

Articles and Essays

FROM DICTATOR GAME TO ULTIMATUM GAME . . . AND BACK AGAIN: THE JUDICIAL IMPASSE AMENDMENTS

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In 1935, Congress decided to replace the “dictator game” that had long been used to set working conditions with an “ultimatum game” by enacting the National Labor Relations Act (NLRA). A dictator game is a two-player economic game in which player one proposes a division of resources and player two has no choice but to accept the offer. Economic theory predicts that in such a case, player one will offer nothing to player two. This is indeed the most common offer.¹ Before the NLRA was enacted, the law allowed the employer (player one), to offer terms of employment and essentially required the employee (player two), to accept the offer dictated by the employer.

The NLRA was enacted to replace this game with an “ultimatum game” by changing the balance of power between employers and employees and creating a system of wage setting that would better support the institutions of a democracy.² In an ultimatum game, player one

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1. Alvin E. Roth, *Bargaining Experiments*, in *THE HANDBOOK OF EXPERIMENTAL ECONOMICS* 253, 270 (John H. Kagel & Alvin E. Roth, eds. 1995).

2. Karl Klare, *The Horizons of Transformative Labour Law and Employment Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES & POSSIBILITIES* 3, 13-14 (Joanne Conaghan et al. eds., 2002). Congress designed the NLRA “to create a vibrant middle class, with higher wages, as a means of stimulating economic growth” and “support a prosperous consumer base” and also to quell labor unrest through a mandatory scheme of collective bargaining. Steven A. Ramirez, *The Law and Macroeconomics of the*

proposes a division of resources, and, if player two rejects it, neither receives anything.³ Economic theory suggests that the first player will offer a minimal amount to the second player and that the rational second player will accept any offer greater than zero. When tested, however, this theory repeatedly has proven false.⁴ Player one commonly offers substantially more than the minimum amount and often splits the sum. Player two tends to punish unfair divisions that is, those not approaching an even division.⁵ This dynamic means that proposers (player one) “are more generous in the ultimatum game than in the dictator game.”⁶ When player two has the ability to punish noncooperating (or nongenerous) proposers, proposing players tend to make more even offers.⁷

In enacting the NLRA, Congress gave employees the ability to punish an employer who did not make a fair offer by protecting collective action. The greatest punishment is the strike. As in the ultimatum game, it is a double-sided weapon; it deprives both the employer and employee of immediate gains. When employees hold this power, employers are pushed to be fair.

Of course, economic game theory was unknown in 1935, and Congress would not have understood what it was doing in these terms when it enacted the NLRA. However, Congress certainly did conceive of its actions within economic and social terms. It believed that wage deflation was caused by inequality of bargaining power between employers and employees, and it stated that wage deflation and depressed working conditions were threatening the country’s stability and destroying commerce.⁸ Congress observed that corporate law was to blame for this inequality because corporate law had enhanced employer power by transforming them from individuals into collective beings, while leaving employees with only the power of an individual.⁹ Congress decided to enact legislation that would give employees the right to become an equal

New Deal at 70, 62 MD. L. REV. 515, 549-51 (2003). Cf. C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KAN. L. REV. 77, 92-95 (2002).

3. Roth, *supra* note 1, at 270; see also Colin F. Camerer, *Strategizing in the Brain*, 300 SCIENCE 1673, 1673 (June 13, 2003); Alan G. Sanfey et al., *The Neural Basis of Economic Decision-Making in the Ultimatum Game*, 300 SCIENCE 1755, 1755 (June 13, 2003).

4. Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association, 1997*, 92 AM. POL. SCI. REV. 1, 11-12 (1998).

5. *Id.*

6. Roth, *supra* note 1, at 270 (citation omitted).

7. Ostrom, *supra* note 4, at 7-8.

8. 29 U.S.C. § 151 (1994) (describing the findings and declaration of policy of the NLRA).

9. This idea was not specific to the NLRA, rather, it grew out of a general view about corporations, and particularly large ones. Wells, *supra* note 2, at 79-80, 85-86, 94-95.

and opposing collective entity capable of rectifying the imbalance of bargaining power created by law itself.¹⁰ Therefore, the NLRA protects worker rights to freedom of association, self-organization, free choice of bargaining representatives, and meaningful collective bargaining both affirmatively¹¹ and by making employer violations of these rights illegal.¹²

Unfortunately, things have not turned out as Congress intended. Since 1935 there has been a return to the status quo ante so that now we live under a collective bargaining system that is closer to a dictator game than to the ultimatum game Congress created under the NLRA. Congress itself played a role in restoring pre-1935 conditions when it amended the NLRA in 1947 and 1958,¹³ amendments bitterly condemned by organized labor.¹⁴

Less noticed, but equally important have been radical judicial decisions that have “amended” the NLRA to take away the right of employees to engage in meaningful collective bargaining. Indeed, since the 1980s, the breadth of revision by the least democratic branch of government and the implications of this process have so transformed private sector wage setting that they have returned private employers and employees to a dictator game.¹⁵ These judicial decisions are so radical that they have actually replaced express provisions of the NLRA.

Among the most destructive of these are the “judicial impasse doctrines” decisions, which deal with the rights of employers and

10. 29 U.S.C. § 151.

11. *Id.* The National Labor Relations Act (NLRA) defines the duty to bargain collectively as the “mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . .” 29 U.S.C. § 158(d) (1994); see also Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 970-77 (1993) (describing the motivations behind the passing of the Wagner Act).

12. 29 U.S.C. § 158(a)(1)-(5) (1994).

13. Taft-Hartley Act, 29 U.S.C. §§ 141-197 (1994); Landrum Griffin Act, 29 U.S.C. §§ 401 et seq. (1990).

14. See *infra* notes 134-38 and accompanying text.

15. Laws affecting work appear particularly prone to this sort of treatment. Labor law is not the only area of employment law that has experienced this sort of judicial amendment. The Americans with Disabilities Act is another example. See Katherine R. Annas, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Part of an Emerging Trend of Supreme Court Cases Narrowing the Scope of the ADA*, 81 N.C. L. REV. 835, 845-47 (2003) (asserting that the Court’s decision suggests that “working” is not to be included among major life activities, thus profoundly narrowing ADA coverage). Judges in nineteenth century England rarely enforced aspects of labor contracts that protected employees, while, at the same time, criminally enforced the same terms against workers. Gunther Peck, *Contracting Coercion? Rethinking the Origins of Free Labor in Great Britain and the United States*, 51 BUFF. L. REV. 201, 204-05 (2003) (book review). For the history of judicial hostility to worker rights, see generally CHARLES O. GREGORY & HAROLD A. KATZ, *LABOR AND THE LAW* (3d ed. 1979).

employees when they reach an impasse in bargaining. These doctrines, examined below, allow employers to fire workers who strike, even though the NLRA explicitly protects that right; to implement changes in terms of work rather than bargain; and to deunionize, even though the NLRA gives employees alone the right to choose to be represented by a union or not. These judicial amendments have taken away the whole point of belonging to a union. When unions have no power to protect employees, give workers a voice in their working lives, and improve working conditions; when workers risk industrial capital punishment when they unionize and bargain, then unionization becomes less attractive to employees. As a result, in most workplaces, wages, hours, and terms of work are set by the dictator-game rules, better known as at-will employment.

This reversion to unilateralism affects far more than just the workplace. Many argue that work has a moral dimension when it enlists human beings as partners with God in the work of creation, when it is a source of dignity, and when it is not seen as the sole end of existence.¹⁶ If the pursuit of happiness and basic human rights, ideas upon which this country was founded, include economic rights,¹⁷ then when work is arranged to obstruct those rights it undercuts a fundamental and necessary component of American democracy. Some would even argue that when law denies workers a meaningful role in setting their wages, it recreates a system of slavery,¹⁸ a system rejected by this country a century and a half ago. Is a workplace that operates as a totalitarian system an institution that is appropriate to a democracy? Put another way, can those who are trained to and who do spend most of their waking hours ruled by such a system operate as citizens of a democracy? Does U.S. labor law deserve its recent condemnation by Human Rights Watch?¹⁹ Finally, if the vision of the NLRA's creators was correct—that a lack of equality of bargaining power

16. See generally Kevin J. Doyle, *The Shifting Legal Landscape of Contingent Employment: A Proposal to Reform Work*, 33 SETON HALL L. REV. 641 (2003) (discussing the influences of the principles of Catholic Social Thought on the legal regime governing contingent employment).

17. See Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557 (2003) (arguing that basic economic rights are a necessary part of the Declaration of Independence); see also Lance Compa and Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-year Review*, 22 COMP. LAB. L. & POL'Y J. 199 (2001) (discussing the history and effect of the Labor Rights Clause in the United States' General System of Preferences).

18. Peck, *supra* note 15, at 201-02 (2003).

19. See generally HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000), available at <http://www.hrw.org/reports/2000/uslabor/> (arguing that the rights of U.S. workers to unionize and bargain collectively are being attacked in the U.S. while the U.S. government is trying to stop the same kind of right violations abroad).

and an inability to codetermine wages and other working conditions leads to the breakdown of our economic system and ultimately our society,²⁰ do we fail to act at our peril?

Sadly enough, as this article describes, statutory reform is not the answer as long as judges blatantly can amend legislation. In such a system, any labor law passed can readily be subverted.

This article examines the judicial activism that has so dramatically rewritten one of this country's basic human rights laws.

I. THE JUDICIAL HI-JACKING OF THE NLRA

A. *The Decisions That Have Brought Us to Where We Are Today*

Although its original language is largely intact, the NLRA today is a far different law than when first enacted, largely as a result of judicial interpretations so broad, they actually override the NLRA's express language.²¹ This is often far from a subtle process. Consider the Supreme Court's 1992 opinion in *Lechmere, Inc. v. NLRB*.²² Critical to the opinion was whether union organizers were employees or not. Section 2(3) of the NLRA states: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . ." ²³ However, not only did the *Lechmere* majority not mention that the statute had a definition for employee, it created a definition of employee that directly contradicted the statute; the Court defined employee as being *limited* to the employees of a particular employer²⁴ and as a result, confined employee rights to the narrowest range possible and made it more difficult to

20. NLRA § 1 concludes:

It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

21. As used in this article, the term judge includes members of the National Labor Relations Board. At times it has been the Board that has radically reshaped the NLRA. This was particularly true during the 1980s when the Reagan Board pursued a course of unparalleled judicial activism.

22. 502 U.S. 527 (1992).

23. 29 U.S.C. § 152(3) (1994). The language of § 2(3) was carefully drafted and is the result of a long legislative and judicial history. See GREGORY & KATZ, *supra* note 15, at 341-474 (discussing the legislative and judicial history of the Act).

24. *Lechmere*, 502 U.S. at 531-32.

organize a union.²⁵

Through other decisions judges have created a series of doctrines that effectively have removed NLRA § 1's goals of promoting equality of bargaining power, encouraging the practice and procedure of collective bargaining, and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."²⁶ These activist decisions have replaced the NLRA's rights with ones that give employers rights to unilaterally set working conditions, to fire workers who have engaged in collective action for mutual aid and protection, and to usurp the employees' right to designate representatives of their own choosing. These judicial amendments eviscerate the ultimatum game the NLRA was meant to be and recreate the dictator game that existed before the NLRA was enacted.

As an ultimatum game, NLRA collective bargaining was designed to push the parties to resolve disputes themselves. It left it to the employer and employees acting collectively to use virtually any weapons at their disposal to achieve their goals. Although the law gave both wide ambit for action, there were limits—but only a few and only those necessary to maintaining the integrity of the ultimatum game. An employer could not discriminate against employees for joining or assisting unions,²⁷ could not create a sham/company union,²⁸ nor interfere with, restrain, or coerce employees in the exercise of a wide range of concerted activities.²⁹ An employer also violated the law if it "refuse[d] to bargain collectively with the representatives of [its] employees"³⁰ But nothing prohibited an employer from pressuring workers by locking them out or unions from pressuring employers by striking. Nothing prohibited workers from engaging in sit-down strikes or slowdowns. Nothing forced the parties to agree to any term or to reach an agreement at all. In other words, once the law helped the employees become collective, it left them and the employer to use whatever market power or powers of persuasion they had in

25. See generally, Ellen Dannin, *Teaching Labor Law Using Socio-Economic Methodology*, 41 U. SAN DIEGO. L. REV. (forthcoming 2003).

26. 29 U.S.C. § 151 (1994).

27. "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" 29 U.S.C. § 158(a)(3).

28. "It shall be an unfair labor practice for an employer—to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it" 29 U.S.C. § 158(a)(2).

29. "It shall be an unfair labor practice for an employer—to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title" 29 U.S.C. § 158(a)(1).

30. 29 U.S.C. § 158(a)(5).

negotiating, as long as they did not commit a handful of illegal actions.³¹ Should a bargaining impasse occur, it was not to be resolved by anything that would

compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met. But the right of workers to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives.³²

In other words, reaching an impasse left the parties with the status quo.

None of this describes today's private sector collective bargaining, even though the relevant legislative structure is virtually untouched. With the exception of legislative changes that outlawed secondary boycotts,³³ the most important amendments have come through administrative and judicial opinions that have given employers the right to permanently replace strikers;³⁴ taken away a union's ability to maintain discipline during a strike;³⁵ expanded the right of employers to lock out workers;³⁶ severely limited who is or is not an employee and thus protected by the Act;³⁷ and

31. Gary Chaison observes that the Wagner Act assumes a system of worker representation in which is embedded assumptions of industrial pluralism—the idea “that unions should act as counterweights to the power of employers and impose a system of self-governance at the workplace through the negotiation and enforcement of collective agreements.” Gary Chaison, *Information Technology: The Threat to Unions*, 23 J. LAB. RESEARCH 249, 250 (2002).

32. 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2335-36 (1935).

33. 29 U.S.C. § 158(b)(4) (1994). These were enacted in 1947 as part of Taft-Hartley's addition of § 8(b) which designated certain acts union unfair labor practices.

34. *See, e.g.*, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (holding that a company could discharge or threaten to discharge striking employees); *see also* Matthew W. Finkin, *Labor Policy and the Evisceration of the Economic Strike*, 1990 U. ILL. L. REV. 547, 548. (describing how, in recent years, employers have been resorting increasingly to permanent replacement of striking workers). For an analysis of recent union attempts to circumvent *Mackay*, see Rodney B. Sorensen, *Crossing the Picket Line in Support of the Union: The New Flavor of Salting*, 38 SANTA CLARA L. REV. 165 (1997).

35. *See* Pattern Makers' League v. NLRB, 473 U.S. 95 (1985) (affirming the Board's decision that union fines on resigning strikers constituted unfair labor practices).

36. *See* Michael H. LeRoy, *Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA*, 74 WASH. U. L.Q. 981 (1996) (providing empirical research regarding employers' use of lockouts); James B. Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. MICH. J.L. REFORM 47, 53 n.16 (1989) (discussing the Board's granting employers the right to use temporary workers during an offensive lockout).

37. *See, e.g.*, NLRB v. Nat'l Health Care & Ret. Corp., 511 U.S. 571 (1994) (holding that Board's test determining if nurses are supervisors was inconsistent with the statutory provision); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (holding that University's full-time faculty members are managerial employees and thereby are excluded from the Act's

created new methods for deunionizing.³⁸ More rarely seen but also important are judicial decisions that eliminate economic weapons such as the sitdown,³⁹ slowdown,⁴⁰ and partial strike⁴¹ and that have placed off limits the obligation to bargain about issues that profoundly affect employees—union rights to be notified and to bargain about decisions to transfer, change, or close operations.⁴² Judicial amendments now limit workers' rights to equality of bargaining power in unionized workplaces across the country.⁴³ Such weak protection for NLRA rights means unions have less to offer unorganized workers and makes union representation not worth the risk.

Each of these judicial amendments utterly defies express NLRA language. Although each of the judicial amendments to NLRA collective bargaining discussed here are independently important, their full impact on destroying employees' NLRA rights can only be understood as a whole.

coverage); *NLRB v. Bell Aerospace Co. Div.*, 416 U.S. 267 (1974) (holding that the NLRB can adjudicate on a case-by-case basis whether certain buyers are "managerial employees").

38. *See, e.g., Levitz Furniture Co.*, 333 N.L.R.B. 717 (2001) (holding employers may only withdraw recognition from incumbent union if it has lost the support of the majority of the bargaining unit employees).

39. *See, e.g., NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (holding that employees can be discharged if they engage in a seizure and forcible retention of an employer's factory building, essentially leaving sitdowns unprotected). Economic weapons such as slowdowns, sitdowns, and partial strikes do not violate the NLRA but rather, constitute unprotected means of engaging in concerted activities. The sanction is that the NLRB allows the employer to discipline or discharge the employee for engaging in those concerted activities. Zimarowski, *supra* note 36, at 97.

40. *See, e.g., NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477 (1960) (noting that slowdowns are unprotected, but not an unfair labor practice under 8(b)(3)); *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950) (discussing the treatment of slowdowns).

41. *See, e.g., Goya Foods, Inc.*, 238 N.L.R.B. 1465 (1978) (holding that intermittent work stoppages are unprotected).

42. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-79 (1981) (discussing whether an employer must engage in collective bargaining); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (affirming the Board's decision to direct company to resume maintenance operations and to continue bargaining with the union); *Dubuque Packing Co.*, 303 N.L.R.B. 386, 390-92 (1991), *enforced in part*, 1 F.3d 24 (D.C. Cir. 1993) (discussing factors used in employer decisions to relocate a work unit and hence engage in mandatory bargaining). The Supreme Court also has given the right to unilaterally alter the pension rights of retirees. *See, e.g., Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (holding that "modification" of a collective bargaining contract, even if unilateral and mid-term, is a prohibited unfair labor practice only when it changes a term which is a mandatory rather than permissive subject of bargaining).

43. Brudney contends that since 1970, unions have fared substantially worse with regard to Supreme Court interpretations of NLRA rights. James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1572-91 (1996).

B. *The Judicial Amendment Permitting Striker Replacement*

Within a few years of the NLRA's enactment, the Supreme Court gave employers the right to replace workers who went on strike.⁴⁴ Permanent replacement of strikers and the representation process have long been the subject of intense scholarly and legislative attention and condemnation.⁴⁵

It is simply impossible to square allowing an employer to permanently replace an employee who has done no more than strike with the plain language of the NLRA. Sanctioning permanent replacement allows an employer to discharge an employee for engaging in lawful activities. Section 13 unambiguously protects the right to strike: "Nothing in this Subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right."⁴⁶ In addition, an employer violates § 8(a)(3) if it discriminates against an employee in hire or tenure because of the employee's union activities.⁴⁷ Section 8(a)(1) forbids employer actions that restrain, coerce, or interfere with employee § 7 rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities"⁴⁸

If sections 7, 13, and 8(a)(1) and (3) are to have meaning, they must proscribe actions that directly and indirectly violate their express language. Yet although striking is a union and a concerted activity, although it is a concerted activity for the purpose of collective bargaining or other mutual aid or assistance, and although it also assists a labor organization, the courts have contradicted the NLRA's express language and effectively amended the Act by permitting an employer to violate all of these rights when it permanently replaces a striker.⁴⁹ Even if permanent replacement of

44. See, e.g., *Mackay*, 304 U.S. 333 (holding that employers could replace striking workers).

45. See, e.g., HUMAN RIGHTS WATCH, *supra* note 19, at pt. I (studying the effect of replacement workers on unions). For an overview of law review articles and legislative responses, see Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 363-67 (1995) (attacking the alleged economic efficiency of the *Mackay* doctrine); Michael H. LeRoy, *Institutional Signals and Implicit Bargains in the ULP Strike Doctrine: Empirical Evidence of Law as Equilibrium*, 51 HASTINGS L.J. 171, 172 n.7 (1999) (examining the declining right to strike in labor law).

46. 29 U.S.C. § 163 (1994).

47. 29 U.S.C. § 158(a)(3).

48. 29 U.S.C. § 157 (1994).

49. James Zimarowski observes:

strikers did not violate the Act's express language, it certainly undercuts the stated purposes of the Act. An employer's power to replace strikers profoundly rebalances bargaining power.⁵⁰ A worker who can be permanently replaced for striking is a worker who will be reluctant to take advantage of the right to freedom of association, self-organization, and other mutual aid or protection and whose bargaining power is decreased rather than being made more equal with the employer.

Striker replacement is not an aberration. It operates with other judicial amendments to individually and collectively eviscerate NLRA rights.

C. *Judicial Developments in Lockout Rights*

An employer's right to lock out is an economic weapon that, in many ways, seems to be equivalent to the employee's right to strike. Both exert economic pressure to force a bargaining partner to agree to an offer. Unlike strikes, however, lockouts exist in a difficult tension with the prohibitions of § 8(a)(1) and (3). A lockout literally punishes employees for engaging in rights protected by § 7 and for the union activity of collective bargaining. Lockouts now tend to last for years.⁵¹ Because the

The distinction between being permanently replaced and being discharged is lost on most employees. The employer is, of course, prohibited from discriminatorily denying reemployment to the replaced worker. The replaced worker continues as an "employee" until rehired, or until she finds suitable substitute employment, and is relieved of employment selection process hurdles, can vote in representational elections within twelve months of severance, and has preferential recall rights. Economic reality, however, will induce even the most diehard union member to seek other means of support during this interim period. A right to permanently replace striking workers, read in context with sections' 7 and 13 protections from interference with lawful concerted activity, raises significant NLRA policy problems because, as one noted labor law scholar observed, "one can conceive of few interferences greater than permanent replacement for striking."

Zimarowski, *supra* note 36, at 98.

50. See HUMAN RIGHTS WATCH, *supra* note 19, at pt. II (asserting that permanent replacement undercuts a fundamental right of workers); John W. Budd, *Canadian Strike Replacement Legislation and Collective Bargaining: Lessons for the United States*, 35 IND. REL. 245 (1996) (analyzing Canadian data to suggest that the presence or absence of legislation prohibiting employers from hiring replacement workers significantly affects bargaining power relationships).

51. Lockouts are lasting increasingly long periods. Michael LeRoy found that before *Harter Equipment*, in 1986, 31% of replacement lockouts lasted more than one year. After *Harter*, 75% of replacement lockouts lasted more than one year. He concluded that that decision had contributed to a substantial prolongation of replacement lockouts. LeRoy, *supra* note 36, at 1023.

LeRoy also found that lockouts begun in 1982 lasted an average of 96 days; in 1983 for 120 days; in 1984 for 67 days. After *Harter*, the length of lockouts increased dramatically: in 1987 for 652 days; in 1988 for 612 days; in 1989 for 778 days; in 1990 for

employer controls the start and the end of the lockout, a lockout is close to a discharge if long-term. In contrast, striking to exert economic pressure does not violate the law, so employees have a legal right to choose whether and when to strike or to end a strike and return to their jobs (assuming they have not been permanently replaced).⁵² No statute protects an employer's right to lock out employees.

Taken further, an employer that locks out its employees for years because they refuse to agree to the employer's proposal and then hires new employees to do their work has effectively fired them. Firing employees for refusing to agree to an employer's offer should lead to a finding that the employer violated § 8(a)(3) for discharging workers for their union activities; § 8(a)(1) for interfering with, restraining and coercing workers for engaging in concerted activities to provide mutual support to one another with regard to their wages, hours and other terms and conditions of employment; and § 8(a)(5) for bargaining in bad faith by using a technique that violated workers' legal rights.⁵³

In the early days of the NLRA, the courts recognized that lockouts are not equivalent to strikes and could easily violate the purpose of the law. If a lockout has the potential to infringe on NLRA rights, the ability to replace locked out workers certainly does. In its most destructive form, an employer could lock out workers and replace them, but never end the lockout. The resulting discharge for union and concerted activities also could allow an employer to destroy the union's power to represent the workers. In the past, the courts were thus careful to severely circumscribe the right to lock out. More recently, however, courts have dramatically expanded the employer's right to lock out. Courts have moved away from permitting employers to lock out only defensively, that is, to lock out only

1087 days; and in 1991 for 1010 days. *Id.* at 1027.

52. Furthermore, although parallels exist in the purposes of lockouts and strikes, it cannot be forgotten that they take place in a context in which employers generally have greater power than do employees, including the power to weather a lockout or strike situation. An employer who is faced with a strike or lockout potentially can stockpile products, shift the work to supervisors, nonunit employees, other work units, or subcontractors, or can increase productivity through the purchase of machinery. Employees faced with a strike or lockout can look for temporary work or rely on income from family members, strike benefits, charity, or potentially unemployment benefits, although they generally are not available in fact. Even though these courses of action seem parallel in providing for an income stream for the employer and employee, the different situations of the parties mean these options are less certainly available for the employee than for the employer. For example, while employers can order supervisors or non-unit employees to do the work created by the strike, employees cannot order another employer to hire them. Of course, the factors that affect employers or employees during a strike are many and complex, and there may be situations in which an employer can be more damaged by economic action than can an employee.

53. *Cf. Estlund, supra* note 11, at 933-36.

to protect a multi-employer bargaining group from being whipsawed when a union strikes only one employer in the group or to preempt a union's ability to choose a time to strike that would most injure the employer.⁵⁴ In 1965, employers were allowed to lock out offensively as well, that is, to place economic pressure on a union to agree to an employer's offer.⁵⁵

A parallel course of judicial decisions has removed restrictions that once prevented employers from hiring replacement workers during a lockout. Before 1986, employers were allowed to use only temporary replacements and then only in defensive lockouts. In 1986, the Reagan NLRB decided that employers could use temporary replacements during offensive lockouts as well.⁵⁶

The most dramatic judicial rewriting of the NLRA and legalizing of what is in essence a violation of § 8(a)(3) came in the D.C. Circuit's 1997 decision in *International Paper v. NLRB*.⁵⁷ The court allowed the employer to permanently displace⁵⁸ the workers it had locked out.⁵⁹ In *International Paper*,⁶⁰ the parties began bargaining for a successor contract in early January 1987. On February 20, the employer presented its "best and final" offer and said it would lock out the employees if the union did not accept it. On March 7, after the offer was rejected, International Paper (IP)

54. Compare *NLRB v. Truck Drivers Local Union No.449 (Buffalo Linen)*, 353 U.S. 87 (1957) (identifying conditions where an employer legally may lock out employees) with *Quaker State Oil Refining*, 121 N.L.R.B. 334 (1958) (describing negotiation circumstances in which an employer's lockout was illegal).

55. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 278 (1965).

56. See, e.g. *Harter Equip., Inc.*, 280 N.L.R.B. 597 (1986), *aff'd sub nom.*, *Operating Eng'rs Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). Of this trend, Zimarowski notes:

It presents a common balancing of interests problem under the NLRA. It should be noted that a strike had not been called. The employees were ready and willing to continue their labor, and although the contract had expired, the parties were still at the bargaining table. Balancing the employees' statutory rights against an employer's prerogative to continue operations on its own unilateral terms, the Board held that using temporary replacements during an offensive lockout had "a comparatively slight adverse effect on protected employee rights." The Board almost reverently approached the employer's prerogative and power to continue operations using ostensibly temporary replacements. One can view the Board's methodological approach as highly suspect in light of labor history and NLRA policy. "We reject the argument that the Board should require more proof of an employer's legitimate purpose in such a case or should engage in balancing employer interests against employee rights to determine whether the Act has been violated, even in the absence of independent proof of unlawful employer motivation."

Zimarowski, *supra* note 36, at 53 n.16 (citation omitted).

57. 115 F.3d 1045 (D.C. Cir. 1997).

58. The word "displace" is used here to distinguish this scenario from striker replacement.

59. *Int'l Paper Co.*, 115 F.3d at 1045.

60. *Id.* at 1046.

unilaterally implemented its proposal and then hired temporary replacements through BE&K.⁶¹ On March 21, it locked out its Mobile, Alabama employees, to prevent what it said would be whipsawing.⁶²

During the lockout, IP gave the union a proposal stating that IP could, “at its option, contract out any or all mill maintenance work on a temporary or permanent basis.”⁶³ The unions insisted they were willing to bargain about the subcontracting proposal. To have done otherwise would have put them at impasse and given the employer the ability to implement its final offer, but there was no doubt that the union was strongly opposed. One representative said, “[D]o you think that we are going to give up 280 jobs? We want to stay alive. You’re going to get us killed.”⁶⁴ On August 11, IP declared an impasse and implemented a permanent subcontract of the maintenance work, thus, as the court of appeals put it, “fulfilling its bargaining obligations on the issue.”⁶⁵

The court reached this conclusion because it looked only at each discrete action by IP, deracinated from its legal context, and concluded that, since each step was sanctioned by law, so too must be the whole act. Thus, past judicial decisions said employers have the right to lock out employees, so the lockout was legal.⁶⁶ IP was also permitted to hire temporary replacements to fill the locked out workers’ jobs. IP had the right to propose that it have the right to subcontract this bargaining unit work permanently and solely at its discretion. The union could have acceded to the employer’s demand, but had it done so it would have committed institutional suicide. The employer must have known that the union could never agree to this term and that therefore the parties would certainly and quickly reach an impasse. When the union refused to agree, IP declared that the parties were at impasse and, as it had the legal right to do,⁶⁷ implemented the subcontracting proposal and then subcontracted the work, permanently as far as the union knew. With that act, the employer de facto discharged the unit employees, destroyed the bargaining unit, and ended the union’s status as the unit’s representative.

Had the court looked at all these acts in the aggregate, it would have

61. Unilateral implementation is discussed below. See *infra* notes 68-90 and accompanying text.

62. *Int’l Paper Co.*, 115 F.3d at 1047.

63. *Id.*

64. *Id.*

65. *Id.*

66. This conclusion was probably wrong because IP had already unilaterally implemented its final offer. As a result, it had no offer on the table and thus no reason to exert economic pressure. It also could not characterize the lockout as a defensive lockout, because all of its competitors were other International Paper plants.

67. The employer’s right to implement its final offer at impasse is discussed below. See *infra* notes 68-90 and accompanying text.

seen that what IP had done was discharge employees solely for not agreeing to the employer's offer, an act that violates § 8(a)(3) and (5). Even had the court failed to consider the express language of the NLRA, it might have asked how permitting an employer to pursue this course of action furthers the Act's goals of promoting equality of bargaining power and collective bargaining.

Indeed, had the court thought about the parties' actions and their meanings, it would have seen that IP was in no danger of a strike. The union had said it would not strike despite the parties' failure to reach an agreement. A thoughtful court ought to have found this curious and, had it considered the matter, would have understood that the union could not strike because it was afraid IP would permanently replace the strikers. The court would have also seen that the union faced an employer to which the law had given the power to dictate an offer that the union had no power to reject and to use the most extreme measures to enforce that power. The statute said that the dictator game had ended in 1935. The courts say otherwise.⁶⁸

D. *Looking at the Role Implementation upon Impasse Plays*

In its iteration of the dictator game, International Paper twice implemented its final offer upon reaching a bargaining impasse. Indeed, though less dramatic than a lockout or than displacing or replacing a worker, IP could not have achieved its ends had the courts not given employers the power to implement their final offers upon impasse.⁶⁹ This

68. The Board has not acquiesced in this interpretation and so far, no court has followed it. It is thus impossible to say that this will be the law. Yet this trend is one that should concern those who support legalized collective bargaining. Workers who are unwilling to capitulate to any offer their employer makes can be locked out and then permanently displaced. *Fairfield Tower Condo. Ass'n, ALJD-54-02, Case No. 29-CA-24243* (Sept. 24, 2002).

International Paper is so close to permitting discharge for refusing to agree to an employer's offer—an act that would be a clear violation of § 8(a)(3)—that it is difficult to see any difference. Will the Court's next step be to decide that permanent replacement after a lockout is legal? If this is legal under the NLRA, then what is left of the NLRA's policy of promoting collective bargaining?

69. See, e.g., *THE DEVELOPING LABOR LAW* 639-43 (Patrick Hardin ed., 3d ed. 1992) (discussing conditions in which it is either permissible or impermissible for an employer to take unilateral action upon reaching impasse). To further explore the doctrine and its development, see J. Gilmer Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956); Ellen J. Dannin, *Collective Bargaining, Impasse and the Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment?*, 19 U. TOL. L. REV. 41 (1987) [hereinafter Dannin, *Fulfillment*]; Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMPL. L.J. 11 (1997) [hereinafter Dannin, *Legislative Intent*]; David G. Epstein, *Impasse in Collective Bargaining*, 44 TEX. L. REV.

doctrine and its implications have not received as much attention as replacement or lockouts, but implementation gives employers the power to destroy collective bargaining.

If workers had the power to engage in an effective strike, if employers could not lock out workers, if employers could not hire replacements in either strikes or lockouts, and if employers could not hire permanent replacements, then implementation upon impasse might have less impact. In that world, any time the employer reached an impasse and said it planned to implement its final offer, the workers would walk out and there would be no one left upon whom those terms could be imposed. Eventually the employer or the union or both would conclude that it or they could not continue without workers or without work, and they would go back to the table and work out an agreement. Equal bargaining partners would flex their economic power to co-determine workplace terms. We would see the purchasing power of wage earners increase and wages and working conditions stabilize within and between industries. The strike would give workers voice by giving them a way to tell their employer what they want and ensuring that the employer would hear their message.⁷⁰ It allows workers to punish the employer who makes an inadequate offer. Yet the pain a strike inflicts on workers would mean that this punishment would not be administered lightly. This is the ultimatum game world the NLRA was supposed to have created.

But that is not the world in which private sector collective bargaining takes place today. Instead, employees do not strike because they fear replacement.⁷¹ The employer negotiates secure in the knowledge that if the union does not agree to the employer's offer, the employer has the right to impose whatever terms it wants without regard to their reasonableness or value to the workplace or society.⁷² Employers know they can rid themselves of any employees who strike and, if the employees are afraid to

769 (1966); Joseph E. Kolick & Merle M. DeLancey, *Can One Unilaterally Gain the Right to Make Unilateral Changes in Working Conditions?*, 9 LAB. LAW. 137 (1993); Terrence H. Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1 (1977); George Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470 (1966); Mark Stolzenburg, Note, *Blind Faith or Efficiency? The Differences Between the Fifth Circuit and All Others on the Topic of Private Sector Impasse Bargaining*, 80 WASH. U. L.Q. 1341 (2002).

70. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 94-110 (1984) (discussing the union voice effect on exit behavior).

71. In 2001, the total number of strikes fell to historic lows, and just three public sector strikes accounted for 40% of all workers on strike. *Total Work Stoppages Fall in 2001 to Historic Low of 29 Strikes or Lockouts*, 59 Daily Lab. Rep. (BNA), at D-9 (Mar. 27, 2002).

72. Although theory would suggest that employers would be rational actors and would not insist to the point of impasse on terms that are of no value to them, this is not necessarily the case. See, e.g., Dannin, *Legislative Intent*, *supra* note 69, at 18 n.39 (describing a situation where employer insisted to impasse on terms it could not use).

strike, the employer can force them off the job and then replace them. In this world, not agreeing with the employer is not an option. If the union agrees to (or capitulates to) what the employer demands, the employer gets what it wants. If the union does not agree to what the employer demands, the employer gets what it wants. Workers have no effective voice mechanism because judges have amended the law to allow employers to turn a deaf ear to employee preferences. The results of this interplay of power, this return to the dictator game, bleed into society and the economy and affect us all.⁷³

Implementation upon impasse affects both the process of collective bargaining and the resulting terms of employment, the substance of bargaining.⁷⁴ In the hands of those who understand labor law and collective bargaining and who have the will to press its use to the maximum, implementation upon impasse can be used to redefine bargaining power. Although it formally operates only when the parties are deadlocked, in fact, it casts a long shadow backward, shaping behavior throughout negotiations.⁷⁵ It allows an employer to fulfill all of its obligations to

73. Paula Voos observed of bargaining in the 1980s:

As tactics to gain leverage, some employers used threats of work relocation, hired permanent replacements in strike situations, and/or unilaterally implemented terms and conditions of employment where workers decided a strike was ill-advised The underlying context of high unemployment, increased competition, and the increasingly evident problems faced by unions in organizing workers and keeping them organized, all facilitated confrontational bargaining.

Paula B. Voos, *Introduction: An Economic Perspective on Contemporary Trends in Collective Bargaining*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 1, 3 (Paula B. Voos ed., 1994).

74. Bronfenbrenner found that employers engaged in hard bargaining on union security clauses in 50% of cases, reducing the likelihood of gaining a contract from 92% to 68%; declared impasse and implemented final offers in 7% of cases, reducing agreement from 82% to 57%; forced a strike through unacceptable demands in 7% of cases, reducing agreement from 85% to 14%; and organized a decertification campaign in 14% of cases, with the agreement rate dropping from 88% to 29%. Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law in RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 85 tbl. 5.2 (Sheldon Friedman et al. eds., 1994). Another study found unilateral implementation by management of its last offer in 23% of negotiations. Joel Cutcher-Gershenfeld et al., *Collective Bargaining in Small Firms: Preliminary Evidence of Fundamental Change*, 49 INDUS. & LAB. REL. REV. 195, 204-05 (1996).

75. A negotiation simulation found strong evidence of this effect across three different regimes for resolving bargaining impasses. Ellen Dannin & Gangaram Singh, *The Force of Law on Collective Bargaining Strategies: Empirical Research and Labor Law Reform* (2002) (unpublished paper on file with author) [hereinafter Dannin & Singh, *The Force of Law*]; Gangaram Singh & Ellen Dannin, *Law and Collective Bargaining Power: Results of a Simulated Study* (2002) (unpublished paper on file with author) [hereinafter Singh & Dannin, *Simulated Study*].

bargain while driving straight toward unilateral action. An employer who wants to reach an impasse and implement can simply offer its wish list, knowing it will be unacceptable to the union. A truly savvy and driven employer can use implementation upon impasse alone or with replacement and/or lockout to legally de-unionize;⁷⁶ to use the legal methods to usurp rights the NLRA meant to give only to employees, and to recreate the dictator game.

The next sections present theory and knowledge about implementation upon impasse and then consider its operation in conjunction with the other judicial amendments that have collectively reestablished the pre-NLRA world.

1. Theory

When an employer and union reach a bona fide impasse in collective bargaining, the employer is allowed to implement all or any part of its final offer.⁷⁷ Implementation upon impasse is justified on the ground that: it “allows limited unilateral action by an employer” when there is a good-faith deadlock in negotiations; it is “a judicial invention used to reconcile the dual mandate of the National Labor Relations Act—to enforce the duty of good-faith bargaining while not compelling parties to accept agreements or make concessions”; and that it is traditionally “viewed as a tool to promote an ongoing bargaining process.”⁷⁸ This traditional view, however, is difficult, even impossible, to reconcile either with traditional contract law or with the language and purposes of the NLRA.

a. Implementation upon Impasse Compared with Contract Theory

Imagine that contract law allowed the buyer to impose its offer on the seller whenever their negotiations were deadlocked. No doubt, the parties would adjust to such a law and gradually develop strategies to promote

76. See *infra* notes 110-14 and accompanying text. LeRoy reaches a similar conclusion but only in the context of striker replacement. Michael H. LeRoy, *Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA*, 29 U.C. DAVIS L. REV. 1019 (1996).

77. THE DEVELOPING LABOR LAW, *supra* note 69, at 639-43 (discussing unilateral implementation by employer of proposed contract changes); see also Dannin, *Fulfillment*, *supra* note 69 (discussing impasse doctrine and its development).

78. Thomas C. Albus, *Head 'em Off at the Impasse!: A Victory for Management in the War to Implement its "Last Best Offer,"* 1996 J. DISP. RESOL. 429, 429; see also Peter Guyon Earle, *The Impasse Doctrine*, 64 CHI.-KENT L. REV. 407 (1988) (discussing history and application of the impasse doctrine).

their respective interests. For example, the buyer who wanted to impose its offer might try to reach impasse so it could impose its terms, and the seller would try to prevent an impasse, perhaps by making small concessions to show they were not deadlocked, while not wholly capitulating. Or the seller might realize it had no choice but to capitulate. In every stage of every negotiation the parties would be aware of these powers and be vigilant for either the chance to use them or to prevent their being used. Buyers who developed a reputation for egregiously harsh behavior might find no sellers, if the sellers could find alternate buyers who would negotiate with them. Harsh buyers who then felt the discipline of the market might modify their strategies. In other words, sellers with options would use exit as a strategy to signal their preferences, and buyers would modify their tactics based on that signaling.

Exit in the employment area is less likely to discipline opportunistic employer behavior because of many complex factors. In particular, unless all workers quit, as opposed to only one or several workers quitting, and unless the employer actually learns why they have quit, there is far weaker signaling than in the case of a commercial buyer.

Of course, contract bargaining is not perfectly analogous to collective bargaining. It most clearly deviates in one fundamental respect. In contract bargaining, the contract creates and governs the relationship. The seller has a choice as to which buyer to negotiate with and whether to negotiate at all or to walk away when there is an impasse. But walking away—other than for a short time—is not a real option in employment and, therefore, in collective bargaining. Although employment has contractual elements, it is also a relationship. That status exists regardless of the outcome of bargaining.⁷⁹ Employment tends to be or is intended to be more long term, complex, and rooted in interpersonal relations. It is based more on an amalgam of status, custom, and layers of informal and formal undertakings that are constantly re-calibrated to meet new situations than is a nonrelational contract. In addition, employment disruptions spill over the boundaries of the workplace. As a result society, as well as the parties, need the employment relationship to continue and therefore need disputes between the parties to be resolved. This creates pressure to resolve employment impasses that keeps the parties in the relationship.

Furthermore, the relational nature of employment makes exit for the seller of labor far more difficult than is the case with a short-term commercial contract. Perhaps the best commercial analogy would be housing. Employees' relationships to their jobs put them in situations akin to those of most home owners. Over time, both workers and home owners

79. See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (holding that preexisting individual employment contracts do not preclude union elections nor do they allow the employer to refuse collective bargaining negotiations).

accrue equity that makes leaving difficult and costly. Benefits, seniority entitlements, firm-specific knowledge, social ties, fear of the unknown, the emotional and practical difficulty of searching for another job, and the cost and disruption of moving to another geographic area often tie a worker to a specific employer and job, even when the worker is dissatisfied.

If the economy is good, if the employee has skills that are in demand, and if the market for workers in general is tight, the accumulated human capital may be valuable and allow the worker to trade up, despite having to leave many accrued benefits behind. When conditions are reversed, no matter how little the job suits the worker, it may be impossible to find a better situation. Employment is unlike housing, however, in that as workers age they reach a point at which they have or can create no capital that any other employer desires. When these are the conditions, employers can most easily impose terms.

b. Implementation upon Impasse Considered in the Context of NLRA Law and Policies

Just as with striker replacement and lockout, implementation upon impasse violates express NLRA law and policies. Nothing in the NLRA says that anything other than collective bargaining is intended to set wages, hours, and terms and conditions of employment. The very purpose of the NLRA is to restore equality of bargaining power between employers and employees and to do so by encouraging the practice and procedure of collective bargaining.⁸⁰ The goals set out in § 1 are promoted by § 7's employee rights, which include the right to organize, to form or join labor organizations, to select bargaining representatives, and then to bargain through those representatives.⁸¹ When an employer seeks impasse and denigrates the role of the employees' representative rather than bargaining, this interferes with, restrains, and coerces employees, thus violating their rights under § 158(a)(1).⁸²

Section 159(a)⁸³ gives an employee representative the right and obligation to bargain on behalf of employees as to wages, hours, and other conditions of employment, and § 152(5) defines the essence of a labor organization as representing employees and as existing for the purpose of dealing with employers concerning "grievances, labor disputes, wages,

80. 29 U.S.C. § 151. Although this paper talks only of private sector negotiations, this method of impasse resolution has also been adopted in some public sector collective bargaining laws.

81. 29 U.S.C. § 157.

82. 29 U.S.C. § 158(a)(1).

83. 29 U.S.C. § 159(a).

rates of pay, hours of employment, or conditions of work.”⁸⁴ Section 158(a)(5) enforces this right by proscribing a refusal to bargain collectively with a union,⁸⁵ and § 8(d) defines bargaining collectively as

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession⁸⁶

The Supreme Court has held that an employer’s unilaterally implementing terms violates the duty to bargain in good faith.⁸⁷ Yet in creating the doctrine of implementation upon impasse, the courts have acted as though nothing exists in § 8(d) but its last phrase: that nothing compels making a concession or agreeing to a proposal.

Giving an employer the right to implement its final offer alters collective bargaining procedurally and thus substantively. These changes are so profound that they not only change NLRA bargaining, but can also rewrite union organizing. An employer who bargains must compromise and will not get all it wants. Allowing an employer to implement its final offer at impasse rewards an employer who eschews the give and take of bargaining by giving the employer its wish list. Differences may be narrowed under both an NLRA regime and an implementation regime, but there is an enormous difference in the way those disparities are bridged. Rather than seeking compromise, an implementation regime invites an employer to increase the distance between the parties. The union’s only recourse to this strategy is to make concessions to decrease differences and thus demonstrate that they are not at impasse.⁸⁸ As a result, the parties move from the NLRA’s ultimatum game in which fairness for all parties is a key consideration to a dictator game in which one party can impose its will on the other.

There are other ways to understand the distinctions between NLRA and implementation bargaining. As a thought experiment, consider being a party who is told to choose the role—as an employer or union under either an NLRA or implementation bargaining regime—that would give it the

84. 29 U.S.C. § 152(5).

85. 29 U.S.C. § 158(a)(5).

86. 29 U.S.C. § 158(d).

87. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962).

88. *See, e.g.*, TNT Skypak, Inc., 328 N.L.R.B. 468 (1999), *aff’d*, 208 F.3d 362 (2d Cir. 2000).

most power to achieve its desires and to identify the role that would make it least likely to achieve its bargaining desires. The party would see that the role of employer in implementation bargaining would give it the most power and that of union the least. The roles of employer and union under NLRA bargaining would fall between those two poles, and it would be difficult to predict just from this information which party would have the greatest power in any one negotiation. In other words, in the case of implementation bargaining, the law loads the dice and all but dictates the outcome. In the case of NLRA bargaining, an array of factors, including the economy, leadership, intelligence, and the needs of the enterprise would play more important roles.

Collective bargaining as a dictator game leads to poorer bargaining outcomes for unions and better ones for employers—but better only in the sense that employers would get more of what they want—than would be the case if this power did not exist. But does having and using the power to implement upon impasse really lead to better outcomes for an employer, let alone for workers and society as a whole? In recent years, many have supported labor-management cooperation because of the importance of communication to the success of a workplace.⁸⁹ An employer who can implement terms may feel it does not need to listen, and refusing to listen may mean the employer is not operating at its highest efficiency.⁹⁰

89. See U.S. DEP'T OF LABOR, BUREAU OF LAB.-MGMT. REL. AND COOPERATIVE PROGRAMS, *Labor-Management and the Duty of Fair Representation*, in U.S. LAB. LAW AND THE FUTURE OF LAB.-MGMT. COOPERATION, SECOND INTERIM REPORT 39 (discussing the doctrine of duty of fair representation and the development of labor-management cooperation); 1995 U.S. DEP'T OF LABOR, COMM'N ON THE FUTURE OF WORKER-MGMT. REL., REPORT AND RECOMMENDATIONS, Section II, pts. 2-4 (discussing employee participation in labor-management cooperation); Arthur J. Martin, *Company Sponsored Employee Involvement: A Union Perspective*, 40 ST. LOUIS U. L.J. 119, 129-30 (1996) (describing the history of the Dunlop Commission and its investigation of worker-management relations); William B. Gould, *Labor Policy by and Beyond the NLRB: Globalization, Corporate Reorganization, and the American Workforce*, Remarks by NLRB Chairman William B. Gould to the Commonwealth Club of California (Aug. 4, 1997), in 152 Daily Lab. Rep. (BNA), at E-1 (Aug. 7, 1997) (summarizing the state of labor relations in August of 1997); *Teamwork for Employees and Management Act of 1997* (TEAM), S.295, 105th Cong. (1997); *As TEAM ACT Moves through Congress, Employers Pursue Employee Involvement*, EMPLOYEE REL. WKLY. (BNA), Mar. 17, 1997, at 255 (explaining Congressional debate regarding labor-management committees); *NAM Offers Agenda for Helping Workers That Stresses Worker Involvement of TEAM*, LAB. REL. WK., Mar. 5, 1997, at 229 (stressing that the employee involvement that the TEAM Act would allow is critical to insuring the competitiveness of U.S. companies); Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159, 185 (1996) (discussing employee participation in workplace decisions). See generally CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* (1988) (summarizing the origin, development and future of labor-management interaction).

90. For a description of employers using the right to implement and the impact that had

Furthermore, an implementation regime conflicts with *H.K. Porter v. NLRB*⁹¹ and § 8(d), which forbid the Board to compel a party to make a bargaining concession or agree to a proposal. Experience with what employers choose to do when they have the power to implement means the Board can predict what such a contract is likely to contain. Such a contract is very different from one formed where the union was given the power to impose, where neither party could impose, or where there was interest arbitration. Employers who can impose terms do not necessarily opt for lowering labor costs. They opt for more power, and they opt to eliminate the union. In a study of NLRB cases involving implementation upon impasse, 50% of employers reached impasse on “control issues,”⁹² that is, terms that allow an employer to control the workplace as if its employees were not represented by a union. Employers opt for using implementation upon impasse to forestall agreement⁹³ and, ultimately, exempt themselves from labor law’s requirements to bargain.⁹⁴ Faced with this doctrine and their experience of what employers are likely to do, unions feel compelled to make concessions *solely* to avoid impasse and implementation.⁹⁵ The

on the workplace versus a decision to reverse that policy and work with the union to establish joint governance, see Caryn L. Beck-Dudley & Steven H. Hanks, *On Virtue and Peace: Creating a Workplace Where People Can Flourish*, 36 VAND. J. TRANSNAT’L L. 427, 435-46 (2003).

91. 397 U.S. 99 (1970).

92. Ellen J. Dannin & Terry H. Wagar, *Lawless Law?: The Subversion of the National Labor Relations Act*, 34 LOY. L.A. L. REV. 197, 223 tbl. 5 (2000).

93. In *TNT Skypak, Inc.*, the employer withdrew from the tentative agreements it had reached when it saw the union was about to agree to the employer’s proposals and thus conclude a contract. The employer later told the union it would not agree to any terms greater than those of its unrepresented employees and that it preferred not having a union. Finally, the employer withdrew recognition. The course of bargaining in this case extended over a number of months, during which the union gradually acceded to all the employer’s demands with only a couple of minor exceptions for which it asked for further consideration. It was at that point that the employer withdrew from its tentative agreements and made proposals that increased the distance between the parties. It seems likely that the union was conducting its course of bargaining in response to its assumptions that the employer was trying to reach an impasse and would eventually implement its final offer, making capitulation the only viable alternative. 328 N.L.R.B. at 472-75.

94. Some employers have tried to impose standards for wage-setting based on employer-determined merit. The highly subjective nature of such a term permits the employer to take unilateral action. See, e.g., *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000); *McClatchey Newspapers, Inc. v. NLRB*, 131 F.3d 1026, (D.C. Cir. 1997), *cert. den.*, 524 I.S. 937 (1998).

95. However, this may not be a viable strategy. In *TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002), the D.C. Circuit reversed a National Labor Relations Board decision that the employer had not reached a genuine impasse in negotiations with International Brotherhood of Teamsters Local 293 before implementing new work rules. The court held that, in order to avoid impasse, a union had to have presented a substantial change in its position in response to the company’s final offer. 254 F.3d at 1117.

judicial amendments take away any power a union has to do more than pursue a course of “incremental concessionism.” Implementation upon impasse thus treads perilously close to prohibitions against compelling agreements or concessions.

E. Not Understanding Implementation upon Impasse

Although judges created the doctrine of implementation upon impasse many years ago, a surprising number of labor lawyers fail to take it into consideration. For example, recent law reform proposals were made: to make family-related matters a mandatory subject of bargaining;⁹⁶ to make “the relationship between bargaining units and negotiating units a mandatory subject of bargaining”⁹⁷ so that economic weapons could be used to promote the creation of negotiating units; and to make permanent replacement of strikers a mandatory subject of bargaining.⁹⁸ The authors advocated these proposals assuming that making these matters mandatory subjects of bargaining would require real bargaining on the issues. The authors know that black letter law divides bargaining into mandatory and permissive subjects of bargaining. Wages, hours, and terms and conditions of employment are mandatory subjects, while all other legal subjects are permissive subjects of bargaining.⁹⁹ Parties may reach an impasse on and may strike in support of a mandatory subject of bargaining but may do neither in the case of a permissive subject of bargaining.¹⁰⁰

Yet the employer’s right to implement means that bargaining is essentially the same whether or not a subject is mandatory or permissive. So if a union wants to bargain about childcare provisions and they are a permissive subject of bargaining, the union and employer are free to reach agreement on the issue, assuming the employer agrees to bargain. If the employer refuses to bargain, the union cannot insist and also cannot strike because it is illegal to strike over a permissive subject. To strike would get the workers fired. If childcare were instead a mandatory subject of bargaining, the parties could bargain about the subject and reach an agreement, if the employer wished. Or the employer could make an offer, reach impasse, and implement its final offer. The union could strike over

96. Melissa A. Childs, *The Changing Face of Unions: What Women Want From Employers*, 12 DEPAUL BUS. L.J. 381, 402 (1999-2000) (arguing that “[m]andatory subject standards should be construed to encompass benefits to accommodate working women’s needs as ‘terms’ or ‘conditions’ of employment over which employers must bargain . . .”).

97. Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 734 (1993).

98. Bierman & Gely, *supra* note 45, at 366, 388-91.

99. COMMITTEE ON THE DEVELOPMENT OF THE LAW UNDER THE NATIONAL LABOR RELATIONS ACT, *THE DEVELOPING LABOR LAW* 768-75, 1157-1289 (4th ed. 2001).

100. *Id.* at 773-80, 918-30.

childcare, and then the employer could permanently replace the strikers. Or the employer could lock them out and replace them. Even if the replacements were only temporary, with lockouts lasting three years on average,¹⁰¹ the workforce would be discharged in all respects that mattered. In other words, what would be gained by making the issue mandatory?

As to the proposals to make bargaining units a mandatory subject, the result would be that it gives the employer the ability to unilaterally create the unit it prefers. In fact, this is essentially what International Paper¹⁰² was permitted to do by using implementation. There is far more protection for the union in having unit determination remain a permissive subject of bargaining that can only be changed by agreement. The same sort of situation would result from the suggestion to make striker replacement a mandatory subject of bargaining. The employer could implement whatever rules it wanted as to permanently replacing strikers—perhaps resulting in less protection than current law.¹⁰³

This does not begin to tap the power implementation bargaining gives an employer. For example, consider employer decisions as to who will perform specific work and where. Much has been written on the question whether employers have an obligation to bargain over decisions to subcontract, relocate or terminate unit work.¹⁰⁴ It is acknowledged that the decision to subcontract is a mandatory subject of bargaining, while whether an employer must bargain over a decision to relocate depends on a complex, subjective multifactor test¹⁰⁵ whose results are difficult to predict.¹⁰⁶

101. LeRoy, *supra* note 36, at 990, 1027-28.

102. *Int'l Paper Co.*, 115 F.3d at 1047.

103. Bierman and Gely miss the significance of implementation upon impasse when they suggest the following outcome of a bargaining impasse:

It could be argued that our proposal will not, in practice, produce results any different than could be accomplished by merely overruling the *Mackay* doctrine. That is, under our proposal unions could arguably bargain to impasse over the striker replacement issue, call a strike, and then behave opportunistically, because employers will not be allowed to replace economic strikers. We argue from both a practical and theoretical perspective that a contrary dynamic will likely prevail.

Bierman & Gely, *supra* note 45, at 393. They are not alone. See William R. Corbett, *Taking the Employer's Gun and Bargaining About Returning It: A Reply to "A Law, Economics, and Negotiations Approach" to Striker Replacement Law*, 56 OHIO ST. L.J. 1511, 1519-20, 1524-37 (1995) (addressing Bierman and Gely's arguments).

104. See, e.g., Estlund, *supra* note 11; Zimarowski, *supra* note 36.

105. Catherine Fayette has found through her analysis of court of appeals decisions on these issues that appellate judges tend to reverse NLRB decisions ordering employers to bargain and to do so based on highly subjective bases. See Catherine R. Fayette, *Judicial Decisions on an Employer's Duty to Bargain: Objective Analyses or Personal Biases?* (unpublished article, on file with author).

106. See Jan W. Sturmer, *An Analysis of the NLRB's "Runaway Shop" Doctrine in the*

The employer who understands the potential of implementation bargaining would never fight over whether a relocation decision is a mandatory subject of bargaining. That requires a complex analysis with difficult evidentiary burdens and an uncertain outcome—except as to huge lawyers' fees. The wise employer would treat the decision as a mandatory subject of bargaining, bargain to impasse, and implement the initial relocation decision. Litigating whether a decision was a mandatory or permissive subject of bargaining is much more complex and uncertain than is the question of whether the parties reached a bargaining impasse. Furthermore, by willingly bargaining the employer could well forestall a charge that the decision was illegal discrimination under § 8(a)(3).¹⁰⁷

Of course, making a term a mandatory subject of bargaining has some advantages for unions. Unions have right to notice of employer actions as to mandatory subjects of bargaining and greater rights to information about mandatory, as opposed to permissive, subjects of bargaining.¹⁰⁸ In many instances these alone may be valuable rights. As can be seen in the *International Paper* situation, however, notice and even bargaining can satisfy the employer's legal obligations but be of virtually no value to the employee.

Implementation bargaining can also destroy the fruits of organizing. An employer who understands these judicial doctrines would not waste time and money fighting a union organizing drive. Rather, it would agree to a fast election or, better yet, recognize the union based on a check of signed union authorization cards. It would agree to immediate negotiations, reach a quick impasse, and implement. The union would be shown up as impotent, and employees would have an object lesson as to just how useful a union is. The employer could produce ample evidence that it has no anti-union animus should the union file charges alleging the employer has not bargained in good faith.

Context of Mid-term Work Relocations Based on Union Labor Costs, 17 HOFSTRA LAB. & EMP. L.J. 289 (2000) (considering an employer's potential legal obligations and liabilities if it decides to relocate union work during the time of the union contract wholly or partly because of labor costs); see also *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (holding that an employer's need to operate freely in deciding whether to close part of its business for solely economic reasons outweighed the incremental benefit that might be gained from the union's participation in that decision); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (holding that an employer had to bargain collectively with representatives of its employees before contracting out work previously performed by union members); *Dubuque Packing Co.*, 303 N.L.R.B. 386, 390-92 (1991), *enforced in part*, 1 F.3d 24 (D.C. Cir. 1993) (enforcing the Board's order against an employer that refused to bargain collectively before relocating and cutting parts of its operations); NLRB Memorandum GC 84-4, *available at* 1984 WL 50029 (N.L.R.B.G.C.) (explaining the Board's decision that relocations that don't modify a specific contract term may still be mandatory subjects of bargaining).

107. Sturner *supra* note 106, at 294-95.

108. See, e.g., Zimarowski, *supra* note 36, at 74.

Finally, implementation bargaining can be very expensive. *Don Lee Distributor, Inc.*¹⁰⁹ demonstrates the range of costs implementation bargaining can visit on all parties. After a lengthy trial, the employers were ordered to rescind the changes they had made and make employees whole for lost wages.¹¹⁰ The employers owed a sum large enough to destroy their businesses.¹¹¹ The workers lost homes, had marriages broken, and suffered mental stress during the years the process took. No remedy can bring back those lost years or repair the emotional and personal costs. Government and society bore the huge costs of trying and deciding a case in which the hearing lasted sixty days. Eventually, the employers were forced by the outcome of the case and other pressures to sign collective bargaining agreements. At learning this, some employees wept, because they had despaired of ever seeing justice done.¹¹²

Bear in mind that this was a happy outcome for the employees. As bad as all this was, they did not strike, so they were not permanently replaced.¹¹³ They also were not locked out. The union was also able to hang on as their representative and fight to regain at least some of what was taken from them. Worse scenarios are played out around the country, with

109. 322 N.L.R.B. 470 (1996), *aff'd* 145 F.3d 834 (6th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). A discussion of the facts of the case can be found at Dannin, *Legislative Intent, supra* note 69, at 14-20.

110. 322 N.L.R.B. at 472-74.

111. Telephone interview with Sam McKnight, Attorney in Detroit, Mich. (Feb. 6, 2002). In June 1998, when the Sixth Circuit Court of Appeals issued its decision affirming the violation, the union attorney estimated back pay to be at least \$40 million. Terry Kosdrosky, *Beer Distributors Lose Back-pay Ruling Appeal*, CRAIN'S DETROIT BUS., June 8, 1998, at 22; *see also Beer Distributors Found to Bargain in Bad Faith With Detroit IBT Local*, 241 Daily Lab. Rep. (BNA), at D13 (Dec. 19, 1994).

112. The back pay accrued over more than ten years with accumulated interest for approximately 450 employees. Some lost \$17,000 a year as a result of the employers' implemented pay cuts, plus amounts owed employees for cuts in pensions, vacations, holidays, and other employee compensation. As of February 2002, only two of the six employers had paid any back pay. This means that more than ten years after the unfair labor practices were committed, \$27 million of the \$45 million in back pay was still owed. Telephone interview with Sam McKnight, *supra* note 111.

113. Studies of the employer's ability to permanently replace economic strikers demonstrate that it does affect collective bargaining. If workers can strike and forego their pay but not lose their jobs, then they are more likely to be willing to use this economic weapon than if striking risks losing a job. The evidence thus suggests that allowing permanent replacement greatly weakens union bargaining power. *See, e.g.,* PETER RACHLEFF, *HARD-PRESSED IN THE HEARTLAND: THE HORMEL STRIKE AND THE FUTURE OF THE LABOR MOVEMENT* 13-14 (1993); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 111-12 (1990); Cynthia L. Gramm, *Empirical Evidence on Political Arguments Relating to Replacement Worker Legislation*, 42 LAB. L.J. 491 (1991). Unions have responded by developing alternate strategies, such as corporate campaigns, to assert pressure on the employer. MICHAEL YATES, *POWER ON THE JOB: THE LEGAL RIGHTS OF WORKING PEOPLE* 113 (1994). However, these appear to be far less effective than would be the strike weapon.

most never being widely noticed.¹¹⁴

F. *Putting Implementation, Lockout, and Striker Replacement Together*

Implementation upon impasse, lockout, and striker replacement are each powerful tools that judges have created, despite their violating the most fundamental structures of the NLRA. When used together, their synergistic operation guts the NLRA. Indeed, this is the way they must be understood, because all these doctrines are connected with reaching a bargaining impasse and thus likely to occur together. They can be connected as part of a strategy to de-unionize and defeat the purposes of the NLRA.

To see how this works, think of the impact of these doctrines as creating a branching tree of possible outcomes, including, in part: (1) the parties reach an agreement; (2) the parties reach an impasse but eventually resolve their differences; (3) the parties reach an impasse, the employer implements its final offer, and the parties then reach an agreement; (4) the parties reach an impasse, the employer implements its final offer, the parties then fail to reach an agreement, and the union becomes moribund leading to de-unionization—either by its walking away or through decertification;¹¹⁵ (5) the parties reach an impasse, the workers strike, the employer replaces the strikers (permanently or temporarily), the parties reach an agreement on workplace terms and on striker reinstatement, and many or all strikers are recalled to work; (6) the parties reach an impasse,

114. Consider just a few recent notorious and protracted disputes: *Caterpillar, Inc.*, 324 N.L.R.B. 201 (1997) (concerning a dispute over the removal of a union's health and safety fliers); *The Detroit News, Inc.*, 319 N.L.R.B. 262 (1997) (concerning a dispute between a newspaper and a union over added responsibilities under which journalists were ordered to appear on television); *Nat'l Football League Mgmt. Council*, 309 N.L.R.B. 78 (1992) (concerning the 1987 strike by the National Football League's professional players); *Silverman v. Major League Baseball Player Relations Comm.*, 67 F.3d 1054 (2d Cir. 1995) (concerning a dispute over the contract status of professional baseball players); *AMERICAN DREAM* (Barbara Kopple 1990); *RACHLEFF supra* note 113 (concerning the Hormel strike); *Int'l Paper Co.*, 319 N.L.R.B. 1253 (1995) (concerning a dispute that arose when an employer subcontracted replacement workers on a permanent basis). See also *JULIUS GETMAN, THE BETRAYAL OF LOCAL 14* (1998) (providing a case study of one protracted dispute).

115. When § 9(c)(3) was enacted in 1947, it completely barred all replaced economic strikers from voting in a union decertification election. The law was amended in 1959 to permit replaced economic strikers to vote in a union decertification election within one year of the beginning of a strike. LeRoy concludes that employers prolong replacement strikes beyond the first anniversary of a strike's inception so that the strikers are ineligible to vote in a union decertification election. LeRoy, *supra* note 76, at 1028-42. As a Board attorney, I observed that unions reacted by having strikers file RD petitions to decertify the union so that the election would be held at a time when the strikers would be eligible to vote, thus preserving the union's right to represent the unit for one more year.

the workers strike, the employer replaces the strikers (permanently or temporarily), the parties reach an agreement on workplace terms and on striker reinstatement, few or no strikers are recalled to work, and the union eventually becomes moribund and is decertified; (7) the parties reach an impasse, the workers strike, the employer replaces the strikers permanently, and after one year, when they are ineligible to vote, a decertification election is held and the union is decertified; (8) the parties reach an impasse, the employer locks out the workers and then replaces them (permanently or temporarily), the parties reach an agreement on workplace terms and on reinstatement, and many or all the employees are recalled to work; (9) the parties reach an impasse, the employer locks out and replaces the workers (permanently or temporarily), the parties reach an agreement on workplace terms and on reinstatement, few or no employees are recalled to work, and the union eventually becomes moribund and is decertified.¹¹⁶

Other outcomes are possible, some of which lead to agreement, some of which lead to disempowering the union, and some of which lead to the end of collective bargaining.¹¹⁷ This is not NLRA bargaining. This is a laundry list of judicial amendments that undercut fundamental NLRA goals of worker self-representation and workplace co-determination and that destroy equality of bargaining power and collective bargaining. While not all employers will use these judicial amendments to the fullest, they provide an employer, who harbors anti-union attitudes, (and employer resistance to unions is widespread)¹¹⁸ control of whether its employees can

116. See Peter Bruce, *On the Status of Workers' Rights to Organize in the United States and Canada*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW *supra* note 74, at 273 (noting the destructive power of an employer's refusal to bargain coupled with an employer's ability to replace striking workers). In recent years, judicial decisions have limited striker rights to reinstatement. Douglas E. Ray, *Some Overlooked Aspects of the Strike Replacement Issue*, 41 U. KAN. L. REV. 363, 381-99 (1992) (describing the erosion of replaced strikers' reinstatement rights). The documentary AMERICAN DREAM amply illustrates the problem. AMERICAN DREAM, *supra* note 114.

117. For example, in alternative (4) above, another likely scenario is sketched by James Brudney:

In legal terms, it is possible for a union to let a collective bargaining agreement expire, refuse to accede to management's concessionary demands, and continue to work without a contract while initiating at least some of the tactical approaches developed by the Jay strikers. But Getman points out that under the law, International Paper could have unilaterally implemented its proposal, imposing lost holidays, job classification changes, and the elimination of some 300 jobs through subcontracting. Those lawful moves would likely anger members enough to force a strike.

James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 85-86 (reviewing JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS AND PERMANENT REPLACEMENTS* (1998)).

118. See generally Morris Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519 (2001) (analyzing the

exercise rights the statute says they have. For an anti-union employer, impasse becomes a goal rather than a glitch on the way to a negotiated agreement.¹¹⁹ As long as the law makes impasse a potential goal, then we must always wonder whether the parties reached an impasse because they simply could not agree, or whether the impasse is the result of a strategy designed to subvert the right of workers to bargain collectively through a union they have designated.

G. *Understanding the Impact of Implementation, Lockout, and Striker Replacement*

Law and the social sciences offer a number of ways to grapple with how the judicial impasse doctrines have altered NLRA bargaining, including experimental economic methodology, contract theory, and social science data.

1. Seeing the Impasse Doctrines Through the Lens of Experimental Economic Methodology

Experimental economics provide a framework for gaining a deeper understanding of how the impasse doctrines transform NLRA bargaining from an ultimatum game into a dictator game. First, the employer's ability to implement its final offer upon impasse is a form of dictator game, because it allows player one (the employer) to propose a division of resources that the law gives player two (the union) no ability to reject. Experiments confirm economic theory that a dictator game will lead to player one offering nothing to player two.¹²⁰ To the extent that this captures core elements of implementation bargaining, it suggests that employer offers under such a system will be far lower than under ultimatum game/NLRA bargaining. It remains to be seen whether empirical studies will confirm this difference.¹²¹

management resistance to unionization and its costs and incentives).

119. See, e.g., *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 798-99 (D.C. Cir. 1997) (noting that a company did not contest the NLRB's conclusion that it violated the NLRA by engaging in "deliberate and egregious bad faith conduct aimed at frustrating the bargaining process").

120. See, e.g., Roth, *supra* note 1, at 270.

121. Some data suggest that the use of implementation upon impasse lowers union ability to achieve first contracts. See, e.g., Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* *supra* note 74, at 75, 84, 86; see also *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* (Kate Bronfenbrenner et al. eds., 1998); Joel Cutcher-Gernshenfeld et al., *How Do Labor and Management View Collective Bargaining?*, *MONTHLY LAB. REV.* 23, 23 (Oct. 1998); *Aided by Consultants, Employers Are Blatantly Violating Law, Saporta Says*, 36 Daily Lab. Rep. (BNA), at A-3 (Feb. 22, 1985).

As discussed above, the employer's right to replace strikers is akin to an ultimatum game with punishment, but without the normal assignment of the right to punish. Economic experiments have repeatedly falsified the economic theory that the first player will offer a minimal amount to the second player and that the rational second player will accept anything more than zero.¹²² Player one commonly offers substantially more than the minimum amount and often splits the sum, and player two tends to be willing to punish unfair divisions, that is divisions not approaching an even division. When there is an ability to punish a non-cooperating (or non-generous) proposer, proposing players tend to make more even offers.¹²³ In short, proposers are more generous in the ultimatum game than in the dictator game.¹²⁴ If these insights are correct, then NLRA collective bargaining in which the strike weapon is intact should lead to improved wages and working conditions for employees, just as the Act intended.

The judicial amendments mean the strike weapon is not intact. While the union can strike and thus inflict punishment if it does not like the employer's offer, the employer (player one) can inflict even greater punishment on the union (player two) by permanently replacing all the strikers. This should negate the ability of the union (player two) to inflict any punishment. This reordering of an ultimatum game's structure ought to reinforce the employer's "dictator" power and skew offers toward the employer's preferences.

Even more destructive of the NLRA's goal is that the judicial amendments have changed the normal assignment of punishment from the one trying to enforce cooperation to the one who does not want to cooperate. In other words, this system essentially lets the employer define what level of cooperation it is willing to engage in, if any, and to mete out punishment if it decides the union has not "cooperated." As a result, by giving the employer the power to implement its final offer and to use striker replacement and lockout with displacement, the judicial impasse doctrines displace collective bargaining with a dictator game. Under such a system, a union will have no power to resist employer unilateralism.

2. Contract Theory and the Judicial Impasse Doctrines

To return to contract theory, imagine, that when a seller walked away from negotiations at impasse, the buyer had the right to permanently replace any or all of the seller's personnel with those it found more tractable and thus more likely to agree to the buyer's terms. In this system, walking away would risk organizational suicide or, at least, a brain

122. Ostrom, *supra*, note 4, at 11-12.

123. *Id.* at 7-8.

124. Roth, *supra* note 1, at 270.

transplant. Indeed, the buyer would hope for the seller's exit, because it could then "colonize" the seller and control it. In the collective bargaining context, this means that the wall the NLRA maintains between employer and employee domains is breached because judges give an employer the right to replace strikers, a/k/a union members, with nonunion workers. If striking is the exercise of worker voice to inform the employer of worker preferences, striker replacement allows an employer to transform the nature of a strike from voice to exit.

Or, imagine that if the buyer itself walked away this would give the buyer the right to temporarily replace the seller's personnel. In other words, the price for a seller's refusal to agree to anything the buyer offered would be for the buyer to walk away from the negotiations and also have the right to replace the seller's personnel with those who will follow wherever the buyer leads. That would be the current situation with lockouts in collective bargaining.¹²⁵ Even without the right to permanently displace locked out employees, the average locked out employee can expect to be out of work over a thousand days.¹²⁶ While they are locked out of their jobs, the employer can impose whatever terms it wants, de facto decertifying the union for however long the lockout lasts. Under those circumstances, the right to permanently replace locked out workers can hardly do more to undermine union bargaining power and NLRA collective bargaining.

3. Do the Judicial Impasse Doctrines Matter?

Experimental economics and contract theory are useful in understanding the impact of the judicial impasse doctrines, but they cannot tell the whole story of how the judicial impasse doctrines actually affect collective bargaining. Of course, neither does looking at labor law from a purely doctrinal viewpoint. It is far too impoverished to explain the reality of a law, such as labor law, that is inextricably imbedded in and affected by its social and economic contexts.

We need to consider what else affects collective bargaining. Any method of impasse resolution affects bargaining power and rewards certain party behavior. The NLRA itself recognizes that law caused an imbalance in bargaining power by allowing one bargaining partner, the employer, to

125. See, e.g., *Int'l Bhd. of Boilermakers, Local 88 v NLRB*, 858 F.2d 756 (D.C. Cir. 1988); *Ancor Concepts, Inc.*, 323 N.L.R.B. 742 (1997); *Goldsmith Motors Corp.*, 310 N.L.R.B. 1279 (1993); *Harter Equip.*, 280 N.L.R.B. 597 (1986), *aff'd sub nom.*; *Operating Eng'rs Local 825 v. NLRB*, 829 F.2d 458; see also, *Int'l Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997) (holding that employer's permanently subcontracting unit work during a lockout produced too minimal an effect to place the company's conduct in the inherently destructive category).

126. LeRoy, *supra* note 36, at 990, 1027-28.

become collective through corporation law, while the other, the employee, could only bargain as an individual.¹²⁷

But while law is certainly an important force, it is not the only one.¹²⁸ If it were, all employers would recognize that the judicial amendments gave them the power to act unilaterally and would do nothing other than reach impasse, implement their final offers, and permanently replace any strikers. Although there are no data on the frequency with which these things happen, we know this is not what happens all of the time. Something else other than law must matter.

Although there is essentially no research about these issues, we can speculate that certain specific factors affect whether the judicial impasse doctrines are used to their full potential.¹²⁹ For example, some employers will value the process of collective bargaining or respect their employees' right to choose a representative or not want to endure the disruption created by impasse, implementation, strikes, or strike replacement. In other cases, unions will be able to muster potent resources, such as strong community support, high employee commitment, low unemployment, or strong demand for the employer's goods or services so that the union has sufficient power to bargain as an equal.¹³⁰ This does not mean that law makes no difference. In every case, the judicial impasse amendments place a thumb on the employer's side of the scale to lower the union's power a notch or two from what it would have been otherwise.¹³¹

Looked at from more of an institutionalist perspective, the state of NLRA bargaining we have today severely constrains the union's power by making it difficult to impose a cost on the employer for not complying with the union's wishes.¹³² This is not to say that unions can never win a strike today. Rather, holding all social and economic factors equal, a union will have a much more difficult task in every situation. As the state of the

127. 29 U.S.C. § 151. For an empirical study of the impact of different collective bargaining laws, see Dannin & Singh, *The Force of Law*, *supra* note 75.

128. Law plays a role that "substantially affects union organizing and collective bargaining." Gregory Saltzman, *Higher Education Collective Bargaining and the Law*, in NEA ALMANAC OF HIGHER EDUCATION (2001).

129. These ideas were developed with D. Gangaram Singh as part of our empirical research into implementation upon impasse.

130. Unions have few weapons to recreate NLRA bargaining power. Rather than pursue the tactic of making successive small concessions, one union reached an agreement with an employer that the contract provisions remain in effect "until a conclusion is reached in the matter of proposed changes." Of course, most unions, and in particular a union with depleted bargaining power facing a strong and determined employer, would be unlikely to achieve such an agreement, especially if the employer realized its potential loss of the right to implement upon reaching impasse. *Pioneer Elec. of Monroe, Inc. & Pioneer Elec. & Mech. Contractor, Inc.*, 333 N.L.R.B. 1192, 1193 (2001).

131. Dannin & Singh, *The Force of Law*, *supra* note 75.

132. *Cf.* James B. Zimarowski, *supra* note 36, at 67-68.

economy worsens, and, in particular, as unemployment increases, unions reach a point where a strike is of no value. This point is reached under less adverse conditions than would have been the situation before these judicial amendments.

What is easy to ignore is that other government policies promote an environment that deprives unions of social and economic resources they need to overcome the impact of the judicial impasse amendments on bargaining power. Chief among these has been the Federal Reserve's policy to fight inflation by raising interest rates whenever unemployment falls too low¹³³ and government deregulation. Both have led to higher unemployment.¹³⁴ When unemployment is high, striker replacement becomes a greater threat, and those fortunate enough to have a job feel grateful to have any job under any conditions. In these circumstances, a union that can do no more as a bargaining representative than stave off impasse and implementation and persuade workers not to strike for fear of being replaced is a union that has little to offer its members and nothing to attract potential new members. It is also a union that is unable to achieve the NLRA's goals of increasing "the purchasing power of wage earners" and stabilizing "competitive wage rates and working conditions within and between industries."¹³⁵

This means that the employer's ability to implement its final offer at impasse and to leverage that ability to de-unionize may also help explain the lack of union organizing success.¹³⁶ Anti-union campaigns frequently

133. *The Wages Of Fear And The New Workplace*, AUSTL. FIN. REV. 32 (Mar. 21, 2001) (asserting that inflation fighting policies increase unemployment, lower job security, and disempower workers vis a vis their employers); Stuart Silverstein, *Some Economists Question Link Between Wages and Inflation; Labor: Pay Raises Get a Bad Rap on Wall Street, but Critics Contend That Higher Salaries Might Energize Economy. Core of Debate Is "Natural Rate of Unemployment."* L.A. TIMES, Jan. 14, 2001, at C-1; Sylvia Nasar, *Thinking as the Fed Thinks*, N.Y. TIMES, Nov. 17, 1994, at D-1; see also Gary H. Stern, President, Federal Reserve Bank of Minneapolis, *The (Uncertain) Resilience of the U.S. Economy*, The 12th Annual Hyman P. Minsky Conference on Financial Markets (Apr. 25, 2002) available at <http://minneapolisfed.org/news/pres/stern0402.cfm> (discussing the difficulties in predicting the performance of the U.S. economy); David Altig & Paul Gomme, *In Search of the NAIRU*, Federal Reserve Bank of Cleveland Economic Commentary (May 1, 1998), available at <http://www.clev.frb.org/research/com98/#0501> (defining the "nonaccelerating inflation rate of unemployment" (NAIRU) and identifying the factors economists consider in describing its relationship to the unemployment rate).

In the 1980s that context included economic policy driven by a desire to stamp out inflation, government policies that led to high unemployment, pressures for low product prices—plus labor laws that gave management many ways to escape or avoid collective bargaining. CONTEMPORARY COLLECTIVE BARGAINING, *supra* note 73, at 8. See also other essays in the same volume describing trends affecting collective bargaining in a wide array of industries.

134. CONTEMPORARY COLLECTIVE BARGAINING, *supra* note 73, at 8.

135. 29 U.S.C. § 151.

136. As labor's numbers decline, it loses power and becomes less attractive to workers in

inform employees of failed strikes and ineffective unions,¹³⁷ situations that can result from the use of impasse and implementation coupled with striker replacement. In other words, to the extent that de-unionization and declining union density lead to lower union bargaining power, they make unions less attractive to workers and make organizing more difficult. This in turn contributes to lower union bargaining power.

Current bargaining and economic theory are now insufficiently robust to answer many common questions. Scholars are puzzled as to why union density continues to decline,¹³⁸ why wages and other working conditions did not improve during an extended time of low unemployment,¹³⁹ and

many ways. Nelson Lichtenstein offers an overview of reasons advanced for labor's decline in recent decades. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 212-45 (2002).

137. MARTIN LEVITT & TERRY CONROW, *CONFESSIONS OF A UNION BUSTER* (1993). Anti-union films employers show during organizing campaigns play up these issues. See, e.g., *COLLECTIVE BARGAINING—THE PARTY'S OVER* (n.d., film on file with author); *UNION STRIKES—A LOT ON THE LINE* (n.d., film on file with author).

138. See Leroy D. Clark, *Movements in Crisis: Employee-Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 HOW. L.J. 49, 57-59 (2002) (comparing similarities between labor unions and civil rights organizations and proposing a coalition based on the development of worker owned businesses); Cutcher-Gernshenfeld, *How Do Labor and Management View Collective Bargaining?*, *supra* note 121, at 23 (providing a summary of the state of collective bargaining in the United States); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529-30 (2002) (discussing ineffectiveness of American labor law because of its ossification); Estlund, *Economic Rationality*, *supra* note 11, at 925-26, 930-34, 947-49 (discussing economic impact of employer resistance to unions); Daniel J. B. Mitchell, *A Decade of Concession Bargaining*, in *LABOR ECONOMICS AND INDUSTRIAL RELATIONS: MARKETS AND INSTITUTIONS* 435, 440 (Clark Kerr & Paul D. Staudohar eds., 1994); Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. CHI. L. REV. 681, 682 (1992) (asserting that natural market forces explain the deunionization trend).

Paula Voos mentions reasons often cited for union decline: changing locus of jobs, job composition, management resistance to unions, and union organizing efforts. Voos herself sees as key factors an environment that encouraged competition based on low wages and laws that gave employers wide latitude to escape bargaining. Voos, *supra* note 73, at 14. Some variation occurs based on whether only private sector or public and private sector union members are included. See MICHAEL D. YATES, *WHY UNIONS MATTER* 107 (1998) (discussing minority workers' inroads into the private sector); Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (discussing factors in the private sector); see also Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, in *THE STATE OF THE UNIONS* 3 (George Strauss et al. eds., 1991) (discussing research explaining union growth and decline).

139. For a review of current research on the economic situation for workers and factors lowering bargaining power, see Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing* (Sept. 6, 2000), available at <http://www.ustdrc.gov/research/bronfenbrenner.pdf>. For charts showing changes in wages, see generally HOLLY SKLAR ET AL., *RAISE THE FLOOR: WAGES AND POLICIES THAT WORK FOR ALL OF US* (2001); CONTEMPORARY COLLECTIVE BARGAINING, *supra* note 73; Paul

whether law reform can change these outcomes.¹⁴⁰ In other words, one reason analysts are at a loss to explain this aspect of the economy is that they have failed to take into account part of the explanation.

II. HOW DO JUDGES GO WRONG AND HOW CAN THEY GO RIGHT?

Understanding the processes that have allowed judge-made law to rewrite the NLRA so dramatically is more than an academic exercise and more than a question of enforcing Congress' express policies. There is widespread and growing discontent with the NLRB. Union representative Wade Rathke accuses the NLRB of being "complicit with employers."¹⁴¹ Larry Cohen, Communication Workers of America (CWA) President, advocates that unions have a national day of civil disobedience to shut down every NLRB office across the country. "Labor needs to show the public that the NLRB is broken," he said.¹⁴² Union critics point to NLRB election delay, laws that cripple unions, striker replacement, and remedies that are so weak as to be useless, to name only a few.¹⁴³ Some have even argued that they would be better off with the law of the jungle or no law compared to the NLRA.¹⁴⁴

Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 YALE L.J. 907, 1908-10 (1993); see also Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries*, in WORKING UNDER DIFFERENT RULES 29 (Richard B. Freeman ed., 1994) (discussing factors of the labor market contributing to the rise in wage inequality in the 1980s). Stephen Kropp suggests that the increase in consumer bankruptcy is a direct result of the decline of income that has resulted from decreasing union power. Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1 (1999). He argues that they reduce "political pressure to narrow the economic gap in America, a task unions previously performed in our society." *Id.* at 5. In addition they make it possible for underpaid workers to have a higher standard of living than would otherwise be possible. *Id.* at 4.

140. See, e.g., Willard Wirtz, *Labor Unions: Not Well but Alive*, 69 CHI.-KENT. L. REV. 259 (1993).

141. Wade Rathke, Majority Unionism: Strategies for Organizing the 21st Century Labor Movement (June 2002) (unpublished paper, on file with author). See also Barbara Ehrenreich & Thomas Geoghegan, *Lighting Labor's Fire*, THE NATION (Dec. 23, 2002).

142. Michelle Amber, *AFL-CIO Convenes Organizing Summit to Find New Ways to Expand Membership*, 9 Daily Lab. Rep. (BNA), at C-1 (Jan. 14, 2003).

143. For examples of this discussion, see *Labor Notes Roundtable, Organizing: What's Needed* (Nov. 2002 - Apr. 2003), available at <http://www.labornotes.org/archives/2003/organizing.html>.

144. Labor leaders such as Richard Trumka and Lane Kirkland have even called for the repeal of the NLRA and a return to common law. Richard Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987); Richard Trumka, *Build Rank-and-File Activism*, in THE FUTURE OF LABOR 64 (Labor Research Association 1992); *Kirkland Calls for Excluding Employers From Election Process*, 116 Daily Lab. Rep. (BNA), at D8 (June 18, 1993); *Kirkland Says Many Unions Avoiding NLRB, Calls Board an "Impediment" to Organizing*, 167 Daily Lab. Rep. (BNA), at A-11 (Aug. 30, 1989); *Senate Labor*

The sad thing is that these critics are attacking the wrong target. The problem lies not so much with the NLRA's language as with those who interpret and apply the law. Missing this point means wasting energy trying to replace a law with sound fundamentals. It also means ignoring the danger that any law will suffer the same fate as a result of judicial amendment. Therefore, at best, new legislation can be of no more than temporary help. In both the long and short run, the only thing that can restore collective bargaining rights is persuading judges to reverse course and enforce the NLRA's express language and policies.

A. *How Do Judges Rewrite Labor Law?*

Advocating that judges begin dismantling the judicial amendments is no easy thing. One obvious problem is that doctrines, such as striker replacement, that have been approved by the Supreme Court cannot be easily reversed. But the more general problem may be even more intractable. It would be easy to write off judges as conservatives who are merely pursuing a conservative course of decision making based on their class interests. While there may be some evidence of this,¹⁴⁵ it alone is insufficient and too unsubtle to explain the complex processes that led to the judicial impasse amendments.¹⁴⁶

Among the factors that have contributed to the judicial amendments include judges' lack of understanding of labor law, a deficiency grounded in their common law training. In addition, there is the common law mode of incremental decision making. Finally, the NLRA's drafters themselves created some of the problems by leaving gaps in the law.

1. The Influence of Common Law

Judges come to the bench imbued with the common law as a body of law and as a process. As a result, they are less able to understand and be sympathetic at a deep level with legal regimes that operate contrary to the laws with which they are familiar.¹⁴⁷ This is a complex topic that could

Subcommittee Holds Hearing on Organizing Rights Under Taft-Hartley Act, 20 Daily Lab. Rep. (BNA), at A-11 (Feb. 1, 1988).

145. James J. Brudney, *Judicial Hostility Towards Labor Unions? Applying the Social Science Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999) (presenting a judicial bias study).

146. The ideas here are the subject of a book the author is working on currently: *Taking Back the Workers' Law: A Litigation Strategy for Labor Law Reform Now* (unpublished draft, on file with author).

147. See James Brudney et al., *Of Labor Law and Dissonance*, 30 CONN. L. REV. 1353 (1998); Julius Getman, *Of Labor Law and Birdsong*, 30 CONN. L. REV. 1345 (1998); Dannin, *Collective Bargaining*, *supra* note 69; see also Brudney, *Judicial Hostility*, *supra*

itself be the subject of a lengthy study.¹⁴⁸ However, two common law doctrines in particular make it difficult for judges to sympathize with the goals and methods of collective bargaining: employer property rights and master and servant.

In addition, decisions often speak of an employer as “he” rather than “it” even when the employer is a corporation. This suggests that when they are deciding a case, judges have a vision of an employer as an individual, one who is subject to very personal feelings. This imagery has important implications for how these two common law concepts play out in labor law.

When judges see an employer as a “he” rather than an “it,” judges are more likely to conceive of employment as the employer’s property and thus to ascribe to a job all the body of rights and duties they would give to the employer’s hat. The reality is that most employers under the NLRB’s jurisdiction are likely to be in some ownership form other than a sole proprietorship. In the case of large corporations, ownership will be diverse and impersonal, and company actions may be decided by directors, managers, and officers whose tenure with the company is likely to be short as they further their careers by moving from one position to another. Never considered is the fact that the employees are more likely to have long tenure and enormous personal resources invested in their jobs, as a sort of sweat equity.

Some are likely to object that the workplace, after all, belongs to the employer, and when collective bargaining fails, the employer must have the right to control the workplace terms.¹⁴⁹ Any other solution would be tantamount to a taking of the employer’s property without due process. Some will respond by saying: Why assume that only the employer owns the workplace and has the right to control what occurs there? Is there any reason that the workers have no ownership interests as a result of “sweat equity”? And if we see only the employer as the owner are we not overlooking the generous subsidies society provides employers: roads, sewers, utilities, educated workers, police protection, laws (especially corporate law), the court system, tax benefits and incentives, and sometimes outright handouts? Is a society that provides these generous benefits to employers barred from having some degree of control over whether that employer runs its business in the public interest?

Envisioning employment as employer property and the employer as an

note 145, at 1675. In a study of a campaign to alter society-wide understandings as a precursor to labor law reform, it was found that one of the few groups who was not influenced was the judiciary. Ellen Dannin, *Hail, Market, Full of Grace: Buying and Selling Labor Law Reform*, 2001 L.REV. MICH. ST. U. - DET. COLL. L. 1090.

148. For such a study, see generally JAMES ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

149. Klare, *supra* note 2, at 11.

individual makes it more likely to see the employer as having a sense of responsibility toward the job. This also means that judges are likely to try to fit employees into this scheme as being present as trespassers or invitees or some other property concept that allows non-owners to be present. It is possible that the common law could expand to find in property law some more accurate place for employees, such as having an easement or rights by adverse possession. In any case, conceiving of employment as the possession of a human employer fails to understand the complex nature of who now is an employer and the importance of jobs in the lives of those who fill them. It is this mindset that leads to a decision such as *Lechmere*.¹⁵⁰

Master and servant law, even by its very terminology, harkens back to a day in which there was a human master who had control of servants.¹⁵¹ This was a fairly accurate description of the United States through the mid-nineteenth century when virtually all employees were in bonded servitude and when the workplace was also likely to be the home. In that day, the father was also the employer, and the employee was likely to be a blood child or a child apprentice living in the home. Law developed in this context of intermingled personal and business relations, where adults needed to educate and control the children who worked for them, while also under their care, cannot be comfortably applied to a world in which it is illegal for children to work, almost no remunerative work is done in the home, and employment relations are the impersonal ones of a distant multinational corporation to its employees.

Although it does not speak in these terms, the NLRA understands that employees have an emotional and physical investment in their jobs that the law must recognize, protect, and support. Senator Robert Wagner said that the labor law converted the relation of master and servant into an equal and co-operative partnership that planted a sense of power, individuality, freedom and security in the hearts of men and made them the people they were meant to be.¹⁵²

What these visions of property and master and servant law and the personal nature of employment lead to is a tendency to interpret labor law so that the wise and mature employer who has a stake in protecting *his* property will go through the process required by law to discuss workplace issues with *his* employees. These conceptualizations presume that the employees are likely to be unwise and immature. Therefore, the employer is permitted to impose *his* will when the employees will not see reason.

150. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (limiting the definition of “employee” and thereby circumscribing workers’ rights). See *infra* discussion Part I.A.

151. Klare, *supra* note 2, at 13.

152. 75 CONG. REC. 4918, 72d Cong., 1st Sess. (1932) (speaking of attempts to legislate organizational right prior to the NLRA).

And if they are so irresponsible as to leave the workplace, *he* can react by taking back *his* jobs because they have shown so little gratitude for them and giving them to those who will treat *his* property with greater care.

Labor law is not the only area that has to deal with this problem of societal changes leading to clashes between common law tradition and legal and social reality. In some cases, such changes can be “integral—and usefully vital—to the evolution of the common law.”¹⁵³ However, the clash is dangerous when these hidden biases are left unexplored and when judges are not candid about what is affecting their reasoning processes.

What judges can aspire to is that these moments will result in decisions that are fully reasoned, that are candid in acknowledging the tensions that exist in the current status of the common law, and that reflect a willingness to update the common law on the basis of new information about the world. In these contexts, judges must hold thoughts tentatively, be careful to ponder the empirical foundations of the various choices before them, and—perhaps most importantly—be willing to revisit and abandon prior decisions, if necessary, to forge a sensible path forward.¹⁵⁴

Unfortunately, this wise path is not the one taken in the case of the judicial amendments to the NLRA.

2. Incrementalism

Incrementalism is intrinsic to the nature of the common law. The *International Paper* case is an example of that process. While incrementalism suggests slow growth, that does not mean that it cannot achieve radical results. Glaciers are also slow moving, but they can grind down mountains and create the Great Lakes. In *International Paper*, the court reached an extraordinary result contrary to express provisions of the NLRA when it applied law that had gradually developed and expanded it to discrete aspects of the case.

The judicial impasse amendments all show evidence of incrementalist processes. Striker replacement developed virtually as an afterthought to *Mackay Radio*.¹⁵⁵ In the case itself, it was clearly dictum and of no legal import whatsoever; but once the *Mackay* dictum was uttered, it took on a life of its own.¹⁵⁶ Implementation upon impasse was similar.¹⁵⁷ In 1940, the NLRB permitted an employer to unilaterally implement its wage offer so it

153. Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 514 (2002).

154. *Id.* at 514-15.

155. 304 U.S. 33. *Mackay* is also an example of applying common law ideas of property rights and master and servant.

156. See Finkin, *supra* note 34 (describing how the *Mackay* dictum “became a rule”).

157. For a history of the development of the implementation upon impasse doctrine, see Dannin, *Legislative Intent*, *supra* note 69; Dannin, *Collective Bargaining*, *supra* note 69.

could comply with new wage and hour laws, but only after lengthy negotiations had led to an impasse in bargaining that otherwise would have left the employer in violation of the law.¹⁵⁸ Over time the doctrine gradually expanded and the safeguards were altered so that it became easier to find that an impasse existed and to allow implementation.¹⁵⁹ The expansion of lockout law likewise followed a similar course.¹⁶⁰

If judges become too wedded to previous judicial conceptions of reality, they may resist accepting different conceptions that have evolved in a dynamic marketplace. Instead of shaping a common law that fits the circumstances . . . as they exist here and now, judges may be tempted to adhere to precedent rigidly, lest they be seen as engaged in unprincipled (and somewhat daunting) acts of lawmaking.¹⁶¹

In the case of labor law, judges adhered to prior concepts and imported them into the NLRA with the result that they then adjudicated without sensitivity to the purposes of the NLRA; judges thus engaged in law making.

Once on this path, incrementalism caused them to veer ever farther from anything that can be called enforcing the law, but the incrementalist process blinds them to just how great a detour has been taken. Incrementalism provides a sense of tradition and almost scientific precision but can lead to absurd ends that necessitate a return to the core of the law. We have certainly reached that point with the judicial amendments.

3. The Role of Judges

But perhaps there is something positive to be said for the way judges have reacted to the NLRA. In some common law countries, New Zealand, for example, some have stated that judges exist in partnership with the legislature and that judges are charged with doing justice.¹⁶² Indeed, some conservative legal philosophers argue that courts, as common law bodies, should not defer to legislative intent when the court thinks that is appropriate, for example, when the court concludes that the law is inconsistent with a society's current mores.¹⁶³ Some would argue that

158. Westchester Newspapers, Inc., 26 N.L.R.B. 630 (1940).

159. Dannin, *Collective Bargaining*, *supra* note 69.

160. See cases discussed *infra* notes 55-56.

161. Strine, *supra* note 153, at 500.

162. See Margaret Wilson, *Policy, Law and the Courts: An Analysis of Recent Employment Law Cases in New Zealand*, 8 AUSTL. J. LAB. L. 203, 216-17 (1995) (discussing the relationship between lawmakers and the courts in New Zealand).

163. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2, 18, 24, 121 (1982); Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in PRECEDENT IN LAW 36, 44 (Laurence Goldstein ed., 1991); Allan Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1767

judges must resolve disputes based on public values,¹⁶⁴ rather than legislative purpose. One commentator observes that in doing this the courts are exercising judicial quality control by protecting citizens “against” the legislative purpose.¹⁶⁵

We live in a time in which unions regularly win fewer NLRB elections than they lose, and in which unions are often seen in negative terms. Arguments for greater judicial activism in overriding legislative purpose would suggest then that the judicial amendments are an appropriate response to general social mores.

Yet the history of the judicial amendment process and public views does not support this argument. *MacKay* and the early decisions related to implementation upon impasse all came at a time when unions were more generally popular. Indeed, it may be that, rather than responding to social views, the judicial impasse amendments are in part responsible for creating those mores by undermining unions and deflating the positive public role they could play. In that case, the judicial impasse amendments can find no support from the proponents for judicial activism.

Another view is that by giving a conservative interpretation based in the pre-legislated system, the courts force the legislature to affirm that it intends to take a radical step and repudiate the prior law.¹⁶⁶ This is appropriate when a court deals with an ambiguous statute.¹⁶⁷ However, in the case of the judicial impasse doctrines, Congress made it clear that its intention was to overturn prior law and even that it was acting to remedy problems created by prior law. Judicial interpretations nonetheless defied that mandate.

4. Gaps as Minefields

On the other hand, there are strong arguments that the drafters of the NLRA brought this problem upon themselves. They held extensive hearings and went through many draft bills. Despite that they failed to include anything in the legislation about events they had to know were likely to arise: how to deal with impasses and how to deal with strikers. It is hard to believe, given what has happened, but the drafters consciously chose not to regulate how impasses would be resolved; rather, they left this to the parties to work out, subject solely to the pressures of the market.

(1982) (book review).

164. Wilson, *supra* note 162, at 217.

165. J. F. Burrows, *An Update on Statutory Interpretation*, 1989 N.Z.L.J. 94, 95; *see also* Strine, *supra* note 153, at 500 (discussing the role of judges in maintaining the legitimacy of the law and helping it evolve in a dynamic market place).

166. CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 114-15 (1990).

167. *Id.* at 119; CALABRESI, *supra* note 163, at 4.

Had the original bill been enacted, the NLRA today would provide for conciliation, mediation, and arbitration. During hearings on the bill, it was argued that the legislation must remedy “the matter of bringing collective bargaining negotiations to a conclusion.”¹⁶⁸ Instead, today, the NLRA does not permit the NLRB to engage in conciliation and mediation.¹⁶⁹ Rather than assist in resolving impasses, the NLRA opted for a system that would give “the reality of *opportunity* . . . to labor to bargain collectively.”¹⁷⁰ Given the NLRA’s goal of promoting collective bargaining, it seems surprising that its drafters decided to leave bargaining almost unregulated¹⁷¹ and not even require that the Act’s goals as to collective bargaining be met, but this is exactly what they did.¹⁷² Indeed, so confident were they that the parties could resolve problems without any intervention that bad faith bargaining came close to not even being included as an unfair labor practice. It was late in the process that bad faith bargaining was made an unfair labor practice and, even then, the right was limited.

By leaving gaps at such crucial points, Congress turned the decision over to the courts.¹⁷³ The courts were, of course, likely to rely on the tools

168. Testimony of Francis J. Haas, 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 143, 150 (1935).

169. “Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.” 29 U.S.C. § 154(a) (2000). Mediation is available through the Federal Mediation and Conciliation Service if the parties request it. 29 U.S.C. §§ 171-173.

170. Testimony of Elinore Morehouse Herrick, 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 206, 211 (emphasis added); *see also* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2320 (1935) (considering bill (S. 1958) to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, and to create a National Labor Relations Board).

171. 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2312; *see also* *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 616-17 (1986) (stating that the employer and the union are “free to use their economic weapons against one another”). For other choices made that have profoundly affected the effectiveness of the NLRA, *see* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002) (discussing the clash between the Wagner Act’s basis in the Commerce Clause and its basis in the Thirteenth Amendment).

172. *See generally* Ellen Dannin & Clive Gilson, *Getting to Impasse: Negotiations Under the National Labor Relations Act and the Employment Contracts Act*, 11 AM. U. J. INT’L L. & POL’Y 917 (1996).

173. The same situation occurred with regard to New Zealand’s Employment Contracts Act in 1991. For its first three years, the Employment Court interpreted the ECA to resolve impasses also by permitting the employer to impose its terms based on a doctrine the court developed and called a “partial lockout.” The court said that the employer had locked workers out of part of their terms when it unilaterally altered them. The cause for this similar outcome for impasse resolution seems to have been the same. Both the ECA and NLRA omitted any method for impasse resolution. The NLRA did so to be non-prescriptive, while the ECA put its faith in the market. The legislature’s failure to act forced the judiciary to step in. Giving employers the right to impose terms was consistent with neither act. Ellen

of the common law and incrementalism to aid them in interpreting a law that was intended to radically overturn master and servant, property law, and workplace control. In addition to making little effort to encourage the parties to bargain as equals and to set workplace terms by consummating an agreement, judicial decisions have limited the remedy for bad faith bargaining to no more than an order to bargain in good faith, rather than imposing monetary sanctions, requiring interest arbitration, imposing terms or other effective sanctions that might, as required by § 10(c), “effectuate the policies of this Act.”¹⁷⁴ In short, history, chance, politics, changes in social mores, and the accretive nature of legal analysis explain a great deal about the inception and growth of the judicial impasse doctrines.¹⁷⁵

The key lesson from experience with the development of judicial doctrines altering the basic intent of the NLRA is that the Board and courts will fill statutory gaps by developing structures to control bargaining and the use of employer and union weapons. Failing to legislate as to a key issue that is certain to arise opens the door for a result that may undercut the entire purpose of the legislation.

III. ENDING THE DICTATOR GAME

Three things are key to restoring the NLRA’s ultimatum game and ending the dictator game. All are based in the need to help judges return to their role as legislative interpreters and not legislators. First, judges need to be sensitized to how the NLRA differs from the common law tradition that frames their world view. Second, NLRA cases need to be tried so that a record is developed that helps common law judges decide cases in a way that promotes NLRA goals. Third, a principled and workable way must be found to deal with the NLRA’s gap in dealing with impasses.

A. *Sensitizing Judges to NLRA Goals*

It is impossible to end the dictator game without being clear that the

Dannin & Clive Gilson, *supra* note 172.

174. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (holding that the National Labor Relations Board has the power to require employees and employers to negotiate, but cannot compel the employer to agree to a proposed checkoff clause). In other words, before committing bad faith bargaining, the parties are required to bargain in good faith, and the remedy for not doing so is solely an order to bargain in good faith. As a result, some now argue that it is not really an unfair labor practice, because the duty to bargain in good faith is meaningless. See, e.g., HUMAN RIGHTS WATCH, *supra* note 19, at pt. IV (studying the impact of judicial decisions regarding bad faith bargaining).

175. For a full description, see Dannin, *Collective Bargaining*, *supra* note 69, at 64-65 (describing how the expansion of the concept of impasse has affected bargaining between employers and unions); Earle, *supra* note 78 (discussing the development of the impasse doctrine over time).

NLRA fundamentally “violates” common law principles. Enforcing such a law entails different strategies than when a law embodies the spirit of the common law. Every aspect of NLRA cases must be handled with a consciousness that the very purpose of the Act was to supplant key parts of the law that controlled the workplace and that are still the default mode for controlling workplace relations. Those who operate in this system often forget just how uncomfortable the fit between our common law legal tradition and the NLRA is. Just as law students must learn to think like lawyers before they can understand the law in more than a rote way, so too must non-labor lawyers learn to think like labor lawyers. Unfortunately, all too often this is not done when cases are tried and then when they are briefed and argued to the courts of appeals.

When I was a judicial law clerk and already knew I wanted a career in labor law, I saw many cases argued on appeal by NLRB lawyers. With only one exception, the arguments were rote and based on assumptions the judges did not have. I could see that the judges left the bench puzzled and with questions that were never answered. But lawyers need not argue cases this way. In, unfortunately, the only case in which the NLRB attorney spoke directly to the judges about the difficult parts of the case, she provided a clear explanation as to why the law had been broken and what must be done to enforce it. Rather than merely listening politely as they had done with other NLRB lawyers, the judges peppered her with questions, even asking for answers to general questions about labor law. When the NLRB attorney sat down, it was easy to see that she had carried the day.

When planning how to present an NLRA case at any level, attorneys must be conscious of the fact that few judges today have been labor lawyers, and few have law clerks who are planning to have a career in labor law or a law clerk who has taken even a single labor law class. If judges are to decide cases in a way that enforces the law—and judges do want to enforce the law—someone has to answer the questions a judge will have not only about a case, but also about the law and its policies. The best way to do this is to anticipate those difficulties at every stage of the case and not wait for the oral argument at the court of appeals.

It is sobering how few court cases ever refer to § 1’s goals and § 7’s methods for achieving those goals. When they do, the goal they most often address is that of promoting labor peace. That is an easy goal for common law judges to understand, but only in an oversimplified way that ignores the components the NLRA’s drafters intended to lead to real labor peace. The difference is that a short term labor peace in a specific case can be achieved by suppressing disagreement, a result utterly at odds with the NLRA’s goals. It neglects the importance of deciding cases aware of the goals of preventing actions that depress wage rates and the purchasing

power of wage earners and that prevent “the stabilization of competitive wage rates and working conditions within and between industries.”¹⁷⁶ Suppressing disagreements ignores the goals of “restoring equality of bargaining power between employers and employees”¹⁷⁷ and “encouraging the practice and procedure of collective bargaining.”¹⁷⁸ It also ignores “protecting the exercise by workers of [their] full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”¹⁷⁹ Every case must be tried in a way that makes it impossible to evade the demands of these goals.

Indeed, although not every case goes to the court of appeals, lawyers should approach every case as if it were headed there, so that judges have the grounds to reverse the judicial amendments that defeat the NLRA’s purposes. There is no question that this means committing more resources since this will take more time in case preparation and more time in trial and post-trial briefing.

B. Helping Common Law Judges Understand the Consequences of What They Are Doing

The key to reversing years of judicial amendments and ending the dictator game judges have recreated thus is litigating NLRB cases in a wholly different way. The judges who review NLRB cases are intelligent, experienced lawyers. Unfortunately, for the most part, they are not experienced in the NLRA and the significance of its role in promoting the co-determination of working conditions.¹⁸⁰ Therefore, cases need to be

176. 29 U.S.C. § 151.

177. *Id.*

178. *Id.*

179. *Id.*

180. A study of the impact of judicial demographics on their decisions in NLRA appeals found that few judges had NLRA experience. James J. Brudney et al., *Judicial Hostility Towards Labor Unions? Applying the Social Science Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1681, 1704-05, 1720 (1999). When judges had practiced labor law, even on the management side, it made it more likely they would find for unions in 8(a)(5) cases.

Section 8(a)(5) claims, on the other hand, raise issues more distinct from other fields of appellate practice. These allegations focus on employer misconduct directed at the union rather than at individual employees. They involve complaints that the collective bargaining process is being undermined or subverted, including charges that an employer refused to provide requested information, engaged in surface bargaining, or improperly withdrew recognition of the bargaining unit. To understand and assess these claims, judges must be comfortable both with the protected nature of group action and with the complex dynamics generated by a clash between two collective entities, the union and the employer. There also are fewer analogues elsewhere in public law

litigated in a way that respects judges' strengths while recognizing where some will need information and assistance. In essence, this means that lawyers should present judges with evidence that demonstrates how these actions violate the Act's purposes, and not simply trying cases mechanically, only putting the facts of a violation in evidence. It also means that lawyers must introduce evidence as to what remedy is appropriate and, at least until the process of reappraisal has taken hold, including evidence as to why the current interpretations must be reversed. In other words, have a phased strategy that recognizes which issues need to be tackled first.

In order to succeed in the cases the NLRB prosecutes, it must create a record that supports the violation alleged and the remedies sought. Simply making arguments in briefs is insufficient. An example that demonstrates this can be found in former General Counsel Rosemary Collyer's attempts to make a modest change in remedies. She wanted to have all orders require a "visitatorial" clause that would permit a Board agent access to an employer's facility in order to ensure compliance with the other terms of a court order.¹⁸¹ Unfortunately, she relied solely on having each brief include a boilerplate argument that a "visitatorial" clause should be an automatic

to claims that center on the paradigm of group action.

With this background, it is noteworthy that the results for our section 8(a)(5) equation differ substantially from those for the other equations

...

Conversely, judges with NLRA management experience displayed the largest pro-union difference from their colleagues under section 8(a)(5). When the Board rejected a union's 8(a)(5) bargaining claim, judges with NLRA management experience were especially likely to reverse and protect the union's position. This pattern supports the hypothesis that section 8(a)(5) claims present particular challenges to the bench. Judges who supported the union under other sections of the statute appeared less likely to register that support under section 8(a)(5), while judges with the most experience interpreting and litigating under the statute showed a special propensity to protect union interests.

Id. at 1726-27.

181. Standard language was:

For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondents, their officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

Cherokee Marine Terminal, 287 N.L.R.B. 1080, 1080 (1988).

remedy. However, the courts and Board were unwilling to accept that visitation clauses were necessary without evidence in the record.¹⁸² The Board in *Cherokee Marine Terminal* stated:

Such a clause would permit the Board to examine the books and records of a respondent and to take statements from its officers and employees and others for the purpose of determining or securing compliance with a court-enforced order. Counsel for the General Counsel first requested this clause in the posthearing brief to the judge pursuant to instructions from the General Counsel as part of an effort to persuade the Board to include visitatorial clauses in all remedial orders. Thus, the specific request was based not on the facts of this case but on more general arguments regarding the Board's enforcement powers and recurring compliance problems in prior unrelated cases.¹⁸³

After losing a number of cases as a result of pursuing an argument-only strategy, and not producing a trial record to support the request, the General Counsel stopped pursuing visitatorial clauses. Only the creation of record evidence that demonstrates the need to change course can restore the NLRA to its intended role.

But where can lawyers find this evidence? It must come from social scientists and others who have done and who will do research on these issues, and from others whose experience qualifies them as experts. Their work must be presented either as an exhibit, or, to be more effective, the researchers themselves or other qualified social scientists may be called as expert witnesses. Some of the research that can be used has been completed, but much is yet to be done. When social scientists see that there is a need for research in a particular area and that it is valued, they will begin to do work in that area.

Experience with experts in other areas makes plain that this is not an easy course.¹⁸⁴ Social scientists are not the only ones with expertise in this

182. See, e.g., *Microimage Display Div. of Xidex Corp., Petitioner v. NLRB*, 924 F.2d 245, 255 (D.C. Cir. 1991); *Cherokee Marine Terminal*, 287 N.L.R.B. 1080 (1988).

183. *Cherokee Marine Terminal*, 287 N.L.R.B. 1080, 1080 (1988).

184. Vice Chancellor Strine observes:

The adjudicative process obviously hampers the judge's ability to put her hands on an unbiased, and sufficiently thorough, sample of the literature, much less to understand it fully. The joyous and, at times, maddening complexity of the human experience confounds the ability of social science to describe the way things are with the certainty that is often achievable in some aspects of the natural sciences. Judges reviewing a skewed and incomplete body of difficult-to-understand social science articles whose composition is shaped largely by time-pressured personal research and citations by self-interested litigating adversaries must proceed with some hesitance. When possible, empirical evidence should be presented through live, expert testimony so that the judge can go beyond the cold page to an active dialogue with the social scientists on

area. The experiences of union representatives, mediators, lawyers, and employees can qualify them as experts. The point is that a whole new group of witnesses addressing an entirely new set of issues must be brought into NLRB trials.

Unfortunately, in order to do this, the insularity with which NLRA cases are tried must be overcome. NLRB cases are prosecuted by an NLRB regional office attorney and usually defended by an attorney who is also well versed in labor law before an administrative law judge from the NLRB's Division of Judges. Thus, everyone at the typical NLRB trial is a specialist in labor law operating with the shortcuts experts use. As a result, trials are usually short and to the point. Because they are not jury trials and because the parties normally file post-hearing briefs, there is no need to try cases in a way that lays out evidence openly or provides much explanatory context. As a result, Board cases are not tried in a way that is helpful to common law judges.

It is possible, however, to try cases in a way that produces a record that will provide guidance to judges who are not experts in labor law. One example I can offer is again from my days as a law clerk; a large part of my caseload was social security disability appeals. The cases were all short and the transcripts and exhibits all followed a formula. The applicant was briefly examined about the disability; a vocational expert was called about jobs the applicant could perform; and a few documents were put into evidence. In one case, however, the attorney veered off this path dramatically. Rather than merely asking his client whether she was in pain and to describe the pain, he periodically would ask her, "I notice you are shifting in your seat constantly. Is there a reason for that?" "Yes." "What is the reason?" "If I sit still for more than a few minutes, the pain in my back gets so bad I can't bear it." "Would it help if you stood up?" "Yes." After a few minutes of standing, the process repeated itself. The witness' testimony and the medical records had stated—as did those of many other applicants—that she was unable to sit or stand or lie down for more than a few minutes without being in such pain she had to move to a different position. In all the other cases, the witness had said nothing in the course of examination that truly demonstrated suffering pain. In this case the problem was not only stated, it was illustrated.

More cases need to be tried so they illustrate what is at stake. Nothing less will restore the NLRA to its original purpose. This method requires the lawyer trying the case to think about more than proving the facts of the

both sides of the question, aided by adversarial examinations. Even when that technique is used to improve the judge's ability to assess empirical claims based on social science research, common sense and modesty still counsel against the adoption of eternal verities supposedly premised on the latest . . . scholarship.

case and meeting the opposing side's evidence. To reiterate, the lawyer must provide evidence as to the goals of the NLRA and explain how a discussion in the given case must correspond to those goals.

The discussion so far assumes that the counsel for the General Counsel will be trying the case and presenting this sort of evidence. But what if the General Counsel is unwilling to do so? In that case, and perhaps in all cases, it is the unions who must intervene and be prepared to take the lead on presenting this evidence. In the sorts of cases under discussion here, the charging party will have been the union, and the union will thus be a party to the case.¹⁸⁵ It makes sense for unions to be prepared to take on this role. No one but the unions involved will have such a strong need to take the steps necessary to change this law. The bottom line is that both the general counsel and union counsel or representatives must provide the judge with the record evidence the judge needs to enforce the statute.¹⁸⁶

Although this article focuses only on the judicial impasse amendments, this new way of trying cases provides a useful way of "amending" the NLRA—and perhaps the only way to get the NLRA to address the many aspects of the law that have angered unions. These include inadequate remedies and election processes.

While perhaps not as straightforward as new legislation and starting from a clean slate, it has to be remembered that the process of legislating does not guarantee success nor is it less expensive. Before a new statute can be passed, there must be agreement on the contents of such a statute accompanied by intense lobbying. Given the current political climate, there can be no question that the NLRA is the best statute labor can hope for now and probably for years to come. It is better to accept that reality and work to improve what exists.

This work should be engaged in with enthusiasm. This is not settling for second best. The NLRA is basically a sound law, and unions need to acknowledge that they would be lucky to get another as good. The work for now is to wipe away the accumulation of years of judicial activism that have tarnished its luster.

C. *Filling Gaps in the NLRA*

If we are to reinstate collective bargaining as an ultimatum game, the NLRA must be enforced in a way that advances the Act's goals: promoting

185. 29 U.S.C. § 160(b) (1994). The NLRB Rules and Regulations §§ 110.10(a), 102.8, 102.29, and 102.38 and Unfair Labor Practice Casehandling Manual §§ 10380.3 and 10388.1 provide for such a role.

186. See Strine, *supra* note 153, at 514-15 (describing the need for judges to consider "new information about the world" derived from social science research to update the common law).

workplace co-determination; removing industrial strife and unrest; creating equality of bargaining power; encouraging the practice and procedure of collective bargaining; “protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”¹⁸⁷ To do so, we must prepare the ground by developing a reasoned understanding of how to resolve bargaining impasses. Merely reversing the rights of an employer to implement its final offer upon impasse, to lockout workers, or to replace strikers recreates the conditions that led to this problem—leaving a gap. It gives judges no assistance.

If we start from the NLRA as enacted, it appears that the drafters intended to create a self-adjusting system that allowed both parties to use the full range of economic weapons and other methods of persuasion available to them—excluding only those that violated the law. This suggests turning to a pure contractual bargaining model with the one exception that such a contract must be negotiated in the context of an ongoing relationship.

Imagine, then, that instead of employer implementation at impasse, the law required the parties to stay in status quo until they reached an agreement, essentially the commercial model of contracting, in a world of buyers and sellers with equal bargaining power.¹⁸⁸ Not only would this recreate the NLRA’s original language and intent, there appear to be a number of advantages over the current system. First, the workplace would be governed by terms the parties had once agreed were sensible for all. Changes to those terms would depend on whether a party had more to gain from retaining the current terms than by altering them and whether one party could or would offer inducements that would induce a reluctant party to agree. As negotiation helped both parties see gains from agreeing to new terms, this system should push them to narrow their differences. They would be forced to learn what each side’s concerns were, to compose their differences, and to create rules for governing the needs of this specific workplace.¹⁸⁹ Such a contract would embody the concept that unions “are

187. 29 U.S.C. § 151.

188. Of course, there could be many other commercial models that would be closer to the situation in the employment relationship. First, employment is normally a long-term relationship. The Detroit automobile companies have forged long term relationships with many of their suppliers. Consider what would be the impact if Ford, for example, unilaterally cut the price it would pay a small supplier for whom Ford was its only or its most important customer. Another commercial model close to that of employment would be that of rental housing, where there may be long term relationships and high costs associated with exit—e.g., losing a place that has become home, searching for a satisfactory substitute, and all the work and cost of moving.

189. A contract that embodies this tension well is the one between a New Zealand auto

not married to a system of narrow job classifications or adversarial shopfloor labor relations; they are willing to cooperate and participate.”¹⁹⁰

However, a pure contractual model is not without problems. We also have to assume that despite legislation intended to promote equality of bargaining power, inequalities will remain. Requiring both employer and union to agree may create new opportunities for gaming the system. A party with little bargaining power who preferred the status quo could prevent change simply by saying, “No.” Or a party with low bargaining power could blackmail a bargaining partner who had a strong desire for change. The result of this stalemate could be detrimental to the workplace and by extension to the economy.

The issue of stalemate and the desire to end it as expeditiously as possible is the problem that led to the creation of the judicial impasse

plant and one of the unions representing workers there. The contract declares that employer and worker interests differ in important respects; despite this, it says, each party agrees to promote the other’s interests:

The parties to this contract recognise the employer’s objective of retaining and promoting a profitable business by providing its customers with high quality vehicles at competitive prices, and recognise the employees’ objective of retaining jobs and reasonable living standards and working conditions. It is acknowledged that the industry operates in a highly competitive environment which is influenced by government policies on tariffs. Without sub-ordinating either party to the objectives of the other, the parties agree to cooperate in achieving their objectives.

The parties agree that:

-employees will be provided with the opportunity to influence decisions that affect them in the work place.

-quality will be put first.

-within the parameters of this contract a well trained and flexible work force will be maintained.

-the importance and contribution of all to the success of the company is recognized.

-they will treat each other with respect and dignity.

-they will act at all times in a safe, fair and honest manner.

-they will promote employee and employer behavior that is consistent with accepted standards of conduct.

-they will develop communication channels and systems that will keep all employees informed of things that affect them in the work place.

-they will resolve problems in a non-adversarial manner where possible based on consensus.

Collective Employment Contract, 1996-1997, C1.1.1, Mitsubishi Motors New Zealand Ltd. —Todd Park Employees (on file with author).

190. Voos, *supra* note 73, at 17.

amendments. There are only two ways to deal with an impasse in bargaining: intervene to a greater or lesser degree or let the parties work it out themselves as long as they violate no laws, in much the same way as federal discovery works. The only boundaries are that whatever system is in place, it must not infringe on the NLRA's fundamental values and must be one that meets all parties' needs.

If the interventionist route is taken, interest arbitration should be considered. In a bargaining simulation comparing three different systems for resolving bargaining impasses, interest arbitration was viewed the most favorably by the employer and union participants.¹⁹¹ Congress considered this system when drafting the NLRA, rejected it, enacting the nonintrusive system instead.¹⁹² This history suggests that we may have to respect that judgment as precluding interpreting the law to include it now.

A more substantial argument is that there is no way to require interest arbitration upon impasse without legislating. There is no question that it would be a major innovation. Nevertheless, it does not seem to be a greater innovation than when judges allowed one party to control terms when an impasse was reached. Unlike implementation, interest arbitration does not itself undercut the express language and goals of the Act. In addition, there are many varieties of interest arbitration, some of which may be less intrusive than others. Such a change must come from the legislature. If judges were wrong to create implementation upon impasse, then it is hard to support the judicial creation of an interest arbitration system triggered by impasse.

Interest arbitration, however, might be an appropriate remedy for bad faith bargaining. Section 10(c) requires that remedies promote the purposes and policies of the Act, and a system of interest arbitration could be created and tailored to the needs of specific cases in order to support collective bargaining and restore equality of bargaining power. As such, *Gissel* bargaining orders might be a useful model. Normally bargaining orders are a remedy for bad faith bargaining, but in the case of a *Gissel* bargaining order, they are a remedy for employer unfair labor practices of such gravity that employees are unable to have fair elections of representatives. As such it becomes a second best method for enforcing the choice employees made when a majority of them signed cards designating the union as their representative at a time before the employer's anti-union campaign began. Similar to *Gissel* bargaining orders, interest arbitration as a remedy would also be appropriate in order to deprive the party who acted illegally of the fruits of that behavior.

This still leaves the parties with no method of resolving bargaining

191. Dannin & Singh, *The Force of Law*, *supra* note 75; Singh & Dannin, *Simulated Study*, *supra* note 75.

192. Dannin & Singh, *The Force of Law*, *supra* note 75.

impasses other than negotiating their way out of them. This noninterventionist option may not be as unworkable as is feared. Impasses of any duration could become relatively rare once the employer no longer has an incentive to reach an impasse and instead has some incentive to move past an impasse. In addition, mediation is generally available now. In a world in which implementation is not available, the parties might make greater use of mediation services. It may even be that if interest arbitration is available as a remedy, an employer will be more interested in reaching a negotiated agreement as opposed to risking the terms an arbitrator might choose. If these predictions are correct, then there is less need for the Board to have an impasse resolution procedure as a matter of course.

Striker replacement is a more difficult issue, because it has been sanctioned to some degree by the Supreme Court and by amendments to the Act itself.¹⁹³ However, there are many details of the right to replace that have not been ruled on. For example, employers have been permitted to replace economic strikers as a right. Social science research could demonstrate that experience with replacement shows that the right should be more regulated rather than allowing employers to decide unilaterally whether to make replacements permanent or temporary. For example under the existing law, while an employer might continue to have the right to replace strikers temporarily, that is, only for the duration of the strike, an employer could not hire permanent replacements unless it could demonstrate that its business would be seriously harmed.¹⁹⁴

Such a standard, of course, bears its own risk that the process of incrementalism and common law traditions that see a workplace as an employer's property and continue to use concepts from master and servant law would gradually make such a burden of proof meaningless. This risk continues, however, under all versions of labor law that are not rooted in common law concepts.

In any case, whatever methods are substituted to resolve impasses and deal with the situations now controlled by the judicial impasse amendments, it is important to bear in mind that the law should not permit a party to reap rewards from behavior that does not comport with the NLRA. Otherwise it will be tempted not to negotiate. That is simply human nature and is a danger that must be kept in check.

IV. CONCLUSION

This article has explored the extent to which the judicial impasse amendments have rewritten the NLRA contrary to its express language and

193. 29 U.S.C. § 159(c)(3).

194. For a discussion of this issue, see the majority and dissenting opinions in *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

the processes that led to this extraordinary degree of judicial activism, supplanting the system of workplace governance set in place by Congress. These judicial amendments are among the factors that led the Human Rights Watch to conclude that U.S. labor law violates international human rights standards¹⁹⁵ and to prompt calls for the NLRA's replacement. There is no easy solution. Labor law is in a desperate state, but it is unlikely that a better law can be enacted. The best answer is to harness the very processes that created the problem—judicial interpretations—in the service of restoring the NLRA as a means of promoting equality of bargaining power, or, put another way, making the ultimatum game the only game in town.

195. HUMAN RIGHTS WATCH, *supra* note 19, at pt. I.