I want to start by thanking the Berkeley Journal of Employment & Labor Law and my friend David Rosenfeld for this amazing honor. I am thrilled to be here and still somewhat surprised by the invitation to join the ranks of previous Feller lecturers. It is a list of people who I greatly admire and who I often call on for advice and guidance.

I also want to thank the UC Berkeley Labor Center for hosting this lecture today. There have been many wonderful people here at Berkeley who have contributed so much to the Clean Slate project, about which I will speak tonight. Ken Jacobs, Annette Bernhardt, Steven Pitts and Catherine Fisk have all traveled to Cambridge multiple times to be a part of the project. I am happy for the opportunity to come west to see all of you here, as opposed to imposing on you to travel east.

I also want to thank the Feller family and to acknowledge the incredible contribution of David Feller to the field of labor law. I didn’t have the privilege of knowing Professor Feller, but in my position now, I have a very keen appreciation of his legacy. As I will get to in a minute, and as will come

DOI: https://doi.org/10.15779/Z38N58CM50

† Sharon Block is the Executive Director of the Labor and Worklife Program and Lecturer at Harvard Law School. Before coming to Harvard, Block led the policy office at the U.S. Department of Labor and served as Senior Counselor to Secretary of Labor Tom Perez. For twenty years, she has held key labor policy positions across the legislative and executive branches of the federal government, including appointment by President Obama to be a member of the National Labor Relations Board. She also was Senior Labor and Employment Counsel to the Senate HELP Committee under Senator Edward Kennedy. Block received her B.A. from Columbia University and her J.D. from Georgetown University Law Center, where she received the John F. Kennedy Labor Law Award.

This piece was prepared as an annual lecture in honor of David E. Feller and has been lightly edited for publication.
as no surprise to anyone, I have very grave concerns about the future of labor law. I am going to speak tonight about what I see as the overarching weakness in the law and what we need to do to fix it. But coming here to give a lecture named for a great labor law professor has led me to think more about another crisis for the labor movement—the challenge in inspiring the next generation of great labor lawyers.

Coming to Harvard Law School is my first stint in academia, and I have loved the interactions that I have had with law students. One of my favorite kinds of interactions is when students come to ask me for career advice, but I approach those conversations with some hesitancy. With the labor movement in crisis, it is challenging to convince even the most progressive, economic justice-oriented students to consider a career in labor law. Great professors, like David Feller was, help make that challenge easier. At Harvard Law School, we have the enormous good fortune to have the best labor law professor in the country—sorry if that hurts anyone’s feelings in the room, but I’m biased—in Professor Benjamin Sachs. I see the impact that he makes on how students think about their futures and the possibilities in labor law.

And I’m trying to do my part to coax that next generation into existence, too. I teach a seminar at Harvard on alternative forms of worker organizations, and I purposely bring in dynamic leaders from worker centers and online organizing sites and other young organizations in order to underscore for students that a career in labor law and organizing can be about building something new, not just trying to keep something from diminishing. We also have recruited almost twenty law students to join our Clean Slate project as research assistants, both to contribute to the project and to encourage them to see labor law as a dynamic intellectual field, poised on the brink of change.

Even the best labor law professors will not be able to inspire the next generation of labor lawyers, however, if we can’t credibly make the case that the labor movement will be sustained long enough for them to have a career. So that brings me to my topic for tonight: how to save labor law. The title of my talk is, “Go Big or Go Home: The Case for a Clean Slate Approach to Labor Law Reform.” I chose this topic because I believe that a commitment to pushing for fundamental labor law reform is what this crisis requires.

I don’t come to this dire warning easily. Nor is it comfortable for me to stand before you and say that for the most part I believe we need to scrap the National Labor Relations Act and start over from a clean slate. I have spent most of my career thinking about and trying to protect the National Labor Relations Act. Early in my career, I was a civil service lawyer at the National Labor Relations Board. And then in the Obama Administration, I returned, albeit for a short time, as a member of the Board. In those positions, I dedicated myself to trying to work from within the confines of the statute as it stands to make it relevant and empowering. I was guided in that work by
the purpose of the Act, as articulated in the preamble, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association.  

But I saw firsthand that the law had become inadequate to fulfill the call of the preamble. I came to believe that reform of the Act was necessary. I had the opportunity to join the front lines of labor law reform by going to work for Senator Ted Kennedy on the HELP Committee. During my tenure with Senator Kennedy, where I stayed until he passed away, I spent a great deal of time working to advance the Employee Free Choice Act. And I worked on the not-so-secret effort to draft the sequel to the Employee Free Choice Act, which some of us took to calling, “EFCA-lite.”

I have a few observations from that experience that are relevant to how I think today about labor law reform. First, I don’t think the status of the labor movement would be all that different today if the Employee Free Choice Act had passed. Yes, we would have had some greater success in union organizing campaigns and some more first contracts. But I am fairly certain that we would still be having this exact conversation about the existential threat to the labor movement.

Second, I want share what I learned about the politics of moving labor law reform. I think it is important to put this perspective out on the table before I tell you about the really big ideas that we are considering in our Clean Slate project. I know that if I don’t, you are going to stop listening carefully to what I’m saying and just be thinking that this will never happen—we can’t move reforms this big. What I learned from the EFCA fight is that the issue of labor law reform is so polarized that it would take just about the same political capital to move small-bore labor law reform as something really big. When we shifted our legislative strategy from EFCA to EFCA-lite, the pieces didn’t fall into place, Republicans didn’t get on board, and even moderate Democrats still had cold feet.

What it will take to move any labor law reform is a big political moment and a compelling narrative that reform will make meaningful change in people’s lives. I think that this case is easier to make with bold reform ideas than more narrow ones. I’m not saying that big change has to happen all at once; incremental legislative change is still probably the most likely viable option for reform. But we need to have in sight a vision of what the fundamental reshaping of the law would look like, even if we only move towards that vision a step at a time. Without that vision of what could really make a difference, we will never get there and we won’t convince anyone—legislators or the public—to come along with us.

My views on the need for labor law reform have evolved. Now, instead of seeing the law as merely inadequate, I have come to the conclusion that the preamble and the rest of the Act are at war with one another. No longer

can I see the procedures for choosing a collective bargaining representative embodied in Section 9 of the Act or the protections for collective action established in Sections 7 and 8 as a viable foundation from which to encourage collective bargaining or protect freedom of association in a meaningful way. This conclusion has led me to believe that it is necessary to think about labor law reform not as amendments to the Act, but as something that has to happen from a statutory clean slate. I am not saying that we must throw out the existing institutions, but we need to look at the economy and politics as they exist today and build a new legal architecture for empowering workers. We also have the opportunity—and indeed, the duty—to rethink the institutions created and enabled by our current labor law, to ensure that they are centered on all workers and not held back by structures that were originally intended to hold back Black workers, immigrants, and women.

To accomplish this rather ambitious goal, I have spent most of the past 18 months on a project I launched with Professor Sachs at Harvard: Rebalancing Economic and Political Power: A Clean Slate for the Future of Labor Law. With the help of many, many people, including approximately eighty who are regularly engaged in working groups at the core of the project, we are coming up with the big reform ideas that we believe are necessary to rebuild labor law to meet today’s challenges. I would like to share with you tonight the Clean Slate case for fundamental labor law reform.

The first step in making the case for fundamental labor law reform is to make the case that the current system is broken. I am not going to spend a lot of time making this case in this room—you all know the statistics that prove the case. There is one statistic that I find surprising and definitive in making the case that our labor law system is profoundly broken: the percentage of American workers who are members of unions is lower now than before the NLRA passed. Put another way, workers were more likely to be union members (13.2 percent) when they had no right to do so than they are now (10.7 percent) after more than 80 years of having a federally protected right.5

As the labor movement has declined, so have the basic measures of economic fairness and equality—wages have stagnated while productivity continues to grow, and so the gap between rich and poor is larger than ever.6 In fact, the decline in union density is having a dramatic effect on everyone who works—because the decline in unionization suppresses wages for all workers, it accounts for about one-third of the increase in income inequality

among men and about one-fifth of the increase in income inequality among women over the past several decades.\textsuperscript{7}

This decline and the resulting imbalance in our economy is changing the very character of our country as the home to the largest and most prosperous middle class in history. While we have a remarkable divide about what to do about it, we do seem to have a growing consensus in our national politics that the American middle class is under extreme stress.\textsuperscript{8} Drawing a line between the demise of the labor movement and the stress of the middle class seems obvious. While it may not be the whole answer to what ails the American economy, the failure of workers any longer to wield power sufficient to counteract corporate power clearly is an important part of this puzzle. The connection becomes increasingly clear as it becomes more and more evident that we are living in a time of increasing corporate concentration and dominance of our political life.\textsuperscript{9} As corporate power has grown and become concentrated, worker power has ebbed. Putting the law in service to rebuilding that power is a critical part of solving the problem.

The second step in building this new architecture for labor law reform is diagnosing the problem with the existing architecture. The thesis that I want to share with you tonight is that there exists across the National Labor Relations Act a pattern of driving the aggregation of worker power towards the smaller and narrower field of contestation rather than the bigger and broader. The law operates with an inherent bias towards less rather than more. As I will now describe in greater detail, at each critical definitional juncture, the framers and interpreters of the law have chosen the definition that constrains the aggregation of power. This pattern can be seen most dramatically across the following areas: who has the right to bargain, level at which bargaining happens, subjects of bargaining, and how collective power can be exercised. This bias towards the small and the narrow requires workers to expend great resources on endless rounds of process to gain voice, but renders that voice inadequate to build real collective power.

Let’s start with looking at who has the right to collective bargaining in our country. The pool of who is covered by the National Labor Relations Act and, thereby, who has the right to engage in collective bargaining, can be seen as a series of winnowing definitional principles. These definitional principles are not drawn around those who otherwise have economic and social power such that they do not need collective power. In fact, many of the


least powerful in our economy, who could only derive power from acting collectively, instead are left outside of the Act.

The first limiting principle is that only those who the law categorizes as employees are covered. This principle expressly removes from coverage anyone categorized as an independent contractor. It excludes millions of workers who genuinely are self-employed, but it also creates an incentive for employers to apply a veneer of independence to many jobs in order to extend the independent contractor exclusion to their workforces or to at least create enough uncertainty to get away with treating them that way. Now, millions of workers in industries characterized by what David Weil calls “fissured” business models are treated as if they have no rights under the NLRA. Workers in the fast-growing “gig economy” similarly find themselves, at least for now, outside of the protection of the Act. For reasons familiar to all of you, many of these workers will remain stuck in this category because the Supreme Court has blocked their path to contesting their status through litigation.

So, we start with the vast universe of people in our country who have to work to earn a living and we exclude the millions designated as independent contractors. Next, we have to subtract the millions of workers in occupations that the statute explicitly excludes – domestic workers and agricultural workers. The farmworker exclusion excludes around 2.5 million workers from the Act’s protection and the domestic worker exclusion around 2 million more.

The Act also expressly excludes supervisory employees from the NLRA as well, taking millions more workers out of the Act’s coverage. The supervisory exclusion grew significantly when the Bush II Board

---

14. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (holding that employers did not violate the NLRA by requiring workers to agree to arbitrate any labor disputes on an individual basis, including whether they are employees or independent contractors).
17. 29 USCS § 152(3), (11) (The NLRA defines supervisors as workers who have the authority “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if . . . the exercise of such authority . . . requires the use of independent judgment). 
adopted its 2006 *Oakwood Healthcare* ruling, establishing a new three-part test for supervisory status. A report by the Economic Policy Institute estimated that the *Oakwood* decision would remove approximately 8 million workers from the Act’s coverage. The rationale for excluding these millions of “supervisors” from the Act’s coverage had nothing to do with whether they had bargaining power over their own wages or working conditions. Just think about the context in which most of the cases arose — cases involving licensed practical nurses in nursing homes. In an industry with more and more market concentration, exercised by bigger and bigger corporations, do we really think that licensed practical nurses feel like they have agency in their own work lives just because in between changing bed pans and taking temperatures they tell a few of their colleagues what shifts to cover? The effect is to further split workers off from the possibility of creating a common project of exercising countervailing power.

I usually hate sports metaphors, but I think a football metaphor works very well in dramatizing my point about how weak the law has made the worker side of the economic game. By limiting the definition of who is covered by the Act, the framers of the Act narrowed how many players the workers’ team could have on the field.

The next area that I want to make the case exemplifies the pattern of going small instead of going big is the level at which collective bargaining happens. Since 1935, collective bargaining in our country has largely taken place at the level of the firm or, even more commonly, among a subset of workers within the firm. The statute gives the N.L.R.B. the authority to determine appropriate bargaining units, but the Board must choose between “the employer unit, craft unit, plant unit, or subdivision thereof.” Thus, the statute limits the size of the biggest collective bargaining unit that employees can demand to an employer unit.

While there are examples of multi-employer bargaining units, the law gives veto power to the employers over whether to permit workers to organize these bigger units. To get beyond the bounds of the firm, a union must get the agreement of the employers. The law forbids, however, the union to use any of its meager arsenal of economic weapons to wrest such an agreement from employers. Because the scope of the bargaining unit is a

---

permissive subject of bargaining – a topic I will soon get to in more detail –
unions are not allowed to strike or picket over a demand for a multi-employer
unit.

This employer-level bargaining may have made sense in 1935 –
although I think it is more accurate to say that it didn’t wreak as much havoc
at that time as it does now. When firms looked like General Motors, one firm-
level contract could cover thousands of workers and effectively set standards
across an industry. As Professors Kate Andrias and Brishen Rogers have
observed, “an increasing number of scholars and commentators have recently
argued, worksite-or firm-based bargaining is often insufficient to protect
workers’ interests and to redress problems of economic and political
inequality.”24 The effect of this limiting principle is to create a strong
incentive for employers to fight unionization, even at great cost.25 Employers
whose workers unionize believe that they are instantly put at a competitive
disadvantage in relation to the rest of their non-union industry and will be
precluded from pursuing a business model based on minimizing labor costs.26

As if the limiting principle of employer-based bargaining embedded in
the law is not limiting enough, the law, at least as the current Board interprets
it, greatly constrains the definition of an employer for the purpose of the level
of bargaining. This limiting principle plays out in the context of the Board’s
definition of joint employer. In its recent Notice of Proposed Rulemaking,
the Board has put forth an extremely narrow definition of joint employer, that
requires the exercise of “substantial direct and immediate control over the
[employees’] essential terms and conditions of employment. . . in a manner
that is not limited and routine.”27 There is every reason to believe that the
Trump N.L.R.B. will finalize this definition.28

The most obvious effect of this limiting principle can be found in the
industry where the joint employer doctrine is being fought over most publicly

---

24. KATE ANDRIAS AND BRISHEN ROGERS, REBUILDING WORKER VOICE IN TODAY’S ECONOMY
26 (The Roosevelt Institute, Aug. 2018).
25. Id. n. 79.
26. Id.
28. In December, the District of Columbia Circuit affirmed the Obama Board’s broader definition of the
While the court withheld judgment on the effect of its decision on the viability of the Board’s
rulemaking effort, scholars have questioned whether the rule could withstand challenge in light of the
D.C. Circuit’s holding that the broader rule was consistent with the common law definition of joint
employer. See Andrew Strom, Your Tax Dollars at Work at the N.L.R.B., ONLABOR (March 29, 2019),
https://onlabor.org/your-tax-dollars-at-work-at-the-nlrb/. Chairman Bobby Scott and Ranking Member
Senator Patty Murray have requested that the Board withdraw the NPRM in light of the D.C. Circuit’s
decision. Letter from Patty Murray and Robert Scott, to Roxanne Rothschild, Associate Executive
Secretary N.L.R.B. (Jan. 28, 2019), https://edlabor.house.gov/imo/media/doc/201-01-
29%20Chairman%20Scott%20%20%20Ranking%20Member%20Murray%20Joint%20Employer%20Com-
ment%20Letter.pdf. On February 26, 2020, the N.L.R.B. finalized its rule without making any
significant changes from the proposed rule. Press Release, N.L.R.B., on Joint-Employer Final Rule (Feb.
– fast food. Although this issue has been litigated before the Board in the context of liability for unfair labor practices – SEIU is seeking to hold corporate McDonald’s liable for unlawful dismissals imposed by McDonald’s franchisees–29—the impact on the scope of organizing and bargaining is even more dramatic. The task of organizing McDonald’s as a single corporation may be daunting, but at least it holds out the possibility, if successful, of making sweeping change. The task of organizing McDonald’s franchise by franchise, in contrast, is pointless in terms of building the kind of power necessary to change fast food to an industry in which workers can enjoy decent working conditions. Individual franchisees do not have the power to set working conditions or the financial resources to meaningfully change pay structures.30 Moreover, this franchise issue isn’t only about fast food—millions of Americans work for franchises, with growth in franchise employment outpacing general employment growth.31

The impact of the Board adopting a narrow definition of joint employer goes beyond the franchise business model. As American companies are increasingly hiring contract firms to perform many of their non-core services, rather than hiring employees directly, the question of whether employees of the lead firm and the contracted firm can organize together becomes more important.32 For example, if an employer hires separate firms to run the cafeteria, warehouse and janitorial services at its worksite, a narrow definition of joint employer coupled with a prohibition on demanding a multi-employer unit limits the size of the bargaining unit within the “firm.” In fact, unions would be required to organize separate bargaining units for each function, instead of one big one.33 Thus, we can see that even the idea that the NLRA allows firm-level bargaining is actually illusory.

To continue my football metaphor, we’ve now seen that the law limits how many players the workers’ team can put on the field and that once those players are on the field, they can only play in very narrowly prescribed parts of the field without the opposing team’s permission. Moreover, they are precluded from running plays that involve players who occupy different parts of the field than they do, even though those players are on the same team. You can see why scoring points is so difficult.

But our workers’ team path to victory is even narrower than I’ve already described. The next area in which the law imposes significant constraints is over which subjects unions are allowed to demand bargaining. Under the National Labor Relations Act, unionized workers in the U.S. have a right to bargain over wages, hours or other terms or conditions of employment – what the law terms “mandatory subjects” of bargaining.34 The Supreme Court has defined mandatory subjects as those that “settle an aspect of the relationship between employer and the employees.”35 Beyond pay and hours of work, mandatory subjects include benefits, grievance procedures, grounds for discharge, procedures for layoffs and workplace discipline.36

The law does not protect workers’ right to bargain over subjects deemed to be managerial or entrepreneurial – those termed “permissive subjects of bargaining.”37 Core business decisions – for example, decisions involving certain subcontracts, capital investments or changes in basic business operations – are permissive subjects, even though these decisions can have substantial (and dispositive) impacts on mandatory subjects like hours and pay.38 Workers have no right to bargain over key business decisions such as what products the employer produces, what equipment it purchases – think robots – or even whether the employer will stay in business or not.39 While the NLRA provides that employers have a duty to bargain over the impacts of these non-mandatory subjects, the law provides no duty to bargain over the decisions themselves as long as the employer’s decisions were not improperly driven by those impacts.40

Although I’m not aware of any cases on these topics, it seems clear that the decisions made by today’s CEOs that probably have the most significant impact on workers are beyond the realm of mandatory subjects of bargaining and likely beyond even the realm of effects bargaining. Take, for example, the subject of stock buy-backs. C-suite decisions about stock buy-backs affect the amount of money the corporation has available to devote to labor costs and thereby can suppress wages.41 Under the NLRA, however, a union’s request to bargain over stock buy-backs would not pass the laugh test. Other aspects of the financialization of corporate America similarly affect the

38. *Fibreboard Paper Products v. N.L.R.B.*, 379 U.S. 203, 213 (1964); see also id. at 223 (Stewart concurring).
40. Id.
economic well-being of workers, but even those workers lucky enough to have a union have no ability to force a discussion about these subjects, much less exercise power over how they get resolved.42

Recent events suggest that workers want to expand the scope of issues on which they can have a say. For example, think about the wave of teachers walk outs that has swept the country over the past year. In many of those actions, teachers walked not only because they wanted to increase their pay, but also because they wanted to bargain over class sizes, repairs to school buildings, and the hiring of adequate numbers of janitors and school nurses. Or think about the Google walkouts. The 20,000 software engineers and employees walked out in part to protest Google’s creation of Dragonfly, a censored search engine for the Chinese market.43 Accenture workers petitioned their employers to cancel a contract to help the Trump Administration recruit border patrol agents.44 Even if all of these workers had been represented by a union, the law would not enable them to force a discussion about these topics at the bargaining table.

These are not just anecdotes. Research validates that workers want more say in more than just what they get paid and what hours they work. Tom Kochan, Co-Director of the Institute for Work and Employment Research at MIT’s Sloan School of Management, recently published results from a major survey, “Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?”. Kochan’s research shows that workers experience a substantial and growing worker voice gap on a range of issues, including their ability to influence the quality of the products their employer produces and their employers’ values.45

I am going to keep torturing you with this football metaphor. To recap, the workers’ team is trying to win the game, but they must confront several obstacles: (1) they are limited in how many players they can have on the field; (2) their players can only operate on small slices of the field and cannot run plays that involve teammates who are on different parts of the field than they are unless the other team says it is okay; and (3) they are limited in the kinds

42. The McCulloch Board in its brief to the Supreme Court in Fibreboard argued for a broad scope of bargaining: “the scope of collective bargaining is confined by the range of employees’ vital interests.” Although the Board prevailed in Fibreboard, the concurring opinion, which has defined labor policy in the area since the decision, imposed a much narrower vision by excluding core entrepreneurial decisions from the definition of mandatory subjects, regardless of whether those decisions affected employees’ vital interests. See JAMES A. GROSS, RIGHTS NOT INTERESTS: RESOLVING VALUE CLASHES UNDER THE NATIONAL LABOR RELATIONS ACT (ILR Press 2019).
43. Google Employees Against Dragonfly, We are Google Employees. Google must drop Dragonfly, MEDIUM, Nov. 27, 2018, https://medium.com/@googlersagainstdragonfly/we-are-google-employees-google-must-drop-dragonfly-4c8a30c5e5eb.
of plays they can run – maybe only rushing but no passing – unless they get permission from their opponent. This is a really tough game for the workers’ team, but it is about to get tougher.

The last area that I want to highlight in this pattern is that of collective action. The National Labor Relations Act imposes strict limits on the kind of collective action in which workers can engage once they have formed a union. The Act constrains who unions can target and how they can act.

First, I will address the limits on who unions can target when they take collective action such as striking, picketing or boycotting an employer. Under Section 8(b)(4) of the Act, unions are precluded from engaging in secondary activity. The ban on secondary activity means that unions may not engage in strikes, pickets or boycotts that target any employer or the employees of any employer other than the primary employer – the employer with whom the union is engaged directly in a labor dispute. Put another way, the union may only target the employer who sits across the bargaining table and is precluded from trying to influence any employer who may have influence over the primary employer.

The heart of the problem with the limitations imposed by Section 8(b)(4) is that it precludes the union from acting strategically. Unions may not analyze power relationships to determine the most effective means of applying pressure and act accordingly. The law quite literally requires the union to act illogically.

The best illustration of the insanity of this limiting principle can be seen in a campaign where Section 8(b)(4) did not apply – the Coalition of Immokalee Workers campaign to raise wages for tomato pickers. CIW is not covered by the Act because its members are agricultural workers. CIW’s members are employed by the tomato growers so the growers would be designated the “primary employer,” if the Act applied. CIW’s goal was to get the growers to pay the pickers a penny more per pound. Experience and economics made clear, however, that making the growers the target of strikes or pickets was not going to yield results. The reality of the industry was that the growers operated on such narrow margins that they could not afford to pay the pickers more unless their customers paid them more for their tomatoes. Had the NLRA applied, however, CIW would have been limited to engaging in the pointless exercise of targeting the growers.

Because they were free from the constraints of the Act, however, CIW was able to act strategically in deploying its use of collective action to pressure secondary targets. Knowing that fast food companies held the power over the growers as their largest customers and that these chains effectively determined what pickers got paid by determining how much growers got

48. Id. at 506.
paid, CIW launched a campaign to target the fast food companies. They appealed to consumers to pressure the fast food companies to pay the growers more. Through pickets, media campaigns, boycotts and other direct actions, CIW got the fast food companies to increase what they pay growers and to commit to only buying tomatoes from growers who pass the additional revenue on to the pickers in the form of higher wages.

Industry groups have taken notice of CIW and groups like them, and how effective these campaigns unconstrained by the NLRA can be. The Chamber of Commerce and allies have mounted a years-long campaign asking the labor department to reclassify these groups as “labor organizations” subject to the burdensome reporting requirements of the Labor-Management Reporting and Disclosure Act of 1959. This effort is likely a first step to using the National Labor Relations Act to effectively constrain the activities of such non-union worker organizations just as are labor unions.

The Act imposes a second constraint on unions’ exercise of collective action: limiting how workers strike. Let’s remember that the right to strike is the first among equals in the realm of collective action. The Act broadly protects “concerted activity,” leaving to the Board to delineate what those two words actually mean. In Section 13, however, the drafters of the Act very specifically assert that “[n]othing in this [Act] . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike.” The Supreme Court has instructed that this protection should be given a “generous interpretation.” Ironically, the Board has done exactly the opposite.

Traditionally, when a union goes out on strike, all the workers walk off the job and stay off the job until the labor dispute is resolved, either by agreement or the union capitulating. There should be no reason, however, that work stoppages have to follow that pattern. Fight for $15 organizers have shown increased interest in using intermittent strikes, as opposed to the traditional “everybody walks out and stays out” model. It is easy to see why intermittent strikes make sense for Fight for $15 – for low wage workers who don’t have access to well-resourced strike funds, the limited financial hit of

49. Id. at 507.
50. Id. at 508.
periodic, short-term work stoppages is much easier to endure than a protracted work stoppage. Moreover, the campaign has been able to garner repeated news coverage each time they launch a “day of action,” while the media often loses interest in long-term strikes after the initial walk out.

The one problem for Fight for $15 or other worker organizations utilizing the intermittent strike as a tool is that the N.L.R.B. has repeatedly held that intermittent strikes are not protected by the Act. In *Briggs & Stratton*, the Supreme Court found unprotected the union’s “recurrent or intermittent unannounced stoppage of work to win unstated ends,” which also involved threats and property damage.57 Despite the unusual nature of the facts at issue in *Briggs & Stratton*, the Board has extended the denial of protection to all manner of intermittent strikes, including those that involved no threats or property damage.58 Once again, the result is to limit the options available to workers and curtail their ability to act strategically.

I promise – this is my last deployment of the football metaphor. Picture our poor workers’ team. They have too few players on the field, who are operating in too narrow parts of the field, with too few plays in the playbook. Now we learn that even their ability to come in contact with the opposing team’s players is limited. Many of the players on the field are off limits – they can’t be touched even if they have the ball and are running for the end zone. For those players that our team can go after – their only option is to tackle the opposing team’s player and then run off the field and wait until the other team forfeits or agrees that they should come back. Let’s now imagine what this game would look like if the workers’ team could go big.

The final step in building the case for clean slate labor law reform is give you a peek at what a legal regime that “goes big” might look like in each of the areas that I just argued are bedeviled by narrowing and limiting principles. I can’t tell you what Clean Slate will recommend because we are not there

58. See Walmart Stores, Inc., 368 N.L.R.B. No. 24 (July 25, 2019) (holding that Walmart lawfully disciplined and discharged workers associated with OUR Walmart who walked out 4 times over a 13-month period). See also *Pacific Telephone & Telegraph Co.*, 107 N.L.R.B. 1547, 1547-50 (1954) (waves of short strikes at different offices over nine days during contract negotiations unprotected); *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1807-11 (1954) (employer’s attempts to compel employees to “work full time or not at all” by suspending intermittent strikers for short periods were lawful where multiple weekend strikes in support of contract negotiations were unprotected); *Swope Ridge Geriatric Center*, 350 N.L.R.B. 64, 64 n.3, 68 (2007) (multiple weekend strikes in support of contract negotiations unprotected); *Embossing Printers*, 268 N.L.R.B. 710, 711-12, 722-24 (1984) (employer lawfully locked out strikers who engaged in three unprotected walkouts to attend union meetings during contract negotiations), enforced mem., 742 F.2d 1456 (6th Cir. 1984) (table decision); *New Fairview Hall Convalescent Home*, 206 N.L.R.B. 688, 701-02, 708, 746-747 (1973) (three mid-day walkouts about three weeks apart in support of demand for speedy election unprotected), enforced sub nom. *Donovan v. N.L.R.B.*, 520 F.2d 1316 (2d Cir. 1975); *Western Wirebound Box Co.*, 191 N.L.R.B. 748, 761-62 (1971) (two surprise 15-minute work stoppages four weeks apart in support of contract negotiations unprotected).
yet, and we have a commitment to a collaborative, participatory process. 59 But I am happy to tell you some of the big ideas that our working groups are debating.

In terms of who should have the right to collective bargaining, one straightforward, yet profound, solution is to eliminate the occupational exclusions. As scholars from the Roosevelt Institute have recently written about in their book, The Hidden Rules of Race: Barriers to an Inclusive Economy, the New Deal that gave birth to the NLRA had a racial element hidden just beneath the surface of these facially race neutral exclusions for domestic workers and agricultural workers. 60 These statutory occupational exclusions had the intentional effect of writing primarily people of color out of the Act’s protection at the demand of racist Southern politicians. Thus, these statutory exclusions are disempowering not only because they narrow the absolute numbers of workers covered but also because they exploit the historically toxic racial divide between workers who might otherwise share an economic and class struggle.

Another obviously necessary step is to give independent contractors the right to act concertedly. This goal could be accomplished one of two ways, either by including them within the collective bargaining law that covers employees – effectively eliminating the distinction between employees and independent contractors – or by amending the anti-trust law to remove that barrier to them working together. 61

A bigger and more complicated change that we are considering is to redefine who sits on each side of the bargaining table to reflect alignment of interests, instead of job titles or placement on an org chart. We are looking at how to better identify those supervisors and managers whose economic interests and ability to exercise power align more closely with employees and allow them to bargain with the rank and file.

We are also considering a couple of other really big ideas that would greatly impact how many workers are engaged in collective bargaining. We are looking at perhaps flipping the default so that the background rule is union bargaining. This flipping of the default could take two forms. First, it could mean that all workplaces must have some channel of collective worker voice, be it a union or something more like a works council unless and until the workers opt out. The logic of such a system should be obvious – momentum


61. Because the independent contractors are considered independent businesses, they are arguably subject to the Clayton Act and not covered by the labor exemption. If they are covered by the Clayton Act, the conduct of collective bargaining could be considered a form of horizontal price fixing. See Sanjukta M. Paul, The Enduring Ambiguities of Antitrust Liability for Worker Collective Action, 47 LOYOLA U. CHI. L.J. 969, 969 (2016).
goes with the status quo. Clearly it is easier to move from union to non-union than it is to move from non-union to union. Second, it could mean that all workers have some form of workplace democracy, again be it union representation or something else, without an opt-out. Although the second option may sound extreme, it simply follows the logic of our political democracy. We go to the polls each election day to choose who represents us, not whether we have democratic representation. The same could be true in the workplace — workers have a choice as to who represents them but the fact of representation is an enduring principle.

Another option is to set a national decision day on unionization so that people are guaranteed the opportunity to choose. In Belgium they already have a social – in addition to political – election day when they choose works councils representatives. This kind of elimination of barriers to voting would be a profound change for the United States and poses many logistical hurdles, but it may be the only way to address the huge gap between how many workers say they want a union and how many even get a chance to vote on the question.62

To address the constraints on the level at which bargaining takes place, we are looking at recommending a system that would move bargaining from the enterprise level to the sectoral level in some fashion. Such a move would address the competitive disadvantage problem that enterprise bargaining is perceived to bring. Moreover, the OECD has done research that shows that sectoral bargaining yields lower unemployment rates for youth, women and low-skilled workers and lessens income inequality.63

We are looking at many international models, including from Europe but also Argentina and South Africa. The South African model is an interesting one – they adopted fundamental labor law reform in 1995 at the same time that they adopted the post-Apartheid constitution. Although the historical context was very different, there are some resonances. Their goal also was to empower a large number of workers who had been historically disempowered and to address profound income inequality. So, we are seeing what we can learn from them and have been lucky enough to engage some of the people who were involved in writing that post-Apartheid constitution and labor law to advise us.

We are also looking at the historical examples in the United States where multi-employer bargaining approached sectoral bargaining, primarily through pattern bargaining. In those industries where something like sectoral bargaining existed, like the auto industry, the unions were able to impose it

---

62. Thomas A. Kochan, Duanyi Yang, William Kimball, and Erin L. Kelly, *Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?*, 72 ILR Rev. Issue 1 (2019) (finding more than fifty percent of non-union private sector workers would vote for a union if they had the opportunity in contrast to the less than seven percent who are represented by a union).

as a consequence of their strength. Our question in the Clean Slate project is to see if changes to the law could operate to jump start such a system in the absence of union strength. Finally, we are looking at some contemporary developments in the U.S., including the Fight for $15 campaign in the fast food sector where wage boards have been used to set minimum wages for the sector as a whole. A big idea could be to expand wage boards to address more sectors in more geographic areas or even nationally and to cover more terms than just wages. Very importantly, we are looking at how a combination of these strategies could work together to bring some version of sectoral collective bargaining to many more people.

A universal sectoral bargaining system effectively would solve the joint employer problem that I outlined earlier, but in case our recommendations come out short of sectoral bargaining for all, our working groups also are looking at how to redefine the “firm” for purposes of collective bargaining. We are considering new definitions of joint employer that would put whole supply chains at the bargaining table together as well as franchisors and franchisees and all the employers in the fissured workplace to bargain with all of their workers.

We have some big ideas about what topics should be on the bargaining table. One broad fix to the problem posed by the law’s distinction between mandatory and permissive subjects of bargaining would be to just eliminate the distinction. Doing so would free workers to bring their collective power to bear on whatever subjects were important to them. For example, if they wanted to strike in order to demand that corporations limit CEO to worker compensation ratios, they would be free to do so. Even if they did not want to strike over such a proposal, the employer at least would have to engage in good faith bargaining over the subject.

We also are looking at ideas that transcend the distinction between workers’ identities as workers and community members. We rely in this exploration on our partners at Jobs With Justice, who are leading in creating an intellectual framework for the concept of “Bargaining for the Common Good,” a term they credit to the Kalmanovitz Institute at Georgetown University. In addition to breaking down the barrier between mandatory and permissive subjects of bargaining, this exploration covers how to bring community interests in subjects like affordable housing, racial justice and student debt to a bargaining table that includes employers, unions, nonunion workers and members of the community. By expanding who benefits from negotiations to encompass the community at large, it may be possible to reach agreements that are better for workers and communities alike and that transcend the constraints of longstanding institutions that were developed in the context of explicit racial and gender subordination.

64. *About Us, Bargaining for the Collective Good* http://www.bargainingforthecommongood.org/about/ (last visited August 29, 2019).
Finally, I want to share our big ideas for ensuring that collective action can leverage power. Again, the most obvious answer is to do away with any limitations on secondary activity, freeing unions to analyze power relationships and exercise collective power strategically. Lifting the secondary activity ban would make any entity that has the ability to influence conditions of work a lawful target of collective action – supply chain, investors, multi-national corporate parent companies. A key precondition for workers to be able to choose the right strategic target, however, is access to information about corporate relationships. Thus, we also are examining whether to require corporations to provide workers information about these relationships.

We are also looking at ways to expand the possibility of collective action by making it less risky for workers. In this vein, we are exploring ideas such as expanding protections for intermittent strikes, banning permanent striker replacements, establishing a generalized strike fund or at least allowing tax deductions for contributions to strike funds, and expanding the range of subjects over which workers have the right to act concertedly. This broad right to collective action could be thought of as a “citizen’s collective action right” that would bar employers from retaliating against workers who engage in collective action on economic and political topics, not just those that have a nexus to their particular work situation.

Finally, with so much collective activity moving into cyberspace, we are examining whether the law needs to do more to protect workers’ access to the on-line space. When Facebook rejected Senator Warren’s ads last month that advocated for breaking up the big tech companies, we were reminded again that those platforms are not public spaces where First Amendment protections apply. As the law now stands, nothing would preclude Facebook or any other social media company from banning all worker organizing from their sites. For many alt-labor groups, such a ban would be the end to their efforts. So, we are delving into how on-line access could be better protected by the law.

We also are working on reforms in a few additional areas that we still believe are important to address. For example, we are considering whether enforcement of labor standards could involve worker organizations in a way that is empowering, such as in some kind of co-enforcement model. Similarly, we have tasked a working group with exploring how the administration of benefits programs could help build new powerful worker organizations. In addition, we are looking at ways to adjust existing models to expand the universe of workers who have some form of collective voice so we are considering the concepts of works councils, members only unions, and mandating workers on corporate boards. Finally, we are looking at ways

---

to move away from the current winner-take-all system of representation and move towards a system of graduated rights based on a sliding scale of support within a workplace or sector.

As you can see, we have no lack of ambition in the Clean Slate project. Our focus may seem to be on adjusting economic power, but equally important, however, is the impact that the reforms we are considering could have in rebalancing political power in our country. There can be no doubt that public policy in the U.S. is disproportionately responsive to the wealthy and underresponsive to poor and middle class workers. The Clean Slate project is looking at recommendations that could address the role of workers in the political system directly, such as mandating that workers get the day off to vote or have protection against retaliation on the job for engaging in political activity. But a core premise of the project is that even without these direct interventions, the presence of strong worker organizations in the economy will lead to a strong voice for workers in the political process. We believe strongly that restoring that voice is essential to restoring our country to a functional democracy.

Although I don’t know now what the final recommendations will be, I do know that they will not be timid. I hope I have given you a lot to think about in terms of how the rules of the game could better support and expand the voice of workers in our economy and, consequently, in our political life. I’m happy to answer any questions.