establishing a joint employer-union health and safety committee, and 4) improved health insurance.

The employer takes the position that health problems are the result of improper use of safety devices and employee alcohol or drug abuse. The employer proposes 1) subcontracting the most hazardous work in the plant, 2) implementing random drug testing, and 3) making hazardous work voluntary and paying a premium for it.

All union caucus information sheets contained the following additional information:

You are meeting in a union caucus to discuss your strategies for bargaining. You are aware that you have the following individuals among your membership. Some employees may be HIV positive and would not want this known. Several are members of the Libertarian Party. Sixty percent of the workforce is female. Seventy-three percent of the workforce is of child-bearing age. Your strategies must accommodate your constituents' interests, your predictions as to your opponent's strategies, and your plan to deal with those strategies. Keeping all this in mind, what strategy will put the union in the strongest position possible? Strongest means what will get the union the most possible.

All employer caucus information sheets contained the following additional information:

You are meeting in an employer caucus to discuss your strategies for bargaining. You are aware that your managers, supervisors, and employees include individuals with diverse interests and views.

The union has provided attorneys for all employees who have filed workers compensation claims and has informed you that it will be considering grievances and further legal action concerning workplace health and safety.

You have been solicited by the president of a company which performs both drug testing and assists in applicant screening and who hopes to gain your business. In fact, this is what first interested the company in testing. There has been news recently about other companies which ran into trouble because of drug use by employees.

Your strategies must accommodate your constituents' interests, your predictions as to your opponent's strategies, and your plan to deal with those strategies. Keeping all this in mind, what strategy will put the employer in the strongest position possible? Strongest means what will get the employer the most possible.

Finally, each caucus had information about the way its legal regime resolved bargaining impasses. The information sheets for employer and union caucuses in Regime A (EA and UA) stated:

If a union and employer reach an impasse in bargaining, the employer may implement its final offer. There is no requirement to make concessions. If the union strikes, the employer may hire permanent replacements to take the jobs of the strikers but may not fire them. At the strike's end the strikers are placed on a recall list and will be recalled if and as positions become available. If the employer bargains in bad faith, the only penalty is an order to bargain in good faith.

Regime A is based on the law that currently controls bargaining in the private sector in the United States as a consequence of various judicially developed doctrines permitting implementation upon impasse and striker replacement.

The information sheets for employer and union caucuses in Regime B (EB and UB) stated:

Strikes and lockouts are outlawed. When impasse is reached, the parties must submit their final offers to "final offer interest arbitration." This means that each side will present evidence to support its proposals to an arbitrator at a hearing. The arbitrator will then choose the best proposal based on the evidence offered.

Regime B is based on interest arbitration, a method commonly used to resolve impasse in many public sector collective bargaining laws, and it is usually the case that strikes and lockouts are illegal in the public sector.

The information sheets for employer and union caucuses in Regime C (EC and UC) stated:

Strikes and lockouts are legal. When impasse is reached, no replacement workers may be hired in either a strike or lockout situation. No terms may be changed until an agreement has been reached.

Regime C is a scenario that emphasizes the parties' use of the equal economic weapons of strike and lockout and that appears to be congruent with the law contemplated by the drafters of the NLRA.

After the participants had finished reading the information sheet for that caucus, they were told to develop a strategy for reaching the most favorable bargaining outcome for their side. After 15 minutes, the par-

ticipants were told to switch positions—that if they were originally an employer, they should begin to develop a strategy from a union point of view, and if they were a union, they should begin to develop a strategy from an employer point of view. After another 15 minutes, they were told to return to their original identities and develop their final strategies. Then after 10 minutes, they were told to begin writing down their strategies.

When all groups completed their strategies, we administered a survey that each participant was to fill out individually. When they were finished, we administered a survey that each caucus was to answer by group consensus. We then held a debriefing session during which we discussed the various caucuses' laws and solicited participant reactions. The participants were not aware until the debriefing session that there were different legal regimes. Finally, we administered an individual questionnaire that permitted participants to add information or reactions they wanted to report as a result of the debriefing.

No actual bargaining occurred, although the participants believed throughout the study that they would be bargaining. We did not define the term *impasse* but rather let the participants use their own sense of its meaning, one that is close to the various legal definitions without necessitating an understanding of the legal complexities of the doctrine. The results discussed here rely on two of the three surveys—the individual level response and caucus level response.

In evaluating and drawing any implications from our results, we have borne in mind that there are important limitations in using this research methodology, although there are also advantages. The advantages are those inherent in any modeling that first simplifies a complex system by limiting variables and then is used to examine and predict the workings of that more complex system (Roth 1995). Here, we have constructed a controlled environment in which to examine and contrast a limited number of features of the negotiation processes preceding *impasse* procedures. The subjects were given only a handful of issues to consider, although they were ones likely to be included in real negotiation.

The primary disadvantage is that the exercise was not real. The subjects had virtually no experience with collective bargaining law or with bargaining. They faced no losses and no real risks and thus were likely to have little invested in the process. The subjects had no opportunity to

learn from past negotiations and apply that experience nor to have been trained—things one would expect with real negotiators. Severe time limits meant emphasizing quick assessments and reactions. Finally, they never bargained but rather simply formulated strategies.

We were aware of all these problems and therefore tried to construct this social science experiment in a way that minimized as many of these problems as possible. In order to inject greater realism into the process, we chose bargaining issues that are commonly encountered in bargaining and have ramifications the subjects could easily grasp. We provided the subjects with information about their respective constituents' interests in order to help them gauge how their proposals and strategies would likely be received. To help them behave more like an experienced and sophisticated bargainer, we had subjects temporarily shift sides and act in the role of their bargaining partner. This was intended to help them appreciate potential strategies and the other side's reactions and then reconsider their own strategies in light of that experience. In fact, during the sessions we heard them actually reacting in this way when they progressed through the session, as they realized what their bargaining partner's limitations or strengths were.

In addition, we recruited participants who lacked experience with collective bargaining and labor law so we would have reactions to the law that would be as untainted by bias and disinterested as is possible. We realize, of course, that law and business students do not come to a collective bargaining exercise with no opinions concerning unions, collective bargaining, or employers. Labor and collective bargaining are highly contested, and proposals for law reform are highly partisan. The participants in this exercise were therefore in the unique situation of having some practical experience with collective bargaining while being relatively nonpartisan in their responses and in having no real stake in the outcomes.

Finally, we stopped short of collective bargaining because we wanted to retain a focus on the law and participants' reactions to it. The give and take of real negotiating, especially with unsophisticated bargainers, might have muddied their responses and made interpretation more difficult. In addition, we were concerned that we have sufficient participants to have statistically reliable results. Sessions of sufficient length to include bargaining would have drastically reduced our pool size. Time was limited to two hours total so we could include a larger number of subjects.

This is the first part of a long-term, phased study to measure the operation of discrete aspects of law with regard to bargaining. In this initial phase, we measured the impact of impasse law in a fairly unobtrusive way. This makes it more likely to get a clear cut answer to the question whether law in general—and impasse law in particular—has an effect on bargaining. In this chapter we examine only the question of whether law has an impact on bargaining power. We use the participants' perceptions of their power versus the power of their bargaining partner in their regime as a proxy for actual bargaining power. The ultimate measure of power would be a study of actual or simulated bargaining. However, perceptions of one's own power relative to the party one bargains with can translate into real power. Therefore, measuring perceptions of power also measures a component of bargaining power.

RESULTS AND DISCUSSION

Participant responses confirmed our overarching theory: different legal regimes resulted in different perceptions of bargaining power (Table 8.1). First, using the individual level responses, in general we found that under Regime A, the participants rated the employer's bargaining

Table 8.1 A Preliminary View of Bargaining Strength (Individual Response)

| Legal regime | Employer stronger | Employer weaker | Union stronger | Union weaker | E/U strength |
|--------------|-------------------|-----------------|----------------|--------------|---------------|
| AU | 23 | 1 | 6 | 17 | |
| AE | 17 | 3 | 4 | 16 | |
| BU | 4 | 11 | 11 | 4 | |
| BE | 8 | 4 | 7 | 6 | |
| CU | 9 | 6 | 13 | 1 | |
| CE | 2 | 10 | 15 | 0 | |
| AU+E | 40 | 4 | 10 | 33 | E: 36/U: (23) |
| BU+E | 12 | 15 | 18 | 10 | E: (3)/U: 8 |
| CU+E | 11 | 16 | 28 | 1 | E: (5)/U: 27 |

NOTE: The raw score does not add up to 120 since we did not include "no effect" and "did not answer" in this table. Parentheses indicate a negative value.

power as net 59 points stronger than the union's. Under Regime B, the participants rated the union's bargaining power as net 5 points stronger than the employer's, essentially a tie. Under Regime C, the participants rated the union as net 22 points stronger than the employer. Each regime has a different pattern of perceptions of bargaining power. These differences are confirmed in other data from this study reported in Dannin and Singh (2004).

While our general theory that law affects perceptions of bargaining power is supported by the data, our theories as to individual regimes were only partly supported. Thus, in two cases (Regimes A and B), our hypotheses were confirmed, and in one (Regime C) they were not. The detailed data on which those conclusions are based are included below.

In Regime A individual responses, the union participants thought the law weakened the union (23 percent union stronger versus 65 percent union weaker), and saw the law as greatly strengthening the employer (89 percent employer stronger but 4 percent employer weaker). The employer respondents agreed that the law strengthened the employer (77 percent employer stronger versus 14 percent employer weaker) and weakened the union (18 percent union stronger but 73 percent union weaker) (Tables 8.2A and 8.2B).

The caucus level responses were in the same direction but more highly skewed. Union respondents saw Regime A as weakening the union (8 percent union stronger to 83 percent union weaker) and as strengthening the employer (92 percent employer stronger to 8 percent employer weaker). Employer respondents also saw the regime as weakening the union (0 percent union stronger versus 82 percent union weaker) and strengthening the employer (82 percent employer stronger to 9 percent employer weaker) (Tables 8.3A and 8.3B).

In short, these results support the hypotheses as to Regime A with respect to bargaining strength. The participants saw the law as creating a highly unbalanced bargaining structure, with employer bargaining power from three to four times greater than the union's. Such skewed bargaining power could destabilize or undermine collective bargaining to such a degree that it recreates the power relations the NLRA was enacted to rebalance (Dannin 2004). These results were in accord with other data from this study that found strong dislike for Regime A among the participants. They saw the law as highly unbalanced. Far more of

Table 8.2A The Effect of Caucus on the Strength of Your Own Bargaining Position (Individual Response, %)

| | UA | UB | UC | EA | EB | EC | Total |
|----------------|------|------|------|------|------|------|-------|
| Strengthened | 23.1 | 52.4 | 76.5 | 77.3 | 50.0 | 11.1 | 47.5 |
| Weakened | 65.4 | 19.0 | 5.9 | 13.6 | 25.0 | 55.6 | 32.5 |
| Did not affect | | 9.5 | | | 12.5 | | 3.3 |
| No answer | 11.5 | 19.0 | 17.6 | 9.1 | 12.5 | 33.3 | 16.7 |
| <i>N</i> | 26 | 21 | 17 | 22 | 16 | 18 | 120 |

NOTE: Chi-square = 48.31; d.f. = 15; and $p < 0.01$.

Table 8.2B The Effect of Caucus on the Strength of Your Partner's Bargaining Position (Individual Response, %)

| | UA | UB | UC | EA | EB | EC | Total |
|----------------|------|------|------|------|------|------|-------|
| Strengthened | 88.5 | 19.0 | 52.9 | 18.2 | 43.8 | 83.3 | 51.7 |
| Weakened | 3.8 | 52.4 | 35.3 | 72.7 | 37.5 | | 33.3 |
| Did not affect | | | | | | 5.6 | 0.8 |
| No answer | 7.7 | 28.6 | 11.8 | 9.1 | 18.8 | 11.1 | 14.2 |
| <i>N</i> | 26 | 21 | 17 | 22 | 16 | 18 | 120 |

NOTE: Chi-square = 55.36; d.f. = 15; and $p < 0.01$.

the participants wanted to alter the law of Regime A to make it more fair (Dannin and Singh 2005).

The results of Regime B show a very different pattern. The individual responses from union respondents saw the law as tending to strengthen the union (52 percent union stronger and 19 percent union weaker, and 29 percent no answer or no effect) and weaken the employer (19 percent employer stronger, 52 percent employer weaker, and 29 percent no answer or no effect). Employer respondents, however, tended to see the law as strengthening the employer (50 percent employer stronger, 25 percent employer weaker, and 25 percent no effect or no answer), while having a more neutral impact on the union (44 percent union stronger versus 38 percent union weaker and 19 percent no answer) (Tables 8.2A and 8.2B).

The caucus level results were similar. Union caucuses saw the law as strengthening the union (67 percent stronger versus 11 percent union weaker and 22 percent no response or no effect) and weakening the em-

Table 8.3A The Effect of Caucus on the Strength of Your Own Bargaining Position (Caucus Response, %)

| | UA | UB | UC | EA | EB | EC | Total |
|----------------|------|------|------|------|------|------|-------|
| Strengthened | 8.3 | 66.7 | 88.9 | 81.8 | 62.5 | 11.1 | 51.7 |
| Weakened | 83.3 | 11.1 | | 9.1 | 37.5 | 77.8 | 37.9 |
| Did not affect | | 11.1 | | | | | 1.7 |
| No answer | 8.3 | 11.1 | 11.1 | 9.1 | | 11.1 | 8.6 |
| <i>N</i> | 12 | 9 | 9 | 11 | 8 | 9 | 58 |

NOTE: Chi-square = 36.29; d.f. = 15; and $p < 0.01$.

Table 8.3B The Effect of Caucus on the Strength of Your Partner's Bargaining Position (Caucus Response, %)

| | UA | UB | UC | EA | EB | EC | Total |
|----------------|------|------|------|------|------|-------|-------|
| Strengthened | 91.7 | 11.1 | 33.3 | | 50.0 | 100.0 | 47.4 |
| Weakened | 8.3 | 44.4 | 55.6 | 81.8 | 50.0 | | 40.4 |
| Did not affect | | | | 9.1 | | | 1.8 |
| No answer | | 44.4 | 11.1 | 9.1 | | | 10.5 |
| <i>N</i> | 12 | 9 | 9 | 11 | 8 | 8 | 57 |

NOTE: Chi-square = 46.43; d.f. = 15; and $p < 0.01$.

ployer (11 percent employer stronger versus 44 percent employer weaker and 44 percent no response). However, the employer caucuses saw the law as strengthening the employer (62 percent employer stronger versus 38 percent weaker) and having no effect on the union's bargaining power (50 percent union stronger and 50 percent union weaker). These results support our hypothesis that neither Regime B employer nor union is favored in terms of bargaining strength (Tables 8.3A and 8.3B).

Certainly, the perception of Regime B's impact on bargaining strength differs markedly from that of Regime A. Both Regime B unions and employers saw the law as more likely to strengthen themselves and weaken their partner. Obviously this cannot reflect reality. What it may suggest is that each saw the law as treating them fairly and as providing ways to increase their bargaining power. This overall satisfaction with Regime B suggests resolving private sector impasses through interest arbitration could be more acceptable to both employers and unions than the current system (U.S. Commission on the Future of Worker-Management Relations 1994).

Of course, experience with actual interest arbitration might alter this attitude. There is a well-known concern that interest arbitration creates dependency and weans employers and unions away from real collective bargaining (the “narcotic effect”) (Kochan and Katz 1992). Certainly, anyone who pays attention to public sector collective bargaining knows that the availability of interest arbitration has not brought about labor relations nirvana.

Nonetheless, given the study results, it seems worthwhile to rethink potential uses for interest arbitration in the context of private sector collective bargaining. For example, it is widely believed that private sector bargaining is undermined by the weak remedy of a bargaining order when an employer has engaged in bad faith bargaining. This is seen as giving an employer who is determined to engage in bad faith bargaining a virtual license to continue this conduct. The NLRA says nothing about bargaining orders and certainly does not mandate them as a remedy for bad faith bargaining. What the NLRA does require under §10(c) is that remedies effectuate the policies of the NLRA. Section 1 states: “It is hereby declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of [workers’] employment . . .” If interest arbitration is more likely to promote the practice and procedure of collective bargaining than an order to bargain in good faith, then it might make sense for the NLRB to order interest arbitration in appropriate cases (Dannin forthcoming).

The point is that an employer who faced an order to interest arbitration if it engages in bad faith bargaining might be more interested in reaching a negotiated agreement than in having an arbitrator impose terms. The results of this study and other survey answers by Regime B participants not discussed would support such a remedy (Dannin and Singh 2002, 2004, 2005).

Regime C responses demonstrate yet a third pattern. Individual union negotiators saw the law as greatly strengthening union bargaining power (77 percent union stronger, 6 percent union weaker, and 20 percent no answer or no effect), and also as generally enhancing employer bargaining power (53 percent employer stronger versus 35 percent union weaker, and 12 percent no answer). Employers, however, saw the law as greatly strengthening union bargaining power (83 percent union stronger and 17 percent no effect or no answer) while weakening

employer bargaining power (11 percent employer stronger versus 56 percent employer weaker, and 33 percent no answer) (Tables 8.2A and 8.2B).

The caucus level response for Regime C shows a similar pattern. Union participants saw the law as greatly strengthening union bargaining power (89 percent union stronger and 11 percent no answer) and tending to weaken employers (33 percent employer stronger and 56 percent employer weaker, with 11 percent no answer). Employer participants again saw the law as giving unions overwhelming strength (100 percent union stronger) and greatly weakening employers (11 percent employer stronger versus 78 percent employer weaker, with 11 percent no answer) (Tables 8.3A and 8.3B).

We had theorized that Regime C would have a fairly neutral impact on bargaining strength since both employers and unions had the economic weapons of lockout and strike but no others. Put in economic game theory terms, we saw it as akin to an ultimatum game with punishment. That is, if a party made an unacceptable offer, the offeree's refusal to accept would mean that neither received the benefits of change. Furthermore, the parties could use the strike and lockout weapons to punish the other for an unacceptable offer.

The results, however, did not support our predictions that the law in Regime C would have a neutral effect. Participants did not see the law as neutral. They perceived it as strongly increasing union bargaining power. It is possible the participants, who had little experience with collective bargaining, felt the strike was a very strong weapon (Fossum 2002). In addition, at the time the sessions were run, unemployment was low and the economy so strong that it was well known that employers were having trouble finding workers. As a result, the environment was one in which employers had relatively low leverage. It is also possible that the participants felt that employers should control workplace terms or that employees and unions were likely to behave irresponsibly. Yet another possibility is that the participants thought that Regime C would let even a weak union in poor economic conditions hold negotiations hostage.

Again, turning to economic game theory, Regime C is an ultimatum game with punishment except that, in some cases, the punishment does not fall equally on both. A party can use punishment to give itself a reward. It gives a party who lacks the strength to use economic weap-

ons the power to hold up changes the other party needs or desires by simply refusing to agree. It may also disproportionately reward a party who is happy with the status quo. Unlike Regime A, Regime C does not pick winners and losers. That is, it will not always be the union or the employer who wants to hold up change. For example, an employer who did not want to increase wages could simply refuse to agree, and a union that opposed subcontracting or other structural changes could easily retain the status quo.

Of course, over time, the parties would develop strategies to negotiate their way out of impasses. A union might accede to changes that harmed employees if it believed this was preferable to harming the company and losing all jobs, and an employer might accept wage increases, because it would be better to give workers a bigger slice of the pie than have no pie at all. In other words, the “dog in the manger” phenomenon that lurks in this scenario might be overcome, because we can trust the parties to create a fair structure over time. If not, it may be useful to consider lessons from economic bargaining experiments and provide some sanction for a non-cooperator. Imposing interest arbitration as a remedy for overly long and destructive impasses could be a sanction that would resolve the impasse and push the parties to bargain.

On the other hand, if these results reveal how such a law would work in reality, it could lead to deep employer grievance, essentially the mirror image of what unions feel under private sector law now. The question this raises for law reform is whether it is possible to alleviate the employer sense of unfairness without making unions feel deeply aggrieved. These results are particularly interesting, given the advocacy for a system of collective bargaining based on economic weapons (Troy 1999).

CONCLUSION

In this study, we found that each law had a different impact on participants’ perceptions of bargaining strength. The scenarios were the same with the exception of the law that applied to impasse resolution. The results show that this fact alone had a powerful effect on the participants’ perceptions of bargaining power, and that these perceptions im-

bued the entire process of bargaining and not only to the single event of reaching an impasse. The study therefore provides support for the basic theory that collective bargaining law should properly be seen as a resource that, along with other resources, can affect bargaining strength. Thus, the results suggest that theories about bargaining power that fail to include law will lack predictive power.

The results also confirm theoretical and anecdotal contentions that the judicially created doctrines of permanent striker replacement and implementation of the employer's final offer upon impasse seriously weaken union bargaining power relative to the employer (Dannin 2005).

The study design provided a fertile way to test how specific laws operate. Given the nature of social science experiments in general and of these in particular, we interpret our results with caution. The way we use them is if our predictions were not confirmed or were found not to exist in the study context, then this would not prove that the effects did not exist in actual labor negotiations, but such a result would suggest caution in assuming they would. On the other hand, if predicted effects are found, this does not mean they will be found in actual labor negotiations, but it makes the expectation more plausible and provides insights and a baseline for comparing what actually happens.

In addition, the results provide guidance as to how discrete aspects of the law affect bargaining power and the formulation of bargaining strategy. Ultimately these ought to affect collective bargaining outcomes. The results also provide some evidence whether common sense instincts about a regime's effects are reflected in human behavior.

Finally, we think it is important to emphasize that we examined the reactions of nonpartisan, disinterested participants to different collective bargaining regimes. For this reason, their responses provide a special window into the operation of the law. Most of those who comment on labor law are highly partisan and self-interested. Therefore, the intensity and unanimity of the views of both those who took the roles of employer and union negotiators in their caucuses as to impasse resolution in the private sector deserves special attention. The NLRA was enacted to promote equality of bargaining power between employers and employees. The study participants, however, perceived a law that is highly unbalanced. The participants saw the judicially created doctrines

of striker replacement and the employer's right to implement its final offer upon impasse as heavily skewing power toward the employer.

The NLRA was enacted because Congress concluded that law—corporate law at the time—so unbalanced bargaining power that workers had lost the ability to bargain as equals with their employers. As a result, wage rates and the purchasing power of workers were depressed, leading to industrial strife and unrest. The results of this study suggest that at least in the private sector, law—in this case, judge-made law—has so unbalanced bargaining power that private sector worker rights are again in danger.

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Part 4

International Perspectives on Workers' Rights in the United States

Justice on the Job

**Perspectives on the Erosion
of Collective Bargaining
in the United States**

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