

MANDATORY SUBJECTS OF BARGAINING:

Four Options for Shifting the Paradigm

MAY 2021

INTRODUCTION

In a series of cases starting in 1958, the judiciary circumscribed the areas in which an employer had a duty to bargain, effectively deciding that unions in the U.S. generally could not and were never intended to participate through bargaining in some of the most fundamental aspects of a business, such as plant closures and relocations. A union’s ability to bargain over anything related to an employer’s supply chain or how it treats subcontracted employees is also generally not required. Despite the lack of congressional intent for such interpretations of U.S. labor law, the judiciary has developed an elaborate and often inconsistent theory of categorizing topics as either mandatory or permissive, attaching far-reaching consequences to the terms that are not enumerated anywhere in the National Labor Relations Act (NLRA, or “the Act”).¹

As a result of this interpretation of the Act, bargaining representatives are circumscribed in using their bargaining power to participate in key company decisions. The present state of the law fails to account for the changing nature of work, as well as unique worker views on what is most important with a particular employer in a given industry and location. Despite this, bargaining today is often taking new, innovative approaches, where unions may use contract fights to organize stakeholders around a set of demands that may benefit the community at large in addition to workers, permitting the union to develop new techniques on power building.² But the law’s cramped construction of the duty to bargain hampers, rather than facilitates, these new efforts. A new labor law regime can do better.

The original report³ by the Clean Slate for Worker Power project (referred to as “Clean Slate” throughout) recommends that a new labor law scheme should reject the premise of the lead Supreme Court cases, *Fibreboard*⁴ and *First National Maintenance*,⁵ and make clear that decisions that are fundamental to the basic direction of a corporate enterprise are squarely within the

¹ 29 U.S.C. §§ 151-169 (2018).

² This is sometimes referred to as “bargaining for the common good” and has been embraced by public sector unions, such as teachers. See *Bargaining for the Common Good*, in *Your Rights & Workplace*, NAT’L EDUC. ASS’N, <https://www.nea.org/your-rights-workplace/bargaining-educator-voice/bargaining-common-good> (last visited Feb. 24, 2021).

³ See Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, LAB. & WORKLIFE PROGRAM, HARV. L. SCH. 1-125 (2020), https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf.

⁴ *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 213 (1964).

⁵ *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 669 (1981).

duty to bargain. **A new labor law, the report argues, should establish that any decision that has a direct impact on workers' terms and conditions of employment—including the existence of that employment—is a mandatory subject of bargaining.** The report notes that examples of such decisions include subcontracting, relocation, decisions to close all or part of the business, capital substitution decisions (including those involving technology with impacts on job quality or employment levels), major changes in investment strategies, major advertising campaigns, and decisions with major environmental impacts. Workers' lives, the Clean Slate authors note, are profoundly shaped by these types of corporate decisions, and workers deserve a voice in making them. A legal regime that ensures workers a bargaining right only with respect to the "terms and conditions of employment" and carves out some of the most fundamental aspects of those terms and conditions (e.g., whether the employer will relocate or subcontract) denies workers a voice on critical issues.

As we have learned from decades of U.S. labor law, far more impacts employees' terms and conditions of employment than is commonly memorialized in collective bargaining agreements. A new labor law regime should account for a broad range of employee interests, including some of the most fundamental to employees. This paper delves further into four options for a new scheme on employer and labor bargaining obligations.

THE PRESENT STATE OF THE LAW

Section 8(a)(b) and (d) of the NLRA requires employers and employee representatives to bargain in good faith with respect to “wages, hours, and other terms and conditions of employment.”⁶ The legislative history of Section 8(d), written into the Act in 1947, indicates that Congress intended to broadly define the subjects over which employers and unions would be required to bargain.⁷ Neither the statute nor the legislative history thus set forth a mandatory-permissive distinction.

The Supreme Court, however, in a series of cases, created the mandatory-permissive distinction and ascribed the consequences of the designations. In *NLRB v. Wooster Division of Borg-Warner Corp.*,⁸ the Court held that if a subject about which one party is seeking agreement falls within the Section 8(d) language, that topic is considered a mandatory subject of bargaining;⁹ if a subject does not fall within the language, such topics are permissive topics of bargaining.

The consequences of designating a topic as permissive are far more consequential than anything contemplated in the Act. First, if a topic is permissive, neither party may insist on the inclusion of that subject in the agreement.¹⁰ Although either party may seek discussion of a permissive topic, refusal by the other to discuss the issue does not violate the Act. By contrast, a unilateral change to a mandatory subject of bargaining violates the statutory duty to bargain and is subject to the National Labor Relations Board’s (NLRB, or “the Board”) remedial order.¹¹ Second, the use of economic weapons to secure concession on a permissive subject constitutes an unfair labor practice;¹² for mandatory topics, however, both employer and union may bargain to impasse and use the economic weapons to attempt to secure their respective aims.¹³ Finally, while the Act prohibits either party, without the consent of the other party, from modifying

⁶ 29 U.S.C. §§ 158(a), 158(b), 158(d) (2018).

⁷ See, e.g., Kathryn A. English, *Updating the Mandatory-Permissive Distinction to Enable Unions to Protect the Job Security and Economic Interests of Their Members*, 20 N.Y.U. REV. L. & SOC. CHANGE 573, 589 (1994).

⁸ 356 U.S. 342 (1958).

⁹ See *id.* at 349.

¹⁰ See *id.* (“[I]t is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without ...”).

¹¹ See *NLRB v. Katz*, 369 U.S. 736, 738-39 (1962).

¹² See *Borg-Warner Corp.*, 356 U.S. at 349.

¹³ See *NLRB v. Am. Nat’l Ins. Co.*, 343 U.S. 395, 409 (1952).

collectively bargained agreements until their expiration date, the Supreme Court has held that this prohibition applies only to modifications concerning mandatory topics of bargaining, permitting a party to unilaterally change permissive subjects after contract expiration.¹⁴

Justice John Marshall Harlan issued a prescient dissent in *Borg-Warner*, setting forth an argument for allowing parties to bargain to impasse or apply economic pressure on permissive topics of bargaining, as well.¹⁵ Even though Section 8(d) may very well be read to create mandatory subjects of bargaining, Justice Harlan noted that he was “unable to grasp a concept of ‘bargaining’ which enables one to ‘propose’ a particular point, but not to ‘insist’ on it as a condition to agreement.”¹⁶ Justice Harlan found that “the right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence.”¹⁷ The adoption, he noted, of such an “inherently vague and fluid” standard would likely “inhibit” the entire bargaining process, as “a party’s fear that strenuous argument might shade into forbidden insistence and thereby produce a charge of an unfair labor practice.”¹⁸ Justice Harlan foresaw that such a “watered-down notion of ‘bargaining’” was “as foreign to the labor field as it would be to the commercial world” and effectively limits bargaining to the three topics enumerated in Section 8(d): wages, hours, and other terms and conditions of employment.¹⁹

Given the far-reaching consequences attached to the mandatory-permissive distinction, extensive litigation on what constituted a “term and condition of employment,” and thus a mandatory topic, has ensued. In 1964, the Court in *Fibreboard* found that subcontracting a portion of bargaining unit work in the case was a mandatory topic of bargaining under the test set forth in *Borg-Warner*, but a concurring opinion ended up dramatically limiting the holding.²⁰ The *Fibreboard* majority noted that the company’s decision to contract out the maintenance work did not alter the company’s basic operation: “The maintenance work still had to be performed in the plant. No capital investment was contemplated; [and the company] merely replaced existing employees with those of an independent contractor to do the same work under similar conditions

¹⁴ See James R. Rasband, *Major Operational Decisions and Free Collective Bargaining: Eliminating the Mandatory/Permissive Distinction*, 102 HARV. L. REV. 1971, 1978 (1989) (discussing *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)).

¹⁵ See *Borg-Warner Corp.*, 356 U.S. at 352-53 (Harlan, J., concurring in part, dissenting in part).

¹⁶ *Id.* at 352.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 352-53.

²⁰ See *Fibreboard Paper Prod. Corp.*, 379 U.S. at 213, 224 (1964).

of employment.”²¹ Thus, requiring the employer to bargain on the topic “would not significantly abridge his freedom to manage the business.”²² Concerned that the majority’s decision “radiates implications of such disturbing breadth,” Justice Potter Stewart, in a concurrence, attempted to limit the Court’s holding to the particular subcontracting at issue in the case.²³ Even Justice Stewart, however, recognized that automation and technological changes were of great concern to job stability and that it was “possible that in meeting these problems[,] Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management.”²⁴

In 1981, without any discernible legislative intent for such a theory, the Supreme Court in *First National Maintenance* held that there are entrepreneurial decisions not subject to mandatory bargaining under the Act, even though they affect the ultimate employment relationship—essentially endorsing Justice Stewart’s premise in his concurring opinion in *Fibreboard*.²⁵ The Court reasoned that “in view of an employer’s need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”²⁶ Despite the breadth of its holding, the Court cited no evidence that Congress intended to prevent employee representatives from bargaining over such decisions, nor did it articulate any general principle to justify their removal from the scope of mandatory bargaining. Instead, the Court determined that “an employer’s need to operate freely” outweighed any gain to “labor-management relations” that could result from bargaining over partial closing decisions.²⁷

Applying this Supreme Court precedent, the NLRB developed a “turns upon” labor-costs test for determining mandatory bargaining subjects in the context of partial plant relocations.²⁸ If, on the one hand, a decision “turns upon” a change in the nature or direction of the business, the

²¹ See *Fibreboard Paper Prod. Corp.*, 379 U.S. at 213, 224.

²² *Id.* at 213. See also *id.* at 210 (“The words [‘terms and conditions of employment’ used in § 8(d)] ... plainly cover termination of employment.”).

²³ See *id.* at 221, 224 (Stewart, J., concurring).

²⁴ See *id.* at 225–26 (Stewart, J., concurring).

²⁵ See *First Nat’l Maint. Corp.*, 452 U.S. at 686.

²⁶ *Id.* at 679.

²⁷ *Id.* at 686; see also Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1449–50 (1982).

²⁸ See *Otis Elevator Co.*, 255 N.L.R.B. 235 (1981); see also *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984) (“*Otis II*”).

decision is a permissive subject of bargaining.²⁹ On the other hand, if the decision “turns upon” labor costs, the decision is a mandatory subject of bargaining.³⁰ When a decision is based on economic reasons or affected the scope, direction, or nature of an employer’s business, the Board has held that the employer had no duty to bargain over the decision.”³¹ But quixotically, under the Board’s interpretation, the involvement of labor costs is not the same as “turns on” labor costs; although labor costs may be a “motivating factor,” the closure decision may nevertheless “turn upon” the loss in business rather than labor costs.”³²

Nearly 40 years later, under present Supreme Court and Board law, an employer’s decision to close, relocate, expand, or contract its business is virtually unassailable.³³ The mandatory-permissive distinction fails to account for the fact that workers are greatly deeply affected by many other corporate decisions. Corporate practices such as downsizing, opening nonunion subsidiaries, and funding pension funds have profound effects on the lives of workers, but they are not considered mandatory bargaining topics.³⁴ It is clear that the mandatory-permissive distinction, as developed by decades of Supreme Court case law, isn’t working. Several options for shifting the paradigm are set forth below.

²⁹ *Otis Elevator Co.*, 269 N.L.R.B. at 892 (“*Otis II*”).

³⁰ *Id.*

³¹ See Peter F. Munger et al., *Plant Closures and Relocations Under the National Labor Relations Act*, 5 GA. ST. U. L. REV. 77, 93 (1988).

³² See *id.* at 94–95.

³³ See Jan W. Sturmer, *An Analysis of the NLRB’s “Runaway Shop” Doctrine in the Context of Mid-Term Work Relocation Based on Union Labor Costs*, 17 HOFSTRA LAB. & EMP. L.J. 289, 290 (2000) (“Under current law an employer has the right to relocate work during the term of a collective bargaining agreement from a unionized facility to other company facilities based upon valid economic considerations, provided that the employer otherwise satisfies its duty to bargain with the union.”).

³⁴ See English, *supra* note 7, at 574.

OPTION 1: ELIMINATE THE DISTINCTION BETWEEN MANDATORY AND PERMISSIVE BARGAINING

Requiring a duty to bargain in good faith over all lawful bargaining topics would have three significant consequences: First, parties could insist to impasse on any lawful topic; second, unions could put economic pressure on employers on any topic important to workers; and third, parties would not be able to make unilateral changes to topics embodied in collective bargaining agreements after contract expiration.

Removing the mandatory-permissive distinction would clarify a confused state of the law with no legislative underpinnings. In fact, “[t]rue to its legislative intent, the NLRA provides no insight whatsoever into what decisions should be subject to collective bargaining and what decisions, if any, should not.”³⁵ While the mandatory-permissive distinction has spurred academic debate, the Board and courts “have dedicated themselves to categorizing the various subjects of bargaining,” and they “rarely [question] the underpinnings of the doctrine itself.”³⁶

In many respects, removing the distinction returns to the early intent of the Act, where the parties were envisioned to identify and prioritize issues of significance to them.³⁷ Even early on, critics noted that “walling issues off from workers’ input promoted industrial insularity, endangering collective bargaining’s historic role in the joint tailoring of standards, norms,

³⁵ Todd L. Sarver, *Dubuque Packing: Employer Relocation Decisions and the Need for a Principled Approach to Determining What Is Subject to Mandatory Collective Bargaining*, 53 OHIO ST. L.J. 909, 913 (1992).

³⁶ Benjamin Duke, *Regulating the Internal Labor Market: An Information-Forcing Approach to Decision Bargaining over Partial Relocations*, 93 COLUM. L. REV. 932, 939 (1993) (citing Note, *Major Operational Decisions and Free Collective Bargaining: Eliminating the Mandatory/Permissive Distinction*, 102 HARV. L. REV. 1971, 1972 (1989)).

³⁷ See generally Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 391-401 (1950) (suggesting even before *Borg-Warner* that the NLRA was not intended to give the Board the authority to determine the scope of collective bargaining); see also Michael M. Oswald, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89, 102 (2019) (“Criticisms of this regime are legion and pop-up when a surprised public learns that the permissive category includes the choice to kill the company—or a conspicuous part of it—as soon as a union shows up.”).

and practices to the needs of particular communities.”³⁸ As noted by legal scholars, even as the doctrine was developing in 1958, the best course of action might have been for the Supreme Court to abandon all attempts to limit the phrase “terms and conditions of employment,” thus reading the phrase to advance every proposal that management or labor might put forward—a reading that was not inconsistent with either the NLRA or public policy.³⁹ If either side felt strongly enough about a proposal to press the issue to impasse, it was preferable to have the party apply economic pressure rather than attempt to conceal for legal reasons.

There are several benefits to getting rid of the mandatory-permissive distinction, including:

- The proposal closely aligns with the original intent of the Act and offers a fundamental recalibration of how employers and unions engage with one another. Unions could bargain as a matter of right with employers over the very existence of employment, including plant relocation, plant closure, and outsourcing. Though it is presently unlawful to close or relocate a plant in retaliation for union activity, proving that retaliation has been challenging.
- The parties actually negotiating their relationship would have the ability to apply economic pressure where issues are important to them, essentially increasing the power of the parties in the bargaining relationship (and decreasing the power of the NLRB/courts).
- Employers would be required to bargain about issues that affect a business and that workers have important viewpoints on, such as patient safety, environmental effects, and classroom size. This would also create opportunities for aligning worker movements with other social justice movements, particularly where interests align.

³⁸ See Oswald, *supra* note 36, at 102 (citing Cox & Dunlop, *supra* note 36, at 405-06; Archibald Cox, 1957 *Supreme Court Labor Decisions at the October Term*, 44 VA. L. REV. 1057, 1083 (1958); and P.R. Louiseaux & Arthur S. Miller, *Collective Bargaining: Some Fundamental Assumptions in Law and Practice*, 35 TEX. L. REV. 188, 188-89 (1956) (likening collective bargaining agreements to private governments that “legislate for the network of factory communities and the millions of members of those communities”).

³⁹ See Archibald Cox, *Labor Decisions of the Supreme Court at the October Term*, 1957, 44 VA. L. REV. 1057, 1086 (1958).

The negatives of this proposal are:

- It could work to the detriment of unions, in that employers could insist and apply economic pressure to things that they currently cannot. Employers, for instance, presently cannot insist that the union call a vote on a strike, nor can they influence internal union matters.
- It could make it more difficult to reach a first contract, with both employers and unions insisting to impasse on any topic of bargaining.

OPTION 2: KEEP THE MANDATORY-PERMISSIVE DISTINCTION BUT ALLOW A PARTY TO INSIST ON ANY TOPIC TO IMPASSE

The duty to bargain under Section 8(d) could be separated from the right to insist on a topic, allowing a party to insist on a topic it cared about to impasse even if it did not fall within the definition of Section 8(d).⁴⁰ In essence, adopting Justice Harlan’s dissent in *Borg-Warner* would achieve the basic objective of the Act while also providing a “more natural reading of the statutory language.”⁴¹ This proposal arguably most closely aligns with original congressional intent, keeping meaning to Section 8(d)’s reference to the “terms and conditions of employment,” while not proscribing bargaining on all other topics, which the Act never intended. And, as Justice Harlan and others have noted, “limiting insistence to mandatory subjects restricts the flexibility of the parties and may prevent the evolution of collective bargaining as the workplace develops and changes.”⁴²

The benefits of this proposal include:

- Compared to Option 1, negotiating a first contract should move faster by not requiring parties to bargain over topics more tangential to the employment relationship, while still allowing the other party to apply pressure (through economic action or bargaining to impasse) if the topic is really important to it.

⁴⁰ See, e.g., Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other “Survivalists”*, 67 *FORDHAM L. REV.* 957, 1022 (1998) (“Justice Harlan’s *Borg-Warner* dissent would separate the duty to bargain from the right to insist.”).

⁴¹ See Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 *ADMIN. L.J. AM. U.* 517, 557 (1994) (discussing *Borg-Warner Corp.*, 356 U.S. at 350-62 (Harlan, J., dissenting)).

⁴² See, e.g., Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 *OHIO ST. J. ON DISP. RESOL.* 513, 558 n.45 (2001) (citing Cox & Dunlop, *supra* note 36, at 391-401; and Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 *CATH. U. L. REV.* 791, 806-09 (1998)).

- Like in Option 1, power is returned to the parties to a significant extent (rather than to the NLRB/courts) to determine what is important to them in bargaining.
- The proposal allows a party to refuse to bargain over permissive topics, which are more tangential to the bargaining relationship, and maintains the importance of the Section 8(d) language.
- This proposal, like Option 1, allows for parties to apply economic pressure on issues outside the terms and conditions of employment, such as patient safety, environmental issues, and social responsibility, while not requiring a party to bargain over issues that are arguably more tangential to actual working conditions.

The drawbacks to this proposal are:

- It does not fundamentally alter the mandatory-permissive distinction, still permitting an employer not to bargain over some of the most fundamental decisions in employment (e.g., subcontracting or plant closure lines of cases). (This option, however, could be combined with Option 3, discussed below, such that Justice Harlan's dissent is adopted by the carve-out for fundamental business decisions is removed, and any topic related to the terms and conditions of employment is considered mandatory.)
- This option will still lead to extensive litigation on the mandatory-permissive distinction, since a party can refuse to bargain over permissive topics.

OPTION 3: DEFINE IN THE STATUTE THE “TERMS AND CONDITIONS OF EMPLOYMENT” TO INCLUDE ANY DECISION THAT AFFECTS OR MAY AFFECT EMPLOYEES, INCLUDING WHETHER THERE IS, IN FACT, AN EMPLOYMENT RELATIONSHIP

The notion that there is a category of business decisions related to contracting, partial closure, and relocations that have an obvious impact on employment, but are somehow separate from the employment relationship because they relate to overall economic profitability, has no basis in the Act and has served to decimate the strength of the labor movement over the last 50 years. And while an employer may not lawfully relocate its plant to retaliate against a union—or to escape its bargaining obligation—proving an unlawful motive is extremely challenging. In a highly publicized charge brought by the NLRB’s General Counsel in 2011, the NLRB argued that Boeing unlawfully decided to move the production of an aircraft to South Carolina, a right-to-work state, to punish the union for a series of strikes that had slowed production.⁴³ The case settled before a decision on the merits, but the highly charged case demonstrates the legal, political, and public relations challenges to attempting to prove that any relocation decision was discriminatory, not to mention “turned on” labor issues.

To clarify this language, Section 8(d) could be amended to provide that the terms and conditions of employment include any decision that affects or may affect employees, including whether there is, in fact, an employment relationship—including the existence of that

⁴³ See Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES (Apr. 20, 2011), <https://www.nytimes.com/2011/04/21/business/21boeing.html>.

employment. This language would remove the difficult burden of proving the “turns on” labor-costs standard as well as bring issues that do not yet affect the employment relationship, but could in the future, into the fold of bargaining. This could include subcontracting as well as supply chain issues.

The benefits of this proposal include:

- This would be a pure interpretation of Section 8(d) of the Act and most in line with congressional intent.
- It would require employers to bargain over all issues fundamental to the employment relationship, greatly increasing employee voice in the workplace and enhancing the ability of bargaining representatives to weigh in on fundamental issues affecting work, automation, and the changing nature of the economy.
- By redefining the terms and conditions of employment rather than getting rid of the mandatory-permissive distinction, employers cannot put pressure on unions to bargain over internal union matters, which have no relationship to the terms and conditions of employment.

The drawbacks to this proposal are:

- This proposal does not bring in the ability to bargain over other social issues important to employees, limiting the ability of workers to act in concert with other movements.
- The proposal will likely lead to litigation on what the new definition of the “terms and conditions of employment” includes. While it is a more liberal definition than the present one, given the significance still attached to it, parties will still litigate on both sides to develop the law favorably to them.

OPTION 4: DEFINE, BY STATUTE, CERTAIN ISSUES AS MANDATORY SUBJECTS OF BARGAINING

Given the judicial distortions in Board law, enumerating the mandatory bargaining topics might most quickly and equitably solve the worst problems presently in the law. This, like Option 3, would have the added benefit of creating no corresponding obligation to bargain upon bargaining representatives about internal union matters. Thus, issues such as strike votes and contract ratification would not require a duty to bargain as they would under Option 1, where all topics essentially become mandatory.

Under this proposal, the statutory language would essentially indicate that an enumerated list of topics was, in fact, the “terms and conditions of employment.” Such topics could include worker representation on corporate boards, plant closures, plant relocations, subcontracting in all instances, and the automation of bargaining unit work.

The benefits of this proposal include:

- This proposal is tailored to solving specific problems and prevents employers from interfering in internal union matters.
- This proposal should not extend first contract negotiations as under Option 1, since the additional mandatory subjects of bargaining are limited.

The downsides of this proposal include:

- This proposal makes it difficult to account for other issues important to employees, such as customer or patient care; the carve-out for unions to consider such issues will be difficult.
- This proposal does not allow for continuous recalibration as to what is most important to workers at a given time and at a particular workplace.

CONCLUSION

Despite the cramped reading of the NLRA, unions have been experimenting with new models of building worker power for the last decade. From massive teacher strikes to a walkout concerning sexual harassment at Google,⁴⁴ working people are taking action to increase their collective bargaining power. How we confront major issues facing our country, such as growing automation, will depend on how workers are engaged at the bargaining table as part of those decisions.⁴⁵ Unions' ability to bargain over how an existing workforce is retrained and retooled can have a profound effect on how our labor force can evolve with automation. And the growing fissuring of work, where businesses have been pushed by financialization to outsource and subcontract significant parts of their businesses,⁴⁶ cries for new models of establishing worker power. An employer's limited duty to bargain over subcontractors' terms and conditions of employment stymies the innovation needed in labor law.⁴⁷

Labor law is long past due for a new scheme on mandatory-permissive collective bargaining issues. Any of the above options would be a vast improvement from the state of labor relations today, but combining options 2 and 3 would serve the most purposes. By allowing parties to bargain to impasse over any lawful topic of importance to them, as well as broadening the mandatory topics of bargaining to include all issues that affect or may affect the terms and conditions of employment, labor law can better serve today's workers.

⁴⁴ See AFL-CIO COMMISSION ON THE FUTURE OF WORK AND UNIONS, REPORT TO THE AFL-CIO GENERAL BOARD 2 (Sept. 13, 2019), <https://aflcio.org/reports/afl-cio-commission-future-work-and-unions>.

⁴⁵ See *id.*

⁴⁶ See DAVID WEIL, THE FISSURED WORKPLACE: HOW WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT, at i-vi (2014).

⁴⁷ See Lynn Rhinehart & Celine McNicholas, *Collective bargaining beyond the worksite: How workers and their unions build power and set standards for their industries*, ECON. POL'Y INST. (May 4, 2020), <https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries/>.

CLEAN SLATE FOR WORKER POWER is a project of Harvard Law School's Labor and Worklife Program.

ACKNOWLEDGMENTS

The Clean Slate for Worker Power project gives a special thanks to Sharon Block, Kendra Bozarth, Alex Hertel-Fernandez, Jenny Lau, Celine McNicholas, Seema Nanda, Raj Nayak, Erica Rubinstein, Nikita Rumsey, Benjamin Sachs, Shayna Strom, and the individuals from around the world who generously participated in convenings about sectoral bargaining in countries outside the United States.

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