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Kenneth G. Dau-Schmidt

Indiana University Maurer School of Law, kdauschm@indiana.edu

Benjamin C. Ellis

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THE RELATIVE BARGAINING POWER OF EMPLOYERS AND UNIONS IN THE GLOBAL INFORMATION AGE:

A COMPARATIVE ANALYSIS OF THE UNITED STATES AND JAPAN

Kenneth G. Dau-Schmidt*

and

Benjamin C. Ellis**

ABSTRACT

In this paper, we examine and compare the impact of American and Japanese labor law on the relative bargaining power of the labor and management within the context of the new global economy based on information technology. We begin by providing a simple economic definition of bargaining power and examining how it can be influenced by economic and legal factors. Next, we discuss the impact of new information technology and the global economy on the employment relationship and how this has decreased union bargaining power relative to management bargaining power. Finally, we compare various facets of American and Japanese labor law that have a significant impact on the parties' relative bargaining power and discuss how one might expect American and Japanese unions to fare in their negotiations with management in the new economic environment.

I. INTRODUCTION

Although implicit or explicit bargaining is a common means for resolving differences among the various stakeholders of the modern corporation, perhaps the quintessential expression of this phenomenon is collective bargaining between representatives of employees and management over the terms and

* Willard & Margaret Carr Professor of Labor and Employment Law, Indiana University—Bloomington, Maurer School of Law. J.D. (1981), University of Michigan—Ann Arbor; Ph.D (economics, 1984), University of Michigan—Ann Arbor. This article was first presented July 15, 2008, in Tokyo, Japan, as part of the RIETI project on “‘Enterprise Law’ as an Infrastructure of an Incentive Mechanism.” My thanks to Professors Zenichi Shishido and Gillian Lester for inviting me to make this presentation.

** Associate, Betz & Associates, Indianapolis, Indiana; J.D. (2009), Indiana University—Bloomington, Maurer School of Law.

conditions of employment. The resolution of disputes through private bargaining has the great benefit of being a decentralized method of problem solving in which the parties who are directly affected by the problem, and know the most about it, determine the solution. Although bargaining solutions are undoubtedly influenced by information and the parties' conceptions of "fairness,"¹ bargaining is not a detached inquiry into either "truth" or "justice."² Instead, the determination of issues through bargaining is largely determined by the relative "bargaining power" of the two parties, or their ability to force the other side to accept an agreement on their terms.

The rise of the global economy based on information technology has done much to shift the relative bargaining power of labor and management in favor of management. New information technology has allowed the organization of firms on a global basis for production, sub-contracting and sales. In the United States, "outsourcing" work to lower-paid foreign workers has become not only good business judgment, but a necessary strategy to compete with goods and services from lower wage countries.³ In this new economic environment, employers place a high premium on flexibility in production and employment, and the employment relationship is subject to the market in ways that have not previously been experienced. This decreases union bargaining power by putting downward pressure on wages and limiting the parties' ability to make long-term contractual commitments.⁴

Law can also influence the relative bargaining power of labor and management. The law can raise labor's bargaining power relative to management's by: facilitating broad organization across industries or the economy; allowing unions a broad array of economic weapons to employ against employers such as strikes, secondary strikes, and consumer boycotts; or limiting employers' ability to respond to a strike by prohibiting discharges and permanent replacements.⁵ Alternatively, the law might lower union bargaining power relative to employers' by limiting employee organization and economic weapons or allowing greater employer response or economic weapons.⁶

1. See generally Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992) [hereinafter Dau-Schmidt, *A Bargaining Analysis*].

2. NLRB v. Int'l Union of Marine and Shipbuilding Workers of America, 361 U.S. 477, 507 (1960) (finding collective bargaining substitutes "processes of justice for the more primitive method of trial by combat.") (quoting Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting)).

3. PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE* 74 (1999).

4. See generally Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1 (2001) [hereinafter Dau-Schmidt, *Employment in the New Age*].

5. Kenneth G. Dau-Schmidt & Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, in 2 LABOR AND EMPLOYMENT LAW AND ECONOMICS (Kenneth G. Dau-Schmidt et al. eds., 2009).

6. *Id.*

American and Japanese labor laws have their roots in the same New Deal principles of the American Wagner Act; however, these laws have developed in significantly different ways that influence the parties' relative bargaining power with the adoption of the Taft-Hartley amendments in the United States and various amendments and doctrines in Japan.⁷

This article will examine and compare the impact of American and Japanese labor law on the relative bargaining power of labor and management within the context of the new global economy based on information technology. We will begin by providing a simple economic definition of bargaining power and examine how it can be influenced by economic and legal factors. Next, we will discuss the impact of new information technology and global economy on the employment relationship and how this has decreased union bargaining power relative to management. Finally, we will compare various facets of American and Japanese labor law that have a significant impact on the parties' relative bargaining power and discuss how one might expect American and Japanese unions to fare in their negotiations with management in the new economic environment.

II. BARGAINING POWER

Although bargaining is a very complex phenomenon depending on the underlying cost structures, information, and strategy, economists have sought to develop simple yet useful models of collective bargaining.⁸ Almost all of these models focus on bilateral negotiations between the union and an employer over the single facet of wages. Although these models are clearly mere caricatures of the phenomenon, they offer insights into the process of collective bargaining and the concept of bargaining power that are relevant to the impact of economic factors and the law on collective bargaining.

"Bargaining power" has been defined as the ability to induce an opponent to accept an agreement on one's own terms.⁹ In economic terms, a party's bargaining power depends on that party's ability to impose costs on the other side for failure to reach agreement while minimizing the party's own costs of disagreement.¹⁰ In collective bargaining, the union's bargaining power depends on its ability to inflict costs on the employer through lost sales from a strike or other collective action while minimizing the costs of the collective action to their membership in lost wages and jobs.¹¹ The employer's bargaining power

7. See generally 1 THE DEVELOPING LABOR LAW (John E. Higgins, Jr. et al. eds., 5th ed. 2006); KAZUO SUGENO, JAPANESE LABOR LAW (Leo Kanowitz trans., U. of Wash. Press 1992) (1985).

8. See generally BRUCE E. KAUFMAN & JULIE L. HOTCHKISS, THE ECONOMICS OF LABOR MARKETS (7th ed. 2005).

9. See Neil W. Chamberlain, A General Theory of Economic Process 81 (1955).

10. See generally Kaufman & Hotchkiss, *supra* note 8.

11. *Id.*

depends on its ability to minimize its costs from the collective action¹² while maximizing the costs of the collective action on the union members.¹³

Accordingly, in collective bargaining, the parties' relative bargaining power depends on economic factors such as the nature of the firm's product (whether it is perishable or can be stockpiled); the firm's technology of production (whether production requires a lot of workers or great skill or can be done with easily obtainable low skill replacements or a skeleton crew of defectors and managers); general economic conditions (whether there is currently great demand for the employer's good or a small supply of potential replacement workers); the structure of bargaining (large unions can generally support a strike longer than small employers, while large employers can generally resist a strike longer than small unions); and the employees' commitment to collective action (whether employees will defect and cross the picket line).¹⁴ If these factors favor the union and it has relatively greater bargaining power, the union will have a greater ability to negotiate terms and conditions of employment that favor its members. However, if these factors favor the employer and it has relatively greater bargaining power, the employer will have a greater ability to determine the terms and conditions of employment in negotiations.¹⁵

The relative bargaining power of the parties to collective bargaining will also depend on the laws that govern a country's system of labor relations. A government might enact legislation to try to affect the relative bargaining power of unions and employers in order to raise or lower negotiated wages and achieve a more equitable distribution of the proceeds from production.¹⁶ For example, a government might limit or prohibit the use of permanent replacements if it wants to lower the potential costs of strikes to employees and raise union bargaining power and wages. Similarly, a government might prohibit employer lockouts to lower employers' ability to impose costs on employees for not agreeing, thereby lowering employer bargaining power and raising union wages. Alternatively, if the government thinks unions are too powerful, it might outlaw secondary boycotts to lower the unions' ability to impose costs on employers for not agreeing and lower union bargaining power and wages.¹⁷ This was, in fact, one of the purposes behind the prohibition on secondary boycotts enacted in the Taft-Hartley amendments to the National Labor Relations Act (NLRA).¹⁸ To the extent that a nation's labor laws raise or

12. An example would be stockpiling their product or operating with replacements.

13. KAUFMAN & HOTCHKISS, *supra* note 8. Examples of employer actions that would increase the costs of collective action on union members would include: discriminating against union supporters and using permanent replacements in a strike.

14. *Id.*

15. *Id.*

16. Dau-Schmidt & Traynor, *supra* note 5.

17. *Id.*

18. See Kenneth G. Dau-Schmidt, Martin H. Malin, Roberto L. Corrada, Christopher David Ruiz Cameron, Catherine L. Fisk, *Labor Law in the Contemporary Workplace* (2009) at 67.

lower union bargaining power relative to employer bargaining power, such regulation will also encourage or discourage employee organizing as it raises and lowers the expected benefits relative to its costs.¹⁹

Thus, it is inevitable that the recent changes in the global economy and differences in American and Japanese labor law would have an impact on the relative bargaining power of labor and management in these countries.

III. THE GENERAL DECLINE IN RELATIVE BARGAINING POWER FOR EMPLOYEES IN DEVELOPED COUNTRIES IN THE NEW GLOBAL ECONOMY OF THE INFORMATION AGE

During the 1970s, the post-war system of trade and technology that served as the foundation for the system of industrial unionism began to change.²⁰ With the rebuilding of Europe and the rise of the “Asian tigers,” international trade began to make serious inroads into the American economy. The impact of international trade was first felt in low-capital industries such as textiles and shoes, but the oil crisis of the 1970s facilitated significant inroads into even the capital-intensive automotive and steel industries.²¹ After the price of oil quadrupled in the 1973 OPEC embargo, the automotive and steel manufacturers in Europe and Asia enjoyed competitive advantages through fuel efficient designs, up-to-date production facilities, superior management, and lower wages.²² Manufacturing jobs began to migrate to low wage countries or disappear entirely as industry strived to become more efficient.²³ As a result, global trade played a more important role in the economies of all industrialized countries.²⁴

During the 1980s, new information technology accelerated globalization and allowed for the efficient horizontal organization of firms. Information technology allowed employers to coordinate production among various suppliers and subcontractors around the world. Employers no longer had to be large and vertically integrated to ensure efficient production; they just had to be sufficiently wired to reliable subcontractors.²⁵ The “best business practices” became those of horizontal organization, outsourcing, and subcontracting, as firms concentrated on their “core competencies”—or that portion of production or retailing that they did best.²⁶ In this economic environment, employers sought flexibility in employment; the number of “contingent employees” who

19. Dau-Schmidt & Traynor, *supra* note 5.

20. CAPPELLI, *supra* note 3, at 4-5.

21. Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 912 (2007) [hereinafter Dau-Schmidt, *The Changing Face*].

22. *Id.*

23. *Id.* at 913.

24. *Id.*

25. CAPPELLI, *supra* note 3, 99-100.

26. *Id.*

work part-time or are leased or sub-contracted reached new heights in the American economy.²⁷ The new horizontal organization of firms broke down the job ladders and administrative rules of the internal labor market, and firms became more market driven. New technology allowed “bench-marking,” or the checking of the efficiency of a division of a firm against external suppliers, thus bringing the market inside the firm in a way not previously experienced.²⁸ Perhaps the most extreme example of a horizontal method of production is the Volkswagen truck plant in Resende, Brazil, where the employees of various subcontractors gather under one roof to assemble trucks using parts manufactured from around the world, and only a handful of actual Volkswagen employees are present to perform quality control.²⁹

New information technology also facilitated the rise of the “big box” retailers to a position of unprecedented world-wide economic power.³⁰ The simple bar code allowed Wal-Mart to master inventory control, coordinate sources of product supply world-wide, and grow into an international economic powerhouse with unprecedented power to determine wholesale prices and employment.³¹ This power in the retail market allows the “big box” retailers to determine the wages and employment of production employees, even though they bear no legal relation to those employees.³² For example, in 1995 when the American firm Rubbermaid sought to raise its prices to cover an increase in the cost of plastic resin, Wal-Mart’s refusal to comply resulted in wage cuts and layoffs for Rubbermaid’s production workers.³³ Moreover, the “big box” retailers provide an extensive retailing network for foreign producers, facilitating the inroads of foreign production into the American economy and across the world. In the case of Rubbermaid, important parts of the firm’s production process were eventually sold to China for employment there.³⁴

Finally, in the 1990s, the global labor market experienced a near doubling of the relevant labor force with a concomitant downward pressure on wages and benefits that is yet to be fully felt in the industrialized world. Since 1990, the collapse of communism, India’s turn from autarky, and China’s adoption of market capitalism have lead to an increase in the global economy’s available

27. Karen Winegardner, *Who Are Your Employees? Contingent Workers on the Rise*, THE CAPITAL, Apr. 1, 2001, at 10. For an example of the contingent worker marketplace in action, see Melanie Holmes, *Confronting the Coming Talent Crunch* (May 15, 2009), http://www.us.manpower.com/webinars/5_15_07_slides.pdf (Manpower placed 4.4 million workers in 2006 alone); Manpower Inc., Profile, <http://www.us.manpower.com/uscom/contentSingle.jsp?articleid=297> (last visited Nov. 16, 2009).

28. CAPPELLI, *supra* note 3, at 104.

29. *Id.*

30. Dau-Schmidt, *The Changing Face*, *supra* note 21, at 914.

31. *Id.* at 913-14.

32. *Id.* at 914.

33. *Id.*

34. *Id.* at 914.

35. *Id.*

labor force from 3.3 billion to 6 billion!³⁵ Because these countries were relatively capital poor, their entry into the global economy has brought no corresponding increase in global capital.³⁶ As a result, the capital-to-labor ratio in the global economy has dropped approximately forty percent.³⁷ This abrupt change in the ratio of available labor and capital in the global economy has put tremendous downward pressure on wages and benefits in global competition. Low wage competition from elsewhere in the world has contributed to American employers' desire to subcontract work to low-wage countries and to encourage the immigration of low-wage employees from Central and South America.³⁸ The downward pressure on wages and benefits exists not only in manufacturing, but in any service in which work can be digitalized and sent to qualified people elsewhere in the world.³⁹

As a consequence of these changes, unions in developed countries such as the United States and Japan have generally suffered a significant decline in their bargaining power relative to their employers. The efficient organization of firms across the globe has decreased unions' ability to impose costs on recalcitrant employers through collective action and increased the potential costs of such action to employees. If American or Japanese workers go on strike and their work can be subcontracted to low wage workers in other countries, these workers can lose their job even if they are more productive and produce higher quality output. Moreover, as firms have adopted a leaner, more horizontal, form of organization that is more subject to market discipline, and put a higher premium on flexibility in production, there has been less for employees and employers to gain through collective bargaining. In the new economic environment, employers are less interested in negotiating benefits and administrative rules to support a long-term employment relationship, so there is less for unions to achieve and administer through collective bargaining. The result has been a precipitous decline in union bargaining power and activity in both the United States and Japan.

IV. A COMPARATIVE ANALYSIS OF THE IMPACT OF AMERICAN AND JAPANESE LABOR LAW ON THE RELATIVE BARGAINING POWER OF THE PARTIES TO COLLECTIVE BARGAINING

Despite their common heritage, there are several significant differences between American and Japanese labor law and the practice of labor relations in each country that would logically have an impact on the relative bargaining power of labor and management.

36. Richard B. Freeman, *America Works: Critical Thought on the Exceptional U.S. Labor Market* 128-40 (2007).

37. *Id.* at 130.

38. *Id.*

39. *Id.* at 133.

40. *Id.* at 133-34.

A. *The Definition of Employee*

In the United States, the NLRA uses the term “employee” to describe the people who enjoy the right to organize and bargain collectively under that statute.⁴⁰ Although the NLRA’s definition of employee includes “any employee,” it expressly exempts “independent contractors,” “supervisors,” and employees covered by the Railway Labor Act.⁴¹ The United States’ National Labor Relations Board and courts have narrowly interpreted the term “employee,”⁴² broadly interpreting the exceptions,⁴³ and adding additional exceptions for “managerial” and “confidential” employees.⁴⁴ Under United States’ law, many professionals, and even employees with only minimal supervisory responsibilities, are excluded from coverage under the Act.⁴⁵

In contrast, Japanese labor law covers a broader array of economically dependent people. In Japan, the term “workers” is used to describe persons protected by the Labor Union Act (LUA), Japan’s primary body of labor laws.⁴⁶ The Act defines “workers” as “those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation.”⁴⁷ Because this standard is not particularly effective in differentiating workers from non-workers, legal commentators and courts often use a substitute standard, asking whether an individual has a “subordinate relationship to an employer.”⁴⁸ A commission established by the Minister of Labor determined that identifying a worker under this definition includes two factors: “(1) the rendering of service under the direction and supervision of another party; and

41. 29 U.S.C. § 152(3) (2009).

42. *Id.* For employees covered by the Railway Labor Act, see 45 U.S.C. § 151 (2009). The NLRA defines supervisors at 29 U.S.C. § 152(11) (2009). The independent contractor exemption was added with the Taft-Hartley Amendments of 1947, overruling *NLRB v. Hearst*, in which the U.S. Supreme Court considered workers who were not technically employees, but were nonetheless economically dependent on a business for their livelihoods, as being protected by the NLRA. See *NLRB v. Hearst Publ’n, Inc.*, 322 U.S. 111, 131 (1944).

43. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (finding NLRA protection available only to employees in the context of their employment with a particular employer).

44. *NLRB v. Yeshiva*, 444 U.S. 672, 682 (1980) (exempting employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employer”) (citation omitted); *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 694 (2006) (exempting certain charge nurses under the ‘supervisor’ exception).

45. *NLRB v. Bell Aerospace Co. Division*, 416 U.S. 267 (1974) (exempting managerial employees); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981) (exempting confidential employees).

46. See *NLRB v. Yeshiva*, 444 U.S. 672, 682 (1980); *Oakwood Healthcare, Inc.*, 348, 694 N.L.R.B. 686 (2006).

47. Labor Union Act, Law No. 174 of 1949, available at http://www.jil.go.jp/english/laborinfo/library/documents/lj_law2.pdf. In Leo Kanowitz’ translation of Kazuo Sugeno’s treatise on Japanese labor law, he uses the term ‘Trade Union Law’ when discussing the LUA. See generally SUGENO, *supra* note 7.

48. Labor Union Act, Law No. 174 of 1949, art. 3, available at http://www.jil.go.jp/english/laborinfo/library/documents/lj_law2.pdf.

49. SUGENO, *supra* note 7, at 425.

(2) the receipt of remuneration in return for the service rendered.”⁴⁹ Sugeno identifies four factors:

(1) that the persons perform indispensable work for the enterprise and that they are an essential component of the enterprise; (2) that the content of their contracts are unilaterally decided; (3) that they are supervised with regard to such matters as the date, time and hour, the place, and the method of accomplishing their work; and (4) that they are not free to accept or refuse contracts relating to their employer’s business that are tendered by third persons.⁵⁰

Though supervisors are excluded from membership in certified unions, they are nonetheless considered to be “workers” under the Act.⁵¹ Additionally, temporary workers are typically not admitted to unions.⁵²

Japanese labor law’s broader coverage of economically dependent people favors greater union bargaining power in Japan. With greater coverage, Japanese unions would have a better opportunity to organize a larger percent of employees in a given industry and the nation as a whole. Greater union density helps protect union workers from non-union competition at least within the country’s borders. This broader coverage is both more and less important in the new global economy. With the changes in production methods of information technology, production is becoming more decentralized, and more employees work for sub-contractors and exercise some degree of managerial or supervisory skills. In the United States, the narrow definition of employee under the NLRA has led to an ever larger share of the work force who are either excluded from coverage under the NLRA, or left working for “employers” with no economic leverage with the ultimate producer or retailer. On the other hand, with

50. Ryuichi Yamakawa, *New Wine in Old Bottles: Employee/Independent Contractor Distinction Under Japanese Labor Law*, 21 COMP. LAB. L. & POL’Y J. 99, 104 (1999). The commission further examined the nature of the relationship that qualifies for protection, noting four factors: “(a) absence of freedom to refuse another party’s request to engage in service; (b) specific direction and supervision while performing service; (c) restriction in terms of time and place for performing service; and (d) prohibition of delegation of duty to a person other than him/herself (“insubstitutability”).” *Id.* Lastly, there are a handful of supplemental factors to consider:

(a) process of hiring that is virtually the same as that of regular employees; (b) withholding tax treatment as an employee; (c) application of labor insurance through the deduction or contribution of a premium under a scheme of worker’s compensation and unemployment insurance; (d) application of rules regarding orders for a workplace or disciplinary actions; and (e) application of provisions regarding severance allowances and fringe benefits.

Id. at 107.

51. SUGENO, *supra* note 7, at 426.

52. T.A. HANAMI, *LABOR LAW AND INDUSTRIAL RELATIONS IN JAPAN* 37 (1979). Supervisors are simultaneously considered to be “employers.” *Id.*

53. *Id.* at 103.

increased international trade, national borders have proven much less important in collective bargaining. Even if Japanese workers are protected under Japanese labor law, they still have to bargain with employers who can shift production to low-wage workers overseas.

B. Exclusive Representation

One of the major differences between U.S. and Japanese unions is the individuals the unions are authorized and obligated to represent. In the United States, a union is considered the “exclusive representative” for the “appropriate bargaining unit” for which it has been certified.⁵³ The role of a union as the exclusive bargaining representative gives it both special rights and obligations. First, the union is not only authorized, but is also obligated to bargain on behalf of all employees of an employer whose positions fall within that unit,⁵⁴ and it must exercise that obligation fairly and without prejudice.⁵⁵ Unlike most violations of U.S. labor laws, a union that fails to fairly represent its members may be liable under civil law in addition to the administrative remedies of the NLRB.⁵⁶ However, with this responsibility comes the power of exclusive representation. While the union remains certified, no other organization may represent the unit or bargain with the employer on their behalf.⁵⁷ Any other union seeking to represent a unit covered by a certified union will be in violation of NLRA section 8(b)(4)(C). Furthermore, at least in states that have not passed “right to work” laws, a certified union is free to bargain for a union security agreement, which requires the payment of union agency fees as a condition of continued employment.⁵⁸

By contrast, Japanese unions are authorized to bargain only on behalf of their members.⁵⁹ Additionally, the LUA contains only a limited exclusivity provision, which provides: “When three-fourths or more of the workers of the same kind regularly employed in a particular factory or workplace come under application of a particular collective agreement, the agreement concerned shall also apply to the remaining workers of the same kind employed in the factory concerned or workplace.”⁶⁰ Similarly,

54. 29 U.S.C. § 159(a) (2009).

55. 29 U.S.C. § 158(d) (2009).

56. *E.g.*, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944) (explaining that the bargaining representative has “the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them”).

57. *Breining v. Sheet Metal Workers Int’l Ass’n Local Union No. 6*, 493 U.S. 67, 84 (1989) (asserting jurisdiction over such matters under 28 U.S.C. § 1337).

58. 29 U.S.C. § 159(a) (2009).

59. 29 U.S.C. § 158(a)(3) (2009); ALVIN L. GOLDMAN, *LABOR AND EMPLOYMENT LAW IN THE UNITED STATES* 176 (1996).

60. Labor Union Act, Law No. 174 of 1949, art. 6, available at http://www.jil.go.jp/english/laborinfo/library/documents/lj_law2.pdf.

61. *Id.* at art. 17.

When a majority of the workers of the same kind in a particular locality come under application of a particular collective agreement, the Minister of Health, Labor, and Welfare or the prefectural governor may, at the request of either one or both of the parties to the collective agreement concerned and, pursuant to a resolution of the Labor Relations Commission, decide that the collective agreement . . . should apply to the remaining workers of the same kind employed in the same locality and to their employers.⁶¹

The absence of an exclusivity or appropriate unit provision in Japanese labor law has resulted in the rise of plural unions. This means that unlike the United States, multiple organizations may arise to represent workers from a single class within a single workplace.

Exclusive representation has proven to be both a blessing and a curse for American unions. Exclusivity simplifies representation and bargaining issues and provides insulation from competitive unions entering the bargaining unit.⁶² However, the elections procedure the United States adopted to determine representation in bargaining units has proven to be a significant burden to employee organization.⁶³ As a result, it is more difficult for U.S. unions to achieve a high level of union density in an industry to “take wages out of competition.” This is particularly true given Japan’s rule that non-union employees in the same locality or industry are governed by the terms of relevant collective bargaining agreements if the relevant unions achieve majority or two-thirds representation. As a result, the doctrine of exclusive representation probably undermines the bargaining power of American unions in the early stages of labor organization in a region or industry, although it may enhance union bargaining power for well established unions.

C. *Employee Collective Action*

In the United States, the employees’ right to engage in collective action to pressure employers to meet their demands and grievances is set forth in the NLRA’s section 7.⁶⁴ It is from section 7 that employees derive their rights to

62. *Id.* at art. 18.

63. Dau-Schmidt, *A Bargaining Analysis*, *supra* note 1, at 503-04.

64. This has resulted in the recent passage of the Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (as passed by House, March 1, 2007), which permits, among other things, the use of authorization cards to support demands for union recognition. *See id.* at § 2(a)(6). In support of its campaign for the Act, the AFL-CIO claims to have research showing that 60 million U.S. workers would join a union if they could. AFL-CIO, Employee Free Choice Act, <http://www.aflcio.org/joinaunion/voiceatwork/efca/57million.cfm> (last visited Nov. 5, 2009).

65. 29 U.S.C. § 157 (2009) (“Employees shall have the right 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 . . . and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an

unionize and bargain collectively. In addition to these explicit rights, employees have the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”⁶⁵

These broad rights are explicitly bounded by the provisions of sections 8(b) through (g).⁶⁶ Prohibited tactics include restraint or coercion of employees’ section 7 rights, invidiously causing an employer to discriminate against an employee on the basis of his non-union status, refusal to bargain collectively and in good faith, and the under-taking of “secondary-boycotts” that are aimed at inducing a “secondary employer” to pressure the “primary employer” to recognize or negotiate with a union.⁶⁷ In addition to this broad prohibition on secondary boycotts, the NLRB has held that partial work-stoppages or slow-downs are unprotected activities under the NLRA and employees who engage in them can be fired.⁶⁸

In Japan, many labor rights stem from Constitutional provisions. While both the U.S. and Japanese Constitutions guarantee a right to free association, the Japanese Constitution further provides “the right and obligation to work,”⁶⁹ and “[t]he right of workers to organize and bargain and act collectively.”⁷⁰ Furthermore, in Japan there is no section analogous to the NLRA section 8 unfair labor practices for labor organizations; instead, the Japanese employ a concept of “justifiable acts” judged in context.⁷¹ Nonetheless, there are some narrow and specific exceptions.

In Japan, the propriety of disputed acts are generally made on a case-by-case basis.⁷² Generally, four elements will be examined in determining whether collection action is justifiable: “(1) their parties, (2) their objectives, (3) their procedures, and (4) their means.”⁷³ Dispute rights must be balanced against the

agreement requiring membership in a labor organization as a condition of employment as authorized in [29 U.S.C. § 158(a)(3)].”)

66. *Id.* Employees also have the ability to refrain from any of these rights. *Id.* For a concise discussion of what is encompassed by these ‘protected, concerted activities,’ see THE DEVELOPING LABOR LAW, *supra* note 7, at 83-87.

67. 29 U.S.C. §§ 158(b) to (g) (2009).

68. See *id.* § 158(b)(1) (prohibiting restraint or coercion of employees in exercise of section 7 rights); *Id.* at 158(b)(3) (refusal to bargain collectively, and in good faith); *Id.* at § 158(b)(4) (prohibiting the use of ‘secondary boycotts’).

69. Elk Lumber Co., 91 N.L.R.B. 333, 338 (1950).

70. MELI KENPŌ, art. 27, no. 1.

71. *Id.* at art. 28.

72. See KEIHŌ, art. 35, available at <http://www.asianlii.org/jp/legis/laws/pc1907an45o1907133/> (“An act performed in accordance with laws and regulations or in the pursuit of lawful business is not punishable.”); Labor Union Act, art. 1, no. 2, available at http://www.jil.go.jp/english/laborinfo/library/documents/lj_law2.pdf (“The provisions of [KEIHŌ, art. 35] shall apply to collective bargaining and other acts of labor unions which are justifiable and have been performed for the attainment of the purposes of the [Act], provided, however, that in no case shall exercises of violence be construed as justifiable acts of labor unions.”); *Id.* at art. 8 (“An employer may not make a claim for damages against a labor union or a union member for damages received through a strike or other acts of dispute which are justifiable acts.”).

73. SUGENO, *supra* note 7, at 548.

74. *Id.* at 549.

employer's property rights, and violence is always improper.⁷⁴ Moreover, a dispute is only justifiable if it has collective bargaining as its object.⁷⁵ As a result, political strikes are unjustifiable,⁷⁶ as are sympathy strikes.⁷⁷ Unions must wait until negotiations have begun before initiating a dispute.⁷⁸ Similarly, unions are required to give notice before initiating a dispute.⁷⁹ Although Sugeno believes that dispute acts in violation of a no-strike or similar agreement are generally unjustifiable, he acknowledges it to be a case-by-case basis, and that there are opposing views.⁸⁰

Although secondary actions are suspect, the Japanese have a broad definition of what constitutes a primary action. If in the course of an industrial dispute workers appeal to customers and the public not to purchase the products of the struck employer, the action is considered a primary product boycott. Such conduct is proper and justifiable because it is within the scope of the protection accorded the dispute right.⁸¹

A dispute act is generally justifiable if it involves the total or partial withholding of work.⁸² Among the acts Sugeno mentions as being generally permissible are full strikes, partial strikes, "designated strikes," rolling strikes, and limited-duration strikes.⁸³ This includes concerted vacation/sick-leave, and refusals to come to/leave work at designated times, or refuse overtime.⁸⁴ In addition slowdowns that don't involve destruction or damage are permissible.

American labor law provides workers with a smaller array of economic weapons for collective bargaining than Japanese labor law. American workers are unprotected in partial work stoppages or slow-downs, while secondary boycotts are prohibited.⁸⁵ In Japan, workers can undertake such collective actions as long as they are "justifiable" under Japan's Constitution and laws.⁸⁶ As a result, American workers have fewer options for effectively imposing costs on their employers for failure to agree with them in collective bargaining, and thus less bargaining power than comparable workers under Japanese law.

75. *Id.* at 556.

76. *Id.* at 550.

77. *Cf., id.* at 550-51 (discussing an influential theory contending that strikes related to legislation and policies concerning core economic interests, like working conditions and organizational rights, are protected).

78. *Cf., id.* at 551-52 (discussing an opposing view that strikes are justifiable if the union has a "substantial interest in the original dispute").

79. *Id.* at 554.

80. *Id. But see* Nihon Kōkū, 17 Lab. Civ. Cases 102 (Tokyo Dist. Ct., Feb. 26, 1966) (holding that although the union gave no notice, it may be considered proper because the company could have foreseen its occurrence, immediate notice was given after the strike began, and it was not the type of action that caused general paralysis of the business).

81. SUGENO, *supra* note 7, at 554-55.

82. Fukui Shinbunsha, 19 Lab. Civ. Cases 714 (Fukui Dist. Ct., May 15, 1968).

83. SUGENO, *supra* note 7, at 555.

84. *Id.*

85. *Id.*

86. K. DAU-SCHMIDT ET AL., *supra* note 18, at 574-611.

87. SUGENO, *supra* note 7, at 555.

This advantage in bargaining power for Japanese workers has probably declined with the advent of the global economy. In the global economy, where an employer can sub-contract work abroad, employee collective action of any sort becomes more risky. However, consumer boycotts may be a viable union weapon even in the global economy.

D. Employers' Economic Weapons

Employers in the United States have considerably more freedom to use "economic weapons" as compared with their Japanese counterparts. In the United States, employers are prohibited from firing striking employees. However, under the "MacKay doctrine" economic strikers can be "permanently replaced."⁸⁷ Although strikers who have been permanently replaced have a right to recall if openings occur and a right to vote in unit elections for up to one year, permanent replacement has proven to be a very powerful weapon for American employers in resisting and breaking unions.⁸⁸ Although permanent replacements were rarely implemented in the years immediately after the adoption of the MacKay doctrine, American employers have shown an increased willingness to resort to permanent replacements since the late 1970s.⁸⁹ In addition, U.S. employers are permitted to resort to offensive lockouts as a means of pressuring their employees to accept a collective bargaining agreement on the employer's terms.⁹⁰ It is not yet clear whether the U.S. courts will allow employers to lockout their employees *and* replace them.⁹¹

In Japan, employers have the "freedom to conduct operations" during dispute acts, which grants a limited right to replace striking workers. The Japanese Supreme Court is often quoted on the matter as saying "[e]ven during a strike . . . an employer is not required to suspend the operation of its business, and can take measures that are necessary to continue its operations in response to the workers' dispute acts that seek to obstruct those operations."⁹² However,

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

89. See, e.g., *Jones Plastic & Eng'g Co.*, 351 N.L.R.B. 61, 67 (2007) (holding that economic strikers need not be reinstated where the permanent replacements are at-will employees who may be discharged at any time).

90. See James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 80-81 (1999) (discussing the success of permanent replacements in the 1980s and 1990s in reducing the number of strikes).

91. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965) ("[W]e cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike.").

92. *But see NLRB v. Brown*, 380 U.S. 278, 284 (1965) (holding to be lawful the lockout and temporary replacement of workers belonging to a union local where a different employer in a multi-employer bargaining unit was the subject of a strike by that local).

93. SUGENO, *supra* note 7, at 585 (quoting *Sanyō Denki Kidō*, Sup. Ct., 2nd Petty Bench, Nov. 15, 1978, 32 Crim. Cases 1855). Sugeno also notes that some collective bargaining agreements contain scab-prohibition provisions which would prohibit the employer from hiring

while this principle permits employers to hire replacements, they may only do so temporarily; even those Japanese workers who would be considered “economic strikers” in the United States are entitled to reinstatement at the conclusion of the strike.⁹³

In addition to this limited replacement right, Japanese employers may have the right to lockout employees under certain circumstances. In *Marushima Suimon*, the Japanese Supreme Court stated that:

[I]n a particular labor dispute, the power balance between workers and their employer collapses because of the workers’ dispute acts, and the employer is subjected to extraordinarily disadvantageous pressures, the employer can prevent such pressures in light of the fairness principle. The employer’s opposing defensive measures which are limited to restoring the power balance between the workers and the employer will be recognized They will also be approved as an employer’s proper dispute acts.⁹⁴

Sugeno’s position on the lockout is that it is a purely defensive right allowing employers

to mitigate the financial burden created by extraordinary adverse pressures produced by the worker conduct that hinders their businesses. As a result, the principal requirement for recognizing a lockout’s propriety is that there be worker obstruction of the business which causes unusual harm to an employer, so that the employer will be in an extraordinarily disadvantageous position if it cannot refuse to accept the work of the disputing workers.⁹⁵

In addition, the only proper targets of a lockout are members of the disputing union.

Because American employers are allowed greater resort to economic weapons, they should have greater bargaining power than similarly situated employers under Japanese law. The ability of American employers to permanently replace economic strikers and undertake offensive lockouts in

replacements at all. *Id.* at 585-86.

94. *Id.* at 585 (see footnote titled “Reinstatement of Strikers”).

95. *Id.* at 587 (quoting Sup. Ct., 3rd Petty Bench, Apr. 25, 1975, 29 Civ. Cases 481). [A lockout] shall exempt the employer from the duty to pay wages . . . if, in the light of various circumstances such as the attitude taken in . . . negotiations, their progress, the forms of dispute acts engaged in by the union, and the extent of their impact upon the employer, the lockout is viewed, from the perspective of equity in labor-management relations, as a proper means of defending the employer’s business against the union’s dispute acts.

Id. at 587.

96. *Id.* at 588.

advance of employee collective action allows them to impose costs on employees for not agreeing with them at the negotiating table and thus to wield greater bargaining power in negotiations. An employer's ability to resort to international out-sourcing in the new global economy has, if anything, probably increased American employers' power in this regard.

E. The Structure of Negotiations

Although most of the factors we have discussed so far suggest that Japanese unions should have greater bargaining power than similarly situated American unions, the structure of negotiations in the United States probably favor union power, while the structure of negotiations in Japan probably limits the desire of Japanese employees to exercise the economic power they do have over their employers.

American collective bargaining tends to be organized on an adversarial basis across a larger regional area or national basis. American unions tend to organize by trade or industry on a national basis.⁹⁶ Moreover, in the structure of industrial relations, American management is strongly allied with the interests of shareholders and conducts collective bargaining through arms length negotiations with the employees. Under American law, corporate managers owe stockholders a fiduciary duty⁹⁷ and generally have strong financial rewards for maximizing returns to shareholders.⁹⁸ Because of this, in American corporations it is common for management to identify with shareholder interests and view employee interests with some hostility as an impediment to achieving corporate goals.

As a result of these structural characteristics of American industrial relations, American labor unions tend to be relatively large organizations that have the resources to maintain local unions in conflicts with individual employers. Moreover, American unions do not share a strong community of interest with any particular employer. Although American unions certainly have no interest in bankrupting viable employers since their interests are less often tied to the interests of a single employer, the unions have no problem

97. The largest union federation, the AFL-CIO, contains over fifty trade unions, collectively representing eleven million workers. AFL-CIO, Union Facts, <http://www.aflcio.org/aboutus/faq/> (last visited Nov. 5, 2009). The next largest federation, Change to Win, claims six million members through seven trade unions. Change to Win, About Us, <http://www.changetowin.org/about-us.html> (last visited Nov. 5, 2009).

98. *E.g.*, *Koehler v. Black River Falls Iron Co.*, 67 U.S. (2 Black) 715, 720-21 (1862) (“[Directors] hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation.”); Richard Posner, *Against Creative Capitalism*, in *CREATIVE CAPITALISM – A CONVERSATION WITH BILL GATES, WARREN BUFFET, AND OTHER ECONOMIC LEADERS* (Michael Kinsley ed., 2008) (“The managers of corporations have a fiduciary duty to maximize corporate profits.”).

99. Strong financial rewards often occur through contracts involving the use of performance-based pay or equity options.

employing strikes in whip-sawing strategies to bid up wages, or even driving out inefficient low wage employers for the benefit of the majority of employees in the union.⁹⁹

By contrast, Japanese unions typically organize at the enterprise level. To the extent that industrial organizations exist, they are typically federations of enterprise unions, rather than industry wide unions.¹⁰⁰ These organizations are relatively informal and have little or no power to control their affiliated unions. They may be most effective in serving as a sort of coordinating committee for industry wide strategy.¹⁰¹ Moreover, in the structure of corporate governance in Japan, shareholders exercise much less control over management and management tends to be promoted from within the ranks of the firm's employees. As a result, Japanese management is more likely to identify their interests with those of their employees and secure capital merely by paying a competitive rate of return in capital markets. This alignment of management interests with employees, rather than shareholders, may account for a number of differences in American and Japanese managerial practices such as the dramatically higher levels of executive compensation in the United States and American management's tendency to focus on short-run profits, even to the long-run detriment of the firm.¹⁰²

As a result, Japanese unions are organized on a smaller basis and owe their allegiance to the interests of one employer. Moreover, the structure of corporate governance in Japan promotes an alignment of management interests with employee interests rather than shareholder interests. This stronger community of interest among Japanese employees and employers is well recognized in the literature.¹⁰³ Because Japanese labor organizations are organized on a smaller enterprise basis, this factor suggests that they will exercise less bargaining power relative to their employers than similarly situated American workers because they will not have larger organization to financially support them in their disputes. Furthermore, the alignment of

100. See, e.g., 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, 1000-02 (1996).

101. HANAMI, *supra* note 51, at 105. The All Japan Seamen's Union (JSU) stands in contrast as a true industrial union that had 150,000 members in 1979. *Id.* The union's website indicates that membership had declined to 40,000 in 1999. See All Japan Seamen's Union, What is JSU?, <http://www.jsu.or.jp/eng/eng.htm> (last visited Nov. 4, 2009).

102. HANAMI, *supra* note 51, at 106. There are a few large national organizations as well. Hanami identified four very large organizations ranging from 500,000 to 2 million workers in 1979 that had been coordinating smaller unions in a 'spring offensive' for two decades. *Id.* at 106-07. The tactics of these organizations varied, but they typically coordinate strategy and plan actions on a national scale. *Id.* at 107.

103. I would like to thank Professor Nokobaku for extending his insightful comments to this paper at the RIETI conference in Tokyo, Japan, held July 15, 2008.

104. E.g., Takashi Araki, *Convergence or Divergence? A Comparative Analysis of Security, Flexibility, and Decentralized Industrial Relations in Japan*, 28 COMP. LAB. L. & POL'Y J. 443, 450-51 (2007).

interests between labor and management within Japanese firms means that collective bargaining is conducted on a less adversarial basis.¹⁰⁴ Even if Japanese workers do have greater access to economic weapons than American workers, they are less likely to have to use them to resolve disputes. Japanese employees who are organized on an enterprise basis certainly have no incentive to engage in whip-sawing strikes among employers to bid up wages or to drive inefficient low wage employers out of the market.

V. CONCLUSION

The balance of bargaining power between labor and management varies according to underlying economic parameters and the laws governing the conduct of collective bargaining. A party's bargaining power, or its ability to induce the other side to accept an agreement on its terms, depends on that party's ability to impose costs on the other side for failing to agree and to avoid or absorb its own costs from failing to agree. Each party's ability to impose and avoid costs depends on economic factors, such as the nature of the firm's product, the firm's technology of production, general economic conditions, the structure of bargaining, and the employees' commitment to collective action. However, the parties' ability to impose and avoid costs also depends on the legal framework for collective bargaining, the legal structure of bargaining and the economic weapons that each side is allowed.

The rise of the global economy and new information technology has significantly decreased the bargaining power of unions relative to employers. New information technology has allowed the organization and distribution of production on a global basis, subjecting all facets of the firm to market discipline and low wage competition in the global economy. This fundamental change facilitates the relocation of production to low wage countries, putting downward pressure on wages in the industrialized countries and raising the possible costs of employee collective action.

The United States and Japan's labor laws also create differences in the relative bargaining power of unions and management. It seems clear that Japan's system of plural unionism facilitates the organization of employees by increasing union density and bargaining power. However, in industries where unions are well established, the United States' system of exclusive representation simplifies representation and bargaining issues and insulates unions from competition. With respect to economic weapons, the United States restricts employee collective action while allowing employers greater latitude in economic warfare. American employees are prohibited from engaging in secondary boycotts and are unprotected in partial work stoppages or slow-downs, while American employers can permanently replace economic strikers and undertake offensive lockouts. In Japan, employees are protected in undertaking "justified" collective action, including boycotts and partial strikes

105. *Id.*

or slow downs, and employers are constrained from making permanent replacement or offensive lockouts. This imbalance in economic weapons suggests that, relative to Japanese employers, American employers can impose greater costs on their employees for refusing to agree and thus enjoy greater relative bargaining power. Finally, and perhaps most importantly from a practical perspective, in the structure of bargaining American employees enjoy larger labor organizations that tend to bargain on a multi-enterprise basis. As a result they can better support local unions in disputes with individual employers. Moreover, the organization of Japanese unions on an enterprise basis and the greater community of interest between labor and management in Japan means that even if Japanese workers enjoy greater legal access to economic weapons, they are less likely to need or want to resort to those weapons to resolve disputes.

