UPDATING THE MANDATORY-PERMISSIVE DISTINCTION TO ENABLE UNIONS TO PROTECT THE JOB SECURITY AND ECONOMIC INTERESTS OF THEIR MEMBERS

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INTRODUCTION

Since the passage of the National Labor Relations Act[1] (NLRA or the Act), significant changes in the business world have rendered much of the

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1. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 141-187 (1988)).

Act's protections for workers inadequate.[2] While unions still need to address traditional issues like wages, hours, and safety, they must now also worry about corporate practices such as downsizing,[3] takeovers,[4] and the opening of nonunion subsidiaries[5] that cost workers their jobs. Furthermore, pension funds are underfinanced,[6] and employers are attempting to dump nonpension liabilities.[7] Corporations are using bankruptcy as an offensive strategy to avoid their obligations under collective bargaining agreements.[8]

While these corporate practices impede unions' attempts to protect their members, some stronger unions have found ways to negotiate effective responses, asserting their members' interests in traditionally managerial spheres.[9] While unions encounter many obstacles in their efforts to protect job security,[10] one significant hurdle is the current interpretation of the NLRA, which does not require employers to discuss many contractual clauses that protect the job security and economic interests of employees. Section 8 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."[11] If a subject about which one party is seeking agreement falls within

2. *See, e.g.*, Panel, *Changing Economic Realities and the Changing Role of Unions*, 11 N.Y.U. REV. L. & SOC. CHANGE 7, 25 (1982-83) (Anthony Mazzochi, former vice-president of the Oil, Chemical, and Atomic Workers Union quoted as saying, "Based on my own experiences, the labor movement as it's now constituted, can't deliver . . . . [W]e can't deal with corporate America. The sides are uneven and they're going to beat us into the ground . . . . We've got to deal with mobility of capital. We've got to deal with investment decisions."); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 73 (1988) ("Unions are becoming increasingly dissatisfied with the operation of the National Labor Relations Act . . . ."); John J. Sweeney, *Is There a Need to Amend the National Labor Relations Act?*, 52 FORDHAM L. REV. 1142, 1143 (1984) ("[M]y answer to the question whether the National Labor Relations Act should be amended is simple: No! The National Labor Relations Act . . . is, for all practical purposes, now dead . . . ."); Cathy Trost & Leonard Apcar, *AFL-CIO Chief Calls Labor Laws a "Dead Letter,"* WALL ST. J., Aug. 16, 1984, at 8 (quoting AFL-CIO President Lane Kirkland as suggesting that the NLRA should be repealed because it no longer serves labor's cause).

3. *See infra* notes 22-24 and accompanying text.

4. *See infra* notes 25-27 and accompanying text.

5. *See infra* notes 15-20 and accompanying text.

6. *See infra* note 35-36 and accompanying text.

7. *See infra* notes 37-41 and accompanying text.

8. *See infra* notes 31-34 and accompanying text.

9. Stone, *supra* note 2, at 73.

10. One of these hurdles may be antilabor bias on the part of the National Labor Relations Board. *See* Robert D. Brownstone, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 BROOK. L. REV. 229, 229 (1986) (arguing that the contemporaneous National Labor Relations Board had knowingly exploited defects in labor law and in its case processing system to support an antilabor bias); *see also* Owen Bieber, *For American Workers, American Government Is Not Working Well at All: Deindustrialization and the Perversion of Basic Worker Rights*, 15 CAP. U. L. REV. 475, 478 (1986) (citing the National Labor Relations Board's efforts to frustrate cooperative practices intended to produce constructive relationships between employers and unions as an example of where the Board "has turned its back and even acted to make matters worse").

11. 29 U.S.C. § 158(d) (1988). The statute requires collective bargaining:

> It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees . . . .

this statutory language, that party may use its economic muscle (for example, a strike or lockout) to compel agreement.[12] Such topics are considered *mandatory* subjects of bargaining. If a subject does not fall within the statutory language, the Supreme Court has held that neither party is obligated to even discuss the issue, and neither party may use its economic muscle to compel agreement.[13] Topics in this category are considered *permissive* subjects of bargaining. Because most contractual provisions intended to ensure that employers meet obligations to workers fall into the permissive category of bargaining subjects, the law effectively denies most unions any input in this area, however large the impact upon the job security or economic interests of union members. Unions that wish to negotiate in this area must make concessions to gain discussion and agreement. I propose that the scope of mandatory bargaining should be understood to include certain subjects crucial to the job security and other economic interests of union members.

In part I, I describe the ways that corporate decisions threaten job security and union members' other economic interests. These practices include, among others, the opening of nonunion subsidiaries, the dumping of pension funds, and downsizing. In part II, I outline some of the contractual provisions negotiated by unions to protect their members and to promote the workers' interests as creditors of the firm. In part III, I explore the legislative history and the case law surrounding the mandatory-permissive distinction. The distinction is central to the discussion of job security and economic interests because the National Labor Relations Board (NLRB or Board) and courts regard almost every contractual provision dealing with job security and union members' economic interests as a permissive subject. Finally, in part IV, I explore ways to adapt the existing labor law to provide more meaningful bargaining for unions. I do not propose labor law reform in a general sense; rather, I outline arguments that might prove successful before the NLRB or the courts.[14] This is not to say that I do not consider full-scale reform

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> It shall be an unfair labor practice for a labor organization or its agents . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees . . . .
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> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id. § 158(a), (b), (d) (1988).

12. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) ("[I]t is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without . . . .").

13. *Id.*

14. This approach is particularly relevant now because the makeup of the Board and the federal courts is changing under the Clinton administration. The new chairperson, two new members, and the new general counsel of the NLRB, all appointed by the Clinton administra-

necessary or possible; I simply hope that my solution might provide more immediate relief.

I make two proposals that are consistent with the current law. First, I maintain that the scope of mandatory bargaining should include certain contractual provisions that ensure the viability of the employer—that is, the ability of the employer to meet its obligations under the collective bargaining agreement. I call this the viability standard. This standard would expand the scope of mandatory subjects to include two more topics: (1) a demand that the parent of a wholly-owned subsidiary be a party to the collective bargaining agreement and (2) a successorship clause (a clause imposing certain obligations on an employer who wishes to sell the business) requiring sale to a viable entity.

Second, I suggest the use of an express waiver of the right to insist on the nonmandatory status of a particular subject. This waiver could be placed in the collective bargaining agreement or in a separate contract between the parties. If the Board were to enforce such waivers, unions would be able to preserve discussion on nonmandatory issues without making concessions beyond those needed to reach the agreement in the first place.

I
JOB SECURITY AND ECONOMIC INTERESTS

Job security was the impetus for the United Mine Workers (UMW) strike, which began in the spring of 1993 and lasted a grueling eight months.[15] The controversy in the strike involved the interpretation of the expired 1988 contract between the UMW and the Bituminous Coal Operators' Association (BCOA).[16] Under a security clause in the contract, BCOA employers who opened or expanded a nonunion mine pledged to give the first of every three new jobs to a laid-off UMW member.[17] The union claimed that various BCOA companies had evaded such provisions by creating subsidiaries that were not parties to the 1988 agreement.[18] BCOA settled the strike by

tion, are expected to shift the voting balance of the Board from business to labor. Frank Swoboda, *Reich Vows Before AFL-CIO to Enforce Workplace Laws*, WASH. POST, Oct. 6, 1993, at F10; *see also Thursday Ticker*, CHI. TRIB., Mar. 3, 1994, at N1 (noting confirmation of the Clinton administration nominees). The Clinton administration is expected to have a similar impact on the federal judiciary. *See, e.g.*, *Chief Justice Urges Fast Appointments of Federal Judges*, N.Y. TIMES, Jan. 2, 1994, § 1, at 17 (illustrating the potential for change in the federal judiciary by reporting on Chief Justice William H. Rehnquist's public call to fill the large number of vacancies in the federal judiciary); Ruth Marcus, *The Judiciary: Building Diversity in Lifetime Positions: Women and Minorities Dominate Initial Selections on the Federal Bench*, WASH. POST, Jan. 16, 1994, at A27 (reporting on the Clinton administration's emphasis on diversity concerns in appointing federal judges to fill the 110 vacancies on the federal bench).

15. Arthur Gottschalk, *Eight-month Coal Strike Is Resolved*, TIMES-PICAYUNE (New Orleans), Dec. 16, 1993, at C8.

16. Laurent Belsie, *Coal Strikes Continue as Talks Falter, Then Stop*, CHRISTIAN SCI. MONITOR, July 1, 1993, at 8.

17. *Id.*

18. *Id.*

guaranteeing that three of every five new jobs at nonunion affiliates of unionized coal companies would go to union members.[19] In exchange for this provision, however, the UMW had to agree to longer daily shifts and a longer work week.[20]

The opening of nonunion subsidiaries, although it provides a particularly acute threat to job security in many unionized industries,[21] is only one example of the corporate practices that threaten the job security and economic interests of union members. Job security in the conventional sense is vulnerable whenever an employing entity undergoes a transformation or takes an action that may result in job loss. Economic interests are undermined by behavior that makes the employing entity less likely to meet its obligations to the employee. These obligations take the form of wages, pensions, and other benefits. Unions must protect their members against all these corporate practices, including downsizing, takeovers, bankruptcy, the underfunding of pension funds, and the dumping of nonpension benefits.

Unions seeking to protect their members' interests must worry about more than preserving jobs. They must seek to protect the larger economic interests, both short-term and long-term, of their members. Employees' short-term interests include accrued wages and immediate fringe benefits such as health insurance, vacations, and paid leaves of absence. Their long-term interests include pensions and other benefits funded currently but not to be disbursed for years and retiree benefits that are not presently funded and will not be disbursed without the continued financial health of the business. Certain corporate reorganization decisions threaten both categories of interests.

Many corporate practices result in layoffs or a total reduction of the unionized workforce. The recent trend of downsizing[22] has left tens of thousands of employees out of work. During the period from October 1993 to January 1994, major American corporations announced plans to lay off more than 90,000 workers, despite rising productivity.[23] Xerox Corporation, for example, announced plans to lay off 10,000 workers (10 percent of its workforce), even though the company made more than $600 million last year.[24]

Corporate takeovers also threaten the job security and economic interests

19. Gottschalk, *supra* note 15, at C8.

20. *Id.*

21. *See, e.g.*, Richard Greer, *Teamsters President Sees Tough Battle in Negotiating Contract for Truckers*, ATLANTA CONST., Jan. 19, 1994, at D7 (noting that, in negotiations between Teamsters and Trucking Management, Inc., which represents most major trucking companies, Teamsters President Ron Carey hopes to protect job security by stopping the growth of nonunion subsidiaries).

22. Bill Barnhart, *The Productivity Story Will Be Bestseller in 1994*, CHI. TRIB., Dec. 27, 1993, at C3 ("Corporate downsizing has become an addictive drug to many CEOs because the benefit to the bottom line is instant and lopping off heads requires little imagination or skill.").

23. Harry Bernstein, *It's a Fine Line Between Profit and Greed: Anti-Labor Laws, Hard-Nosed Employers and a President Lukewarm to Labor Conspire Against Workers*, L.A. TIMES, Jan. 2, 1994, at M5.

24. *Id.*

of employees. Corporate restructuring increased greatly in the 1980s: between 1981 and 1984 there were more than forty-five takeovers of $1 billion or more, while in the preceding seven years, there were only twelve such takeovers.[25] While mergers and acquisitions accounted for less than 5 percent of Wall Street brokerage houses' profits in 1978, by 1988 they accounted for more than 50 percent.[26] The AFL-CIO estimates that prior to 1987 its members lost 80,000 jobs due to takeovers alone[27] and that corporate restructuring displaced more than 500,000 workers between January 1984 and April 1987.[28] Tragically, workers displaced by corporate restructuring are unlikely to find other well-paying jobs:[29] they lose about 9 percent of their income on average,[30] as well as their fringe benefits, pensions, and seniority. Nor can they transfer their job-specific skills to new employment. In addition to losing her job, the displaced worker loses her short-term and long-term investments in the business.

In addition, bankruptcy poses a grave threat to the interests of union members. Corporations are able to use bankruptcy, or the threat of bankruptcy, as a means of gaining concessions[31] or even rejecting collective bargaining agreements.[32] Continental Airlines, which filed a Chapter 11 petition on September 24, 1983, so that it could modify the collective bargaining

25. Robert B. Reich, *A Culture of Paper Tigers: The New Entrepreneurship*, DISSENT, Winter 1990, at 58, 58.

26. *Id.*

27. *Hostile Takeovers: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 261, 262 (1987) (statement of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO).

28. *Id.* at 262.

29. Barry Bluestone & Bennett Harrison, *A Low Wage Explosion: The Grim Truth About the Job "Miracle,"* N.Y. TIMES, Feb. 1, 1987, § 3, at 3.

30. Ronald J. D'Amico & Jeff Golon, *The Displaced Worker: Consequences of Career Displacement Among Young Men*, *in* THE CHANGING LABOR MARKET: A LONGITUDINAL STUDY OF YOUNG MEN 7, 21 (Stephen M. Hills ed., 1986).

31. *See, e.g.*, Richard M. Weintraub & Frank Swoboda, *Northwest Says Bankruptcy Looms: Airline Seeks Almost $1 Billion in Contract Concessions from Its Unions*, WASH. POST, June 17, 1993, at B11 ("Playing the bankruptcy card . . . has pushed the negotiations to a more critical level.").

32. *See* Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 471 (1988) (providing specific examples of employers using bankruptcy to reject collective bargaining agreements). In NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), the Supreme Court sustained the unilateral right of companies to modify or reject collective bargaining obligations following their filing of bankruptcy petitions. On June 29, 1984, Congress amended the Bankruptcy Code with the addition of 11 U.S.C. § 1113 (1988), for the "ostensible purpose" of making it more difficult for employers to utilize bankruptcy proceedings to avoid their contractual commitments to employees. Under § 1113, specific procedural prerequisites must be satisfied before bargaining agreement obligations may be altered, and the prior approval of the bankruptcy court must be obtained. Despite this legislation, employers are still able to use bankruptcy as a means of obtaining relief. Craver, *supra*, at 508; *see also* B. Glenn George, *Collective Bargaining in Chapter 11 and Beyond*, 95 YALE L.J. 300, 311 (1985) (describing the development of a standard to reject a collective bargaining agreement); Richard H. Gibson, *Chapter 11 Is a Two-Edged Sword: Union Options in Corporate Chapter 11 Proceedings*, 35 LAB. L.J. 624, 624-33 (1984) (outlining the legal standard for an employer's rejection of a collective bargaining agreement in the bankruptcy context).

agreement and dramatically decrease labor costs, was an early practitioner of this tactic.[33] Continental cut the wages of its pilots from $77,000 per year to $43,000 per year and the wages of its flight attendants from $29,000 to $14,000.[34] Obviously, once a corporation is in bankruptcy, the union must work to ensure that its members' interests are preserved in the emerging company.

Companies also seek to reduce their labor costs—at the expense of union members—by underfunding and even cutting pensions and other benefits. Particularly precarious are the pension funds of industrial companies with large unionized forces.[35] For example, General Motors' pension fund is estimated to be underfunded in the amount of $24 billion.[36] The status of nonpension retiree benefits is even more precarious, in part because of the adoption of a new standard by the Financial Accounting Standards Board[37] that requires employers to reflect currently the cost of providing for current and future postretirement nonpension benefits.[38] Huge charge-offs for retiree health care benefits reduced Fortune 500 companies' net earnings to $10.5 million, the lowest level since 1955.[39] The rule wiped out $148 billion from the balance sheets of companies that make up Standard & Poor's 500 stock index.[40] Employers have responded by looking for ways to dump these enormous, and now glaring, liabilities and are less likely to provide the benefits in the future.[41]

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33. Craver, *supra* note 32, at 471.

34. *Id.*

35. *"And when they got there . . . ,"* ECONOMIST, Dec. 18, 1993, at 69.

36. Lawrence J. White, *G.M.'s Bookkeeping Game*, N.Y. TIMES, Dec. 18, 1993, at A23. G.M.'s pension fund is the most underfunded, while those of Bethlehem Steel, LTV, Chrysler, and Westinghouse are also listed in the top five. *Id.*

37. The Financial Accounting Standards Board (FASB) is an independent organization that issues standards, which are considered part of the Generally Accepted Accounting Principles (GAAP) and are followed by practitioners. *See* STANLEY SIEGEL & DAVID A. SIEGEL, ACCOUNTING AND FINANCIAL DISCLOSURE 6 (1983).

38. ORIGINAL PRONOUNCEMENTS: ACCOUNTING STANDARDS AS OF JUNE 1, 1991, Statement of Financial Accounting Standards No. 106 (Fin. Accounting Standards Bd. 1991). This standard focuses primarily on postretirement health care benefits. By requiring employers to account for these benefits on an accrual basis, this new accounting standard recognizes the view that these benefits are not gratuities but are part of an employee's compensation for services rendered.

39. Edmund Faltermayer, *The Fortune 500 Largest U.S. Industrial Corporations: Poised for a Comeback*, FORTUNE, Apr. 19, 1993, at 174.

40. *$148 Billion Toll Seen from New Accounting Rule*, CHI. TRIB., Jan. 2, 1993, at 9 [hereinafter *$148 Billion*]. The write-off for G.M. is estimated at $16 to $24 billion which would equal approximately 67 percent of G.M.'s book value. *Id.*; *see also* White, *supra* note 36. The estimated liability for Navistar International is $2 billion, a figure representing 351 percent of its book value. *Id.* A.T. & T.'s charge against earnings under the new rule would virtually ensure a large paper loss for the full 1993 year. Anthony Ramirez, *Company News: A.T. & T. to Take a Charge of $7 Billion for New Rules*, N.Y. TIMES, Feb. 17, 1993, at D5.

41. Ethel R. Nance, *Unions Help Workers Beat the Odds in Negotiations*, AFL-CIO NEWS (AFL-CIO, Washington, D.C.), Mar. 15, 1993, at 7; *see also $148 Billion*, *supra* note 40, at 9 (Brown Brothers analyst Ronald Hill stated, "When forced to account for these costs, employers are now seeking ways to reduce them.").

II
CONTRACTUAL PROTECTION STRATEGIES

Employer obligations to employees may lead the law to consider employees to be both short-term and long-term creditors of the employer.[42] The idea of employees as creditors of their firms has theoretical support in implicit contract theory. According to some scholars, most American workers are employed under implicit contracts.[43] In the early phases of their careers, employers pay employees less than the value of their marginal products and less than their opportunity wage in exchange for a promise of job security and a wage rate that is greater than the value of their marginal products and their opportunity wages in the later phases of their careers.[44] This means that employees work for less than they are worth to the employer in the early phases of their careers with the understanding that they will receive more than they are worth in the later phases. Since the firm receives its biggest benefit in the initial stages of employment, it has incentives to behave opportunistically and lay off "later stage" employees.[45]

When viewed as creditors, the employees' interests extend beyond solely keeping a job. Employees need to ensure that the business has longevity and financial health so that its long-term obligations will be honored. In order to protect the short-term and long-term interests of its members within the current legal scheme, unions negotiate for three types of contractual protections. The first group consists of strategies designed to restrict the ability of the corporation to change the identity of the employer. The second group covers methods to restrict the employer from changing its operational or financial structure in a manner that hinders its creditworthiness. The third group includes strategies to enhance the likelihood of employee payments by seeking collateral for the employer's obligations or looking for other parties to guarantee the obligations.

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42. *See* Stone, *supra* note 2, at 76 n.16 (citing cases holding that unions have the right to sit on creditors' committees in a Chapter 11 proceeding).

43. *E.g.*, Alan Hyde, *In Defense of Employee Ownership*, 67 CHI.-KENT L. REV. 159, 203 (1991). *See generally* Sherwin Rosen, *Implicit Contracts: A Survey*, 23 J. ECON. LITIG. 1144 (1985).

44. Katherine Van Wezel Stone, *Employees as Stakeholders Under Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 51 (1991); *see also* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 63-71, 134-52 (1990) (arguing that long-term employment with a stable wage schedule is more desirable to both the employee and the employer and more reflective of the reality of the labor market); Richard A. Ippolito, *The Labor Contract and True Economic Pension Liabilities*, 75 AM. ECON. REV. 1031, 1037-41 (1985) (contrasting the implications of the implicit contract theory against the implications of an employment-at-will model as far as pension plans are concerned); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1203-18 (1991) (summarizing economic literature on implicit employment contracts); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1362-64 (1988) (illustrating the implicit contract theory mathematically).

45. *See* Hyde, *supra* note 43, at 178-79; Stone, *supra* note 44, at 52.

The status of most of these subjects has not been challenged.[46] However, under the conventional thinking, the courts and NLRB would probably consider the above types of provisions to be permissive subjects. While strong unions have been successful in getting discussion and agreement on these subjects despite their permissive status,[47] this success has obviously not come without sacrifice.[48] Furthermore, even if a union does convince an employer to agree to one or more of these protections, the employer is under no obligation to bargain over the provisions after the collective bargaining agreement expires.

A. Restrictions on the Ability of the Corporation to Change the Identity of the Employer

Restrictions on the ability of the corporation to change the identity of the employer prevent the employer from undermining the interests of union members by selling the business to an underfunded employer. These restrictions fall into two categories: successorship clauses and "right to buy" clauses.

Traditional successorship clauses focus on securing the obligation of the buyer to assume the terms of the collective bargaining agreement.[49] Enhanced successorship clauses restrict the ability of the employer to sell the business unless further criteria are met, such as union approval of the sale or the execution of a new collective bargaining agreement between the union and the buyer. Examples of enhanced successorship clauses include an absolute veto,[50] a requirement that the sale be to a viable entity,[51] and corporate

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46. The Supreme Court has, however, determined that retiree health benefits are a permissive subject of bargaining. Allied Chem. and Alkalai Workers, Local Union No. 1 v. Pittsburgh Plate Glass, 404 U.S. 157 (1971).

47. *See* James B. Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. MICH. J.L. REF. 47, 73 n.74 (1989) ("[P]owerful unions can link mandatory and permissive issues . . . and thereby negate the impact of the dichotomy at least at the bargaining table. Weak unions . . . cannot achieve satisfactory accommodation on mandatory items let alone permissive items."). Because only strong unions have been able to get these provisions, most of my examples come from industries, such as steel, that are union-dense. However, the theoretical model I propose is equally applicable to less union-dense industries and in fact has special relevance for weaker unions since it would expand the range of mandatory subjects.

48. *See supra* notes 15-20 and accompanying text (discussing United Mine Workers strike).

49. *See infra* notes 136-138 and accompanying text.

50. *See, e.g.*, Collective Bargaining Agreement Between the United Steelworkers of America (USWA) and Bethlehem Steel (effective June 1, 1989), at 94 [hereinafter Bethlehem I Agreement] (on file with author and the *New York University Review of Law & Social Change*):

> (a) The Company agrees that it will not sell, convey, assign or otherwise transfer any Plant or significant part thereof covered by this Agreement between the Company and the Union that the Company has not declared permanently shut down to any other party (Buyer) who intends to continue to operate the business as the Company had, unless the following conditions have been satisfied prior to the closing date of the sale:
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> (1) The Buyer shall have entered into an Agreement with the Union recognizing it as the bargaining representative for the Employees within the existing bargaining units,

guarantees of benefits in the event of a shutdown following a sale.[52] While the Board considers traditional successorship clauses to be mandatory subjects of bargaining, it considers the enhanced versions to be permissive subjects.[53]

"Right to buy" clauses restrict the ability of the corporation to change the identity of the employer by enabling the employees to bid for or buy the business if the employer is seeking to sell it. These provisions typically take one of three forms. A right of first refusal allows the employees to meet the price of the other buyer and therefore be the successful bidder.[54] A right of

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(2) The Buyer shall have entered into an Agreement with the Union establishing the terms and conditions of employment to be effective as of the closing date,

(3) If requested by the Company the Union will enter into negotiations with the Company on the subject of releasing and discharging the Company from any obligations, responsibilities and liabilities to the Union and the Employees, except as the parties otherwise agree.

(b) This provision is not intended to apply to any transactions solely between the Company and any of its subsidiaries or affiliates, or its parent company including any of its subsidiaries or affiliates; nor is it intended to apply to transactions involving the sale of stock.

This clause functions as an absolute veto clause because the union is not obligated to enter into an agreement with the buyer, and its refusal to do so, for whatever reason, would block the sale.

51. *See, e.g.*, Collective Bargaining Agreement Between the United Steelworkers of America and New Steelco (Sharon Steel) (effective Aug. 22, 1990), attachment 7 [hereinafter Sharon Steel Agreement] (on file with author and the *New York University Review of Law & Social Change*): "The Company agrees that it will not sell, convey, assign, or otherwise transfer . . . unless the following conditions have been satisfied prior to the closing date of the sale: . . . (b) The Buyer assumes the contract and is a viable entity capable of fulfilling the obligations under the collective bargaining agreement."

52. *See, e.g.*, Collective Bargaining Agreement between the United Steelworkers of America and United States Steel (USS), Division of USX Corporation (effective Feb. 1, 1991), at 276-77 [hereinafter USX Agreement] (on file with author and the *New York University Review of Law & Social Change*):

2. In the event of a sale pursuant to conditions described . . . above, and in the further event of a subsequent permanent shutdown of the plant so sold within five (5) years of such a sale, the Company shall guarantee that each former USS employee at the plant so sold will receive from the purchaser, from the PBGC [Pension Benefits Guarantee Corporation] or from the United States Steel and Carnegie Pension Fund the following benefits:

a. The same severance pay that the employee would have received had the plant so sold been shutdown as of the date of the sale.

b. The same regular pension benefit . . . .

c. A special initial pension payment equal to the same special initial pension payment which would have been payable to such employee had the plant so sold been shut down . . . and had all regular vacation been taken prior to retirement.

d. The same retiree health insurance coverage . . . .

e. An amount of life insurance coverage equal to the same retiree life insurance coverage . . . .

53. United Mine Workers of Am. (Lone Star Steel Co.), 231 N.L.R.B. 573 (1977), *enforced in relevant part*, 618 F.2d 698 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *see also* Amax Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980).

54. *See, e.g.*, Settlement Agreement Between the USWA and Wheeling-Pittsburgh Steel (effective Dec. 7, 1990), Amended Joint Plan of Reorganization, app. A, at 1, 4 [hereinafter Wheeling-Pittsburgh Agreement] (on file with author and the *New York University Review of Law & Social Change*):

[I]n the event that (i) [the] Corporation or any affiliate . . . decides directly or indi-

first offer gives the employees the right to bid first, and prevents the company from selling the business to another party except on better terms than provided in the employees' offer.[55] Finally, a standstill agreement provides the employees with a certain amount of time to put together a bid after the company has tentatively agreed to sell the business to a third party but has not consummated the sale.[56] A standstill agreement does not obligate the employer to accept the employees' offer.[57]

B. Protecting the Ability of the Employer to Meet its Obligations

The second group of contractual protections restrict the ability of the employer to change its operational or financial structure in a way that hinders its creditworthiness. For example, an employer might transfer assets beyond the reach of the union and therefore avoid certain obligations under the collec-

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rectly to sell or otherwise transfer ownership or control of any shares . . . of common stock . . . the Seller shall give prompt written notice . . . to the [Union] . . . .

. . . .

2. Upon the [Union's] receipt of the Seller's Agreement Notice, the employees of the Offered Property or, in the case of the sale of Common Shares, the employees of the entity in which such Common Shares represent an ownership interest . . . shall have the irrevocable and exclusive option . . . to purchase all (and not less than all) of the Offered Property upon the First Offer Terms . . . .

55. *See, e.g.*, Collective Bargaining Agreement Between the USWA and Bethlehem Steel (effective Aug. 1, 1993), app. P, Letter Regarding Right of First Offer on Sale of Facilities (July 28, 1993), at 1-2 [hereinafter Bethlehem II Agreement] (on file with author and the *New York University Review of Law & Social Change*):

Should (i) the Company . . . decide to sell or otherwise transfer ownership or control . . . it will consider [the union] as the first potential buyer therefor . . . .

f. In the event that [the union] submits an offer . . . the Company shall be entitled to [sell to] an entity other than [the union] provided that the transaction contemplated by such purchase agreement is . . . more favorable to the Company than [the union] offer . . . .

56. *See, e.g.*, USX Agreement, *supra* note 52, at 267-69:

4.(a) [The Company] will advise the Union whenever [it] or a Subsidiary enters into a letter of intent or other written agreement . . . for the sale of all or any of [its operations] . . . . During an initial period of twenty (20) days from the delivery of the Notice of a Letter of Intent . . . [the Company] agrees that it will not consummate the sale . . . so that during the Initial Period the Union may evaluate whether the Union wishes to make an offer for the purchase of the Offered Facility . . . . If the Union desires to pursue the possibility of purchasing the Offered Facility, the Union shall within the Initial Period give [the Company] written notice of its intention . . . together with an initial deposit of Fifty Thousand Dollars ($50,000) (the "Initial Deposit") . . . .

(b) Upon receipt by USX of the notice . . . and the Initial Deposit, [the Company] agrees that for a period not exceeding ninety (90) days . . . [it] will not consummate a sale of the Offered Facility . . . . During [this period] the Union may make, but is not obligated to make, an offer to [the Company] to purchase the Offered Facility.

See also Collective Bargaining Agreement Between the USWA and LTV Steel (negotiated Summer 1992, to be effective upon consummation of a plan of reorganization), app. V, at 2-5 [hereinafter LTV Agreement] (on file with author and the *New York University Review of Law & Social Change*).

57. *See, e.g.*, USX Agreement, *supra* note 52, at 269; LTV Agreement, *supra* note 56, app. V, at 4.

tive bargaining agreement. Union strategies to counter such maneuvers include dividend limitations, financial tests and limitations, restrictions on dealings with affiliates, corporate governance participation, and financial and operational standards.

Dividend limitations restrict the right of corporations to pay dividends to shareholders, thus making more funds available to the employer to meet obligations to employees. The limitations commonly allow the payment of dividends only if certain criteria are satisfied. The criteria may include compliance with a capital expenditures schedule,[58] satisfaction of a particular financial test (such as an operating income test[59] or net income test[60]), compliance with collective bargaining obligations,[61] or compliance with bank loan covenants.[62]

Financial tests and limitations require that the employer meet certain fi-

58. *See, e.g.*, Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 2-5 (setting out minimum capital expenditure amounts that must be met before the dividend is paid out).

59. The Sharon Steel agreement requires, for example, that the company have aggregate operating income in an amount at least equal to $40 million in the four fiscal quarters preceding the quarter in which the dividend is to be paid out. *Id.* at 2.

60. *See, e.g.*, Wheeling-Pittsburgh Agreement, *supra* note 54, Amended Joint Plan of Reorganization, at 4-6 (providing in part, that the company may not pay dividends in an amount greater than 50 percent of its net income).

61. *See, e.g.*, LTV Agreement, *supra* note 56, app. D, at 1-3:

> The company will not (a) declare or pay, directly or indirectly, any dividend or make any other distribution of any sort in respect of any of its capital stock (other than dividends or distributions payable solely in shares of its capital stock), or (b) directly or indirectly purchase, redeem or otherwise acquire or retire for value any shares of its capital stock or any option, warrant or other right to acquire shares of such stock or set aside any amount for any such purpose, or (c) permit any member of the LTV Consolidated Group to declare or pay, directly or indirectly, to any Person not a member of the LTV Controlled Group any dividend or make any other distribution of any sort to any Person not a member of the LTV Controlled Group in respect of any of the capital stock of such member (other than dividends or distributions payable solely in shares of its capital stock), or (d) permit any member of the LTV Consolidated Group to purchase, redeem or otherwise acquire or retire for value from any Person not a member of the LTV Controlled Group any shares of its capital stock or any option, warrant or other right to acquire shares of such stock or set aside any amount for any such purpose, if there is any breach or violation of any obligation under this agreement to make periodic payments to the defined contribution pension plan or the restored pension plans or to provide the benefits for employees and retirees as set forth in the insurance plans and for employees as set forth in the SUB plan.

See also Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 3-5. The Sharon Steel agreement sets forth a condition for a dividend with respect to Common Stock, Junior Preferred Stock and Series A, and Series B Preferred Stock:

> New Steelco shall not know of or have received from the USWA as of the date of any proposed Restricted Payment a true and accurate written notice of any material breach or violation of any material obligation under the CBA [collective bargaining agreement] including, but not limited to, pension plan funding, retiree health insurance, shipment and price adjustment bonuses and ESOP payments . . . .

Id.

62. *See, e.g.*, Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 3-4 (As a condition for a dividend with respect to Common Stock, Junior Preferred Stock, and Series A and Series B Preferred Stock, "[t]he financing institutions under the New Steelco Financing Agreements shall not have delivered to New Steelco a true and accurate written notice of De-

nancial criteria in order to ensure its soundness. Financial criteria include a restriction on increasing indebtedness above certain levels,[63] a restriction on incurring indebtedness unrelated to business,[64] a requirement that the employer's capital structure, including the equity investment, meet certain minimum levels,[65] and a limitation on the purchase price paid for assets.[66]

Restrictions on dealings with affiliates are important because the employer can be drained of assets needed to pay employee obligations if affiliated corporations overcharge it for goods or services. These restrictions include a requirement that affiliate transactions be made at arm's length,[67] a limitation

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fault, and such Default shall not have been cured, under the terms of the New Steelco Financing Agreements.").

63. *See, e.g.*, Wheeling-Pittsburgh Agreement, *supra* note 54, Amended Joint Plan of Reorganization, at 3:

> Steel may incur indebtedness as contemplated under the Plan and may guarantee (on a collateralized basis or otherwise) the long-term indebtedness (including all indebtedness having an original term of one year or longer) of Parent as in effect upon consummation of the Plan, and may incur indebtedness or guarantee indebtedness (in each case on a collateralized basis or otherwise) in connection with any refinancings thereof so long as the aggregate amount thereof in each case (the "Allowed Amount") does not at any time exceed the amount of such indebtedness outstanding as of the Effective Date; provided, however, that the Allowed Amount shall be reduced by any principal payments thereof made directly or indirectly by Steel (including dividends by Steel paid to Parent as permitted under the provisions of paragraph 3(a) below) to the extent the same would not otherwise be a Permitted Dividend . . . .

64. *See, e.g., id.* at 2-3:

> Steel will not incur, guarantee, or secure any obligations (including any lease, debt, preferred stock, or any other form of financial obligation or commitment) on behalf of Parent or any affiliate or Parent (other than a subsidiary of Steel in a steel or steel-related business) in connection with the Plan or on or after the Effective Date as defined in the Plan except as permitted under this Agreement.

65. *See, e.g.*, Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 6:

> On the Effective Date, the capital structure of New Steelco shall be on terms not materially less favorable for New Steelco than the structure set forth on Annex B attached hereto; provided, however, that in no event shall the equity investment in New Steelco (in common stock and/or preferred stock) on the Effective Date be less than the amount indicated on Annex B.

See also id. annex B (setting forth the minimally required capital structure).

66. *See, e.g., id.* at 6 ("New Steelco acquires the Designated Steel Assets and assumes the Designated Steel Liabilities pursuant to the Asset Purchase Agreement for a consideration on terms not materially greater than the terms set forth on Annex C attached hereto."); *see also id.* annex C (setting forth the terms of the asset purchase). Because the Sharon Steel agreement was negotiated while the company was in bankruptcy, the union wanted to ensure that the reorganized company would be financially secure. If the purchaser paid too much for the assets, the reorganized company would lack financial capital and would be less able to meet its obligations to employees.

67. *See, e.g.*, LTV Agreement, *supra* note 56, app. D, at 3:

> The Company will not sell, transfer or lease any asset or buy or acquire from, or enter into any material contract with any existing or future non-steel affiliate of the Company unless the transaction is under fair and reasonable terms no less favorable to the Company than an arms [sic] length transaction between non-affiliated entities. Notwithstanding any other provision in this labor agreement, this provision may only be enforced in a court of competent jurisdiction without resort to the grievance and arbitration procedure of the labor agreement. For the purposes of this paragraph, any existing joint venture engaged in the steel business is a steel affiliate.

on payment of interest on intracompany debt,[68] a requirement linking payment of management fees to an earnings test and to compliance with the collective bargaining agreement,[69] and a requirement that employer subsidiaries share in income tax benefits.[70]

Unions also negotiate for clauses that allow employees to be involved in or to otherwise monitor some aspects of corporate governance.[71] Examples of such provisions include limited representation on boards of directors,[72] in-

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See also Bethlehem II Agreement, *supra* note 55, Letter Regarding Transactions with Subsidiaries or Affiliates (July 30, 1993), at 1; Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 5.

68. *See, e.g.*, Wheeling-Pittsburgh Agreement, *supra* note 54, Amended Joint Plan of Reorganization, at 6 ("Parent agrees that [the Company] will not be charged interest or similar charges for any cash advanced by Parent or any affiliate of Parent to [the Company] or any subsidiary of [the Company].").

69. *See, e.g.*, Sharon Steel Agreement, *supra* note 51, Viability Agreement, Letter Agreement (Aug. 17, 1990):

> [Management Corporation] shall be permitted to receive an annual management fee from [the Company] in consideration for ongoing advisory and other services subject to the following conditions: . . .
>
> . . . .
>
> 2. The annual fee may be automatically increased to $600,000 on the first date on which [the Company] shall have recorded during the immediately preceding four full fiscal quarters aggregate operating income in an amount at least equal to $30 million. . . .
>
> . . . .
>
> 4. Annual fees for Management Services may be payable . . . only if [the Company] shall not know of or have received from [the Union] a true and accurate written notice of a material breach or violation of any material obligation . . . under the [Collective Bargaining Agreement] . . . .

70. *See, e.g.*, Wheeling-Pittsburgh Agreement, *supra* note 54, Amended Joint Plan of Reorganization, at 6-7:

> Parent and [the Company] shall execute and deliver a tax sharing agreement which shall provide . . . that (i) [the Company] will join with Parent in filing a federal income tax return for any taxable period requested by Parent and Parent will pay the tax liability of Parent and [the Company], (ii) [the Company] shall be deemed to the extent provided for herein to have succeeded to the net operating loss carryover and all tax credit carryovers of Parent and [the Company] existing as of the Effective Date and to the net operating loss carryover and all tax credits of Steel arising after the Effective Date, (iii) [the Company] will be deemed to be entitled to the deduction (to the extent obtained by Parent) for interest paid on long-term indebtedness of Parent guaranteed by [the Company] . . . (iv) [the Company] shall be obligated to pay to Parent as a federal tax liability only those amounts which would be payable by [the Company] if it were filing its own federal income tax return (after giving effect to . . . (ii) . . . and . . . (iii) above to the extent the same are obtained by Parent) . . . .

71. The well-known Saturn Project is a total joint labor-management effort between the United Auto Workers (UAW) and General Motors (G.M.). *See* NLRB Advice Memoranda, 1985-86 NLRB Dec. (CCH) ¶ 20,270 (June 2, 1986) (memorandum issued by the NLRB on UAW-G.M. Saturn Agreement analyzing the effect of Saturn project on UAW members and the extent to which UAW negotiated concessions with G.M.). The goal of the project is to maintain G.M.'s viability as a domestic enterprise by building a new subcompact car in the United States. *Id.* ¶ 33,483. The partnership includes employee participation and enhanced job security. *Id.* ¶ 33,484.

72. *See, e.g.*, Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 5-6:

> 1. As soon as practicable after the Effective Date, New Steelco's By-Laws shall provide for one or more non-voting directors to the Board of Directors of New Steelco

volvement on corporate committees,[73] and a right to information on corporate finances and operations.[74]

Finally, financial and operational standards ensure the availability of adequate resources so that the business can meet its obligations. Examples of such provisions include the development of a mutually acceptable capital spending schedule[75] and a commitment of the seller/employer to guarantee

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and New Steelco agrees to have one individual nominated by the President of the USWA serve as such a non-voting director (the "USWA Non-Voting Director"). New Steelco agrees that the USWA Non-Voting Director shall not be removed or replaced by New Steelco's Board of Directors during the term of this Agreement.

2. The USWA Non-Voting Director shall be a person who in the good faith judgment of the President of the USWA has the intelligence, experience and qualifications suitable for such a position and shall be selected by the President of the USWA after consultation with and consideration of the views of the Board of Directors and principal shareholders of New Steelco and officers of the local union representing the Sharon Steel Workers.

3. The USWA Non-Voting Director shall be entitled to attend and speak at all meetings of the Board of Directors of New Steelco; *provided, however*, that the USWA Non-Voting Director shall not be present at any portion of any discussion during any meeting of the Board that poses a direct conflict of interest for the USWA Non-Voting Director, including without limitation, conflicts concerning the CBA, this Agreement or New Steelco's relationship with the USWA.

Unions have negotiated with major companies in the automobile, airline, trucking, and food processing industries for board representation. *See Labor's Voice on Corporate Boards: Good or Bad?*, BUS. WK., May 7, 1984, at 151. In the late 1970s, the UAW negotiated to have its president, then Douglas A. Fraser, sit on the Chrysler Board of Directors. *See* Kenneth B. Noble, *Organized Labor: Taking the Fight to the Shareholder*, N.Y. TIMES, Mar. 20, 1988, § 4, at 4.

According to Lynn Williams, president of the United Steelworkers of America (USWA), "Workers bring a long-term perspective to the table, which is one of the reasons [the USWA is] interested in putting workers on boards of directors." Barbara P. Noble, *Reinventing Labor: An Interview with Union President Lynn Williams*, HARV. BUS. REV., July-Aug. 1993, at 114, 123 [hereinafter Noble, *Reinventing Labor*].

73. UAW agreements with Ford established a National Joint Committee on New Technology to discuss the development and implementation of new technology. *See* Nicholas Ashford & Christine Ayers, *Changes and Opportunities in the Environment for Technology Bargaining*, 62 NOTRE DAME L. REV. 810, 852 n.196 (1987). The UAW also joined with G.M. to establish the Occupational Health Advisory Board to study the effects on workers of exposure to chemicals used in machinery. *UAW and GM Launch Study on Effects of Exposure to Chemicals in Machining*, [June-Dec.] O.S.H. Rep. (BNA) 158 (July 12, 1984).

The recent USWA-Bethlehem Steel agreement establishes a "Joint Strategic Partnership Committee" made up of both management and union members, which is responsible for reaching agreement on issues such as workplace restructuring and technological change. *See* Bethlehem II Agreement, *supra* note 55, app. O, at 4-7.

74. *See, e.g.*, Bethlehem II Agreement, *supra* note 55, app. O, at 2-3; Wheeling-Pittsburgh Agreement, *supra* note 54, app. A, at 2-3:

> Seller will at all times (regardless of whether a . . . Seller's Agreement Notice has been delivered) provide reasonable access and information (subject to a confidentiality agreement) to not more than two financial institutions designated by [the Union] for the purpose of developing familiarity with the business of the Seller in order to permit a prompt response to any . . . Seller's Agreement Notice.

75. *See, e.g.*, Wheeling-Pittsburgh Agreement, *supra* note 54, at 4:

> [I]f Steel has not expended or by contract or otherwise firmly committed to expand monies for capital expenditures, in an aggregate amount (the "Required Capital Amount") equal to or greater than the amount projected to be so expended or com-

financing.[76]

C. *Credit Enhancements from the Employer or Outside Entities*

The third group of contractual protections are designed to enhance the likelihood of employer payments by obtaining collateral for the employer's obligations or by looking for other guarantors of the obligations. Often, unions want the parent corporation as well as the actual employer to be a party to the collective bargaining agreement.[77] Thus, even if an undercapitalized subsidiary has financial difficulties, contractual privity with the parent corporation allows employees to receive what is due to them under the agreement. A second type of clause requires the parent corporation to explicitly assume or guarantee certain specified liabilities.[78] A third protection requires the employer to set aside funds adequate to meet obligations, possibly in a cash escrow account held by a third party or in a fully funded benefits plan administered by an independent trustee.[79]

Other provisions may require the employer to have a standby letter of credit issued by a third party financial institution or to give security interests in the employer's assets as collateral for its benefits obligations.[80] Finally, it

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mitted for such purposes as of such date under the capital expenditure plan (the "Capital Plan") agreed to between the USWA and Steel as contemplated in the letter . . . , then the dividends otherwise permitted to be paid under this paragraph 3(b) shall be reduced by the amount of the shortfall unless such amount shall have been deposited in cash or cash equivalents (the "Segregated Funds") in a segregated bank account or similar account maintained by Steel . . . .

76. *See* Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 6 ("*Initial Caster Financing* — Reorganized Sharon shall commit to provide a guarantee in the amount of $16 million for financing of the installation and start-up of the Caster (the 'Caster Financing').").

77. Lynn Williams, president of the United Steelworkers of America (USWA), sketched out the reasons the USWA seeks such protections:

> [The USWA] want[s] to ensure that the parent corporation accepts responsibility for whatever its subsidiaries or joint ventures may be doing. For example, [the USWA] want[s] to make sure that when a piece of a corporation is sold off, pension obligations aren't passed onto a new subsidiary where [the USWA] could lose track of them.

Noble, *Reinventing Labor*, *supra* note 72, at 122.

78. *See, e.g.*, USX Agreement, *supra* note 52, at 278 ("This document sets forth certain undertakings by [the Parent] to remain liable for certain employee benefits for active Union-represented employees . . . ."); *see also id.* at 278-86 (setting forth undertakings).

79. *See, e.g.*, Memorandum of Understanding Between the USWA and Monessen, Inc. (June 26, 1988) (on file with author and the *New York University Review of Law & Social Change*):

> [The Company] shall not only accrue but shall pay into a Special Trust Account, on a bi-weekly basis, amounts earned by employees for vacation, the 65 cents per hour retirement program, and the $1.00 per hour special bonus payment. The . . . Account shall be managed pursuant to a trust agreement by an independent Trustee, mutually acceptable to the Union and the Company.

80. *See, e.g.*, Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 8-9:

> [The Company] hereby agrees to assume as of the Effective Date the payment of all retiree medical expenses and all pension expenses pursuant to . . . and as collateral therefor agrees to grant (i) a security interest in favor of the Retiree Plan in the Retiree Note and (ii) a security interest in favor of the Pension Plan in the Pension Plan Note. . . . In addition, the Retiree Plan shall receive a $5 million security interest in

may also be possible to require either an outside entity to assume the obligation to make certain employee benefits payments or the seller of a business to retain those obligations even after the sale.[81]

While strong unions have negotiated successfully for these and other provisions, they have obviously not done so without considerable difficulty and sacrifice. Because the Board and courts consider such provisions to be permissive subjects of bargaining, the employer has no legal duty to bargain over them. Therefore, unions have to sacrifice even to get the employer to negotiate about the provisions. For strong unions, this is a costly option, but an option nonetheless. For weaker unions, it is much more difficult to get an employer to agree to any of these contractual provisions.

III
THE DEVELOPMENT OF THE MANDATORY-PERMISSIVE DISTINCTION

Sections 8(a), 8(b), and 8(d) of the NLRA require employers and employee representatives to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment."[82] The statute did not establish a mandatory-permissive distinction, but only mandated bargaining over subjects falling within the statutory language. The Supreme Court formulated the distinction and developed the consequences of the designation of a topic as mandatory or permissive.

The legislative history indicates that Congress intended a very broad definition of the subjects over which employers and unions would be required to bargain. The original House bill of the Act that ultimately added the "wages, hours, and other terms and conditions of employment" language of section 8(d) to the NLRA[83] included a narrow list of subjects over which an employer would be required to bargain:

> (i) Wages, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall,

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> the fixed assets of [the Company] which shall rank *pari passu* with the security interest granted to the Pension Plan . . . .

Similarly, the recent USWA-Bethlehem Steel agreement, *supra* note 55, granted the union a lien on a large office building in Bethlehem, Pennsylvania, which the union can act on if the company does not meet its obligations. Alison L. Cowan, *Board Seat Promised to Steel Union*, N.Y. TIMES, Aug. 2, 1992, at D1. The recent collective bargaining agreements between the USWA and National Steel grant the union a new coke plant as collateral. *Id.* In the USWA-Inland Steel agreement, a steel plant serves as collateral. *Id.*

81. *See, e.g.*, Sharon Steel Agreement, *supra* note 51, Viability Agreement, at 9:

> On or before the Effective Date, [Reorganized Company] shall deliver to [the Company] (i) a Note (the "Retiree Note") . . . evidencing [Reorganized Company's] obligation to pay to [the Company] an amount equal to $19 million . . . and (ii) a Note (the "Pension Plan Note" . . .) evidencing [Reorganized Company's] obligation to pay to [the Company] an amount equal to $9 million . . . .

82. 29 U.S.C. § 158(a), (b), (d) (1988). See *supra* note 11 for the text of these sections.

83. Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-187 (1988)).

> seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.[84]

Congress rejected this list in favor of the more flexible "wages, hours, and other terms and conditions of employment" language, reaffirming its commitment to "a dynamic, expansive view of collective bargaining."[85] The authors of the Act wanted to maintain a flexible approach: "The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors."[86]

Over time, the Supreme Court and the NLRB have defined the contours of the section 8(d) language. Subjects that are typically deemed mandatory include compensation in its varied forms, hours (including the scheduling of particular shifts and the scheduling of overtime), and the physical aspects of the workplace.[87] Subjects that are typically deemed permissive include interest arbitration clauses and internal union affairs.[88]

From the passage of the NLRA in 1935[89] until 1958, when the Supreme Court decided the *Borg-Warner* case[90] the Board found employers guilty of unfair labor practices for refusing to bargain over a variety of topics, thus determining for employers and unions which bargaining subjects were mandatory subjects of bargaining.[91] The Supreme Court eventually inter-

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84. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947).

85. Ashford & Ayers, *supra* note 73, at 815.

86. H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947).

87. *See, e.g.*, American Nat'l Can Co., 293 N.L.R.B. 901, 904 (1988) (holding that heating in a plant is a mandatory subject of bargaining); United States Gypsum Co., 94 N.L.R.B. 112, 113-14 (1951) (holding that issues such as seniority and wages are customary subjects of bargaining).

88. *See, e.g.*, North Bay Dev. Disabilities Servs., Inc. v. NLRB, 905 F.2d 476, 478 (D.C. Cir. 1990) (holding that an issue of concern between the union and nonunion employees is not mandatory); NLRB v. Sheet Metal Workers Int'l Ass'n, Local 38, 575 F.2d 394, 398 (2d Cir. 1978) (holding that interest arbitration is too speculative to be a mandatory subject).

89. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 141-187 (1988)).

90. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); *see infra* text accompanying notes 92-100 (discussing *Borg-Warner*).

91. *See, e.g.*, Inland Steel Co., 77 N.L.R.B. 1 (pensions), *petition denied*, 170 F.2d 247 (7th Cir. 1948), *aff'd sub nom.*, American Communications Ass'n v. Douds, 339 U.S. 382 (1950); J.H. Allison & Co., 70 N.L.R.B. 377 (1946) (merit increases), *enforced*, 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948); NLRB v. Bachelder, 120 F.2d 574 (7th Cir.) (discharge), *cert. denied*, 314 U.S. 647 (1941); Singer Mfg. Co., 24 N.L.R.B. 444 (1940) (holiday and vacation pay), *modified and enforced*, 119 F.2d 131 (7th Cir.), *cert. denied*, 313 U.S. 593 (1941); Woodside Cotton Mills Co., 21 N.L.R.B. 42 (1940) (workload and standards); Wilson & Co., 19 N.L.R.B. 990 (work schedules), *enforced*, 115 F.2d 759 (8th Cir. 1940).

vened to provide a description of the duty to bargain over certain subjects and a theory on which the Board should apply this duty.

A. The Supreme Court Case Law

The Supreme Court has articulated a general vision of the meaning of section 8(d) in only three cases. The Supreme Court's main contribution has been to describe the consequences of defining a bargaining topic as mandatory or permissive. Although the Court purported to offer a rule distinguishing between mandatory and permissive subjects, the end result of the three Supreme Court cases is nothing more than a murky sketch of the general characteristics of a mandatory subject.

In *NLRB v. Wooster Division of Borg-Warner Corp.*,[92] the Court ruled that all legal collective bargaining subjects were either mandatory or permissive and clarified the practical consequences of the designation.[93] Either party is entitled to a good faith discussion of a mandatory subject and may insist on its inclusion in the agreement to the point of impasse.[94] Either side may use its economic muscle (such as a strike or lockout) to encourage concession on a mandatory topic.[95] On the other hand, a refusal by either party to discuss a permissive subject does not violate the Act.[96] More importantly, neither party may insist upon the inclusion of a permissive subject in the agreement or use economic weapons to secure a concession on a permissive subject.[97] Finally, while the Act prohibits either party, without the consent of the other party, from modifying collectively bargained agreements until their expiration date,[98] the Supreme Court has held that this prohibition attaches only to modifications concerning mandatory topics of bargaining.[99] Therefore the party controlling the permissive subject may implement unilateral changes in permissive subjects without bargaining.[100]

The first articulation of a principle by which to distinguish mandatory and permissive subjects came in Justice Stewart's concurrence in *Fibreboard Paper Products Corp. v. NLRB*.[101] Justice Stewart divided bargaining topics into three categories: (1) decisions about conditions of employment; (2) deci-

92. 356 U.S. 342 (1958).

93. *Id.* at 349-50.

94. *Id*; *see also* NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963) (defining impasse as a "state of facts in which the parties, despite the best of faith, are simply deadlocked").

95. *Borg-Warner*, 361 U.S. at 489 (stating that "it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without . . . .").

96. *Id.* (stating that "each party is free to bargain or not to bargain, and to agree or not to agree" as to permissive matters).

97. *Id.* The 1993 UMW strike is not to the contrary, since it was not over whether the job security provision would be a part of the collective bargaining agreement (this provision would presumably be considered permissive), but rather over whether the BCOA breached the contract by later refusing to honor this term. *See supra* notes 15-20 and accompanying text.

98. 29 U.S.C. § 158(d) (1988).

99. Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185-88 (1971).

100. *Borg-Warner*, 356 U.S. at 349.

101. 379 U.S. 203, 217 (1964) (Stewart, J., concurring).

sions that have an indirect and uncertain impact on job security; and (3) decisions that may imperil job security or even terminate employment, but that "lie at the core of entrepreneurial control."[102] According to Justice Stewart, the first category, which includes, for example, seniority rights, freedom from discriminatory discharge, and mandatory retirement, clearly lies within the parameters of section 8(d).[103] The second category consists of subjects, such as advertising and marketing, that, because of their indirect impact on job security, are permissive.[104] The final category is not necessarily mandatory, even though the subjects included in this category may directly affect job security. Justice Stewart described this category as including decisions concerning the "commitment of investment capital and the basic scope of the enterprise."[105] He did not explain how to decide whether topics in the third category should be classified as mandatory or permissive.

The Supreme Court did not speak directly to the issue of classification again until 1981 when it held in *First National Maintenance v. NLRB*[106] that an employer was not required to bargain about a decision to close part of its operation.[107] The Court adopted Justice Stewart's tripartite analysis and introduced a balancing test for determining whether decisions within Stewart's third category remain within the scope of mandatory bargaining.[108] The Court determined that management must bargain over decisions that have a direct impact on employment security "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[109] The Court held that the employer's need for unfettered discretion to close down a part of its business for economic reasons outweighed any benefit of union participation in the decision.[110] The majority limited its holding both in a footnote that distinguished "other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc.,"[111] and in a closing paragraph that suggests that not all economically motivated decisions to shut down part of a business necessarily fall outside of the scope of mandatory bargaining.[112]

B. The National Labor Relations Board Case Law

First National Maintenance is the Supreme Court's last word on the mandatory-permissive distinction. The Board must determine what subjects

102. *Id.* at 222-23.
103. *Id.* at 222.
104. *Id.* at 223.
105. *Id.*
106. 452 U.S. 666 (1981).
107. *Id.* at 686.
108. *Id.* at 676-77. The Supreme Court expressly rejected the rebuttable presumption analysis used by the District of Columbia Circuit in the lower court decision. *Id.* at 684.
109. *Id.* at 679.
110. *Id.* at 686.
111. *Id.* at 686 n.22.
112. *Id.* at 687-88.

fall within the scope of mandatory bargaining with only the guidance of these three cases. To understand the contours of the distinction as the Board has developed it, I will describe the two major Board cases construing it. In both cases, the Board attempted to define the factors that would qualify a subject as mandatory. However, the cases are very fact-specific and do not provide much of a theory. Additionally, both cases involved an employer's decision to relocate operations. Neither case involved the more subtle and sophisticated types of corporate transformation facing unions today.

Three years after *First National Maintenance*, the NLRB ruled in *Otis Elevator Co.*[113] that it would consider a subject within Justice Stewart's "core of entrepreneurial control" as mandatory if it depends upon a reduction of labor costs.[114] A plurality of the Board[115] held that an employer's decision to relocate its research and development operation to a more modern facility was not a mandatory topic even though labor costs "may have been one of the circumstances which stimulated the evaluation process which generated the decision."[116] The plurality reasoned that the question of whether a decision is a mandatory subject of bargaining is "the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives."[117]

Two Board members, Dennis and Zimmerman, concurred. Member Dennis attempted to balance the competing interests of job security and economic profitability of the enterprise consistent with *First National Maintenance*'s analysis.[118] Member Zimmerman thought the employer's duty to bargain should be measured by the amenability of the decision to resolution through collective bargaining. Under his approach, the Board would determine amenability by the union's ability to "substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision."[119] If the union has this ability and the employer cannot show a need for speed, flexibility, or secrecy, then the employer is obligated to bargain.[120]

In *Dubuque Packing Co.*,[121] the Board sought to end the confusion

113. Otis Elevator Co. [Otis II], 269 N.L.R.B. 891 (1984).

114. *Id.* at 893 (plurality opinon). This test was endorsed by the Fifth Circuit. Local 2179, United Steelworkers v. NLRB, 822 F.2d 559 (5th Cir. 1987). *But see* Arrow Automotive Indus., Inc. v. NLRB, 853 F.2d 223, 228 (4th Cir. 1988) (rejecting the Board's *Otis II* standard in favor of the per se benefit over the burden rule of *First National Maintenance*).

115. Chairman Doston and Members Hunter, Zimmerman, and Dennis decided *Otis II*. 269 N.L.R.B. at 891. Members Dennis and Zimmerman concurred in the result but put forth their own tests. *Id.* at 895, 900.

116. *Id.* at 892.

117. *Id.*

118. *Id.* at 899 (Dennis concurring).

119. *Id.* at 901 (Zimmerman concurring).

120. *Id.*

121. 303 N.L.R.B. 386 (1991).

created by *Otis II*.[122] In *Dubuque Packing*, an employer wished to relocate work from a unionized plant to a nonunion one.[123] The Board held that plant relocation decisions were mandatory subjects if the General Counsel of the NLRB has established that the relocation does not fundamentally change the scope or direction of the enterprise and the employer cannot rebut this finding.[124] The employer can rebut the finding by showing that either the work at the new location is significantly different from that at the former location or that all work at the former location will be discontinued.[125] Alternatively, the employer may rebut the finding by showing that labor costs were not a factor in the decision or that, although labor costs were a factor, the union could not have offered labor cost concessions that would have changed the employer's decision.[126] This test retains the principle from earlier tests that an employer's market-based decisions should be shielded from a bargaining obligation but shifts the burden of proof to the employer on the issue of the employer's motivation.

C. Criticisms of the Mandatory-Permissive Distinction

Commentators have noted an array of problems associated with the Supreme Court's and Board's approaches to define the scope of mandatory bargaining. Some maintain that the current law is inconsistent and confused[127] and that decisions simply express the tribunals' own values.[128] Others argue that the current law unfairly protects management by removing the most important decisions from the collective bargaining process.[129] Quite a few scholars have urged a broadening of the scope of mandatory subjects.[130]

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122. *Id.* at 388. In *Dubuque Packing*, the Board wrote, "the time has come to clarify this area of the law. Because the *Otis Elevator* opinions set forth 'divergent views,' . . . the fact that the Board has continued to rely on all three of them has no doubt led to uncertainty in the labor-management community as to how a specific decision will be analyzed and whether an obligation to bargain will be found." *Id.* at 390.

123. *Id.* at 387.

124. *Id.* at 391.

125. *Id.*

126. *Id.*

127. *E.g.*, Ashford & Ayers, *supra* note 73, at 811.

128. *E.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 115-21 (1983); Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1449 (1982).

129. *E.g.*, 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, 501 (1992); Karl E. Klare, *Critical Theory and Labor Relations Law*, *in* THE POLITICS OF LAW 65, 78-79 (David Kairys ed., 1982); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1547-50 (1981).

130. *See, e.g.*, James B. Atleson, *Management Prerogative, Plant Closings, and the NLRA*, 11 N.Y.U. REV. L. & SOC. CHANGE 83, 104-05 (1982-83) (advocating broad scope for mandatory bargaining over employer capital decisions); Archibald Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1086 (1958) (arguing that the Court should broadly interpret the "terms and conditions of employment" language of section 8(d) so as to include every subject either party might advance that was "not inconsistent with a federal statute or declared public policy"); Dau-Schmidt, *supra* note 129, at 501 ("[D]ue to the

Additionally, completely different principles for distinguishing between mandatory and permissive subjects have been proposed, notably Professor Michael Harper's product market principle[131] and Professors Michael Wachter and George Cohen's strategic behavior test.[132] Still other commentators note that the mandatory-permissive distinction, as it is currently construed by the Board and the courts, is not expansive enough for the realities of labor-management relations in this new era.[133] Finally, some commentators reject the Court's conclusion that section 8(d) requires that certain types of decisions be insulated from the normal bargaining process.[134]

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benefits of collective bargaining under the bargaining model, the scope of mandatory subjects should be broadly construed."); William B. Gould IV, *The Burger Court and Labor Law—The Beat Goes On*—Marcato, 24 SAN DIEGO L. REV. 51, 64 (1987) ("The broadest possible scope ought to be given to both parties to bring issues to the bargaining table.").

131. Harper, *supra* note 128, at 1462-65 (proposing the alternative of a product market analysis). The product market analysis would not require bargaining over management decisions that "determine what products are created and sold, in what quantities, for which markets, and at what prices." *Id.* at 1463. Harper's principle defines a limited set of employer decisions that the national labor policy does not demand be subject to collective employee bargaining power, and that our general social and political ideology suggests should be insulated from such pressures, notwithstanding their possible effects on employees. *See* Michael C. Harper, *The Scope of the Duty to Bargain Concerning Business Transformations, in* LABOR LAW AND BUSINESS CHANGE—THEORETICAL AND TRANSACTIONAL PERSPECTIVES 25, 33-34 (Samuel Estreicher & Daniel Collins eds., 1988). Product market analysis is predictable and can be used to draw lines around mandatory bargaining without excluding entire categories of cases. *Id.* at 34.

132. Michael Wachter and George Cohen have developed an adaptation of economic analysis to the mandatory-permissive distinction. *See* Wachter & Cohen, *supra* note 44. They argue that bargaining should only be required over those management decisions motivated by strategic behavior. *Id.* at 1358-61. "Strategic behavior" is defined as actions that take unfair advantage of the other party. *Id.* at 1359-60 & n.42. Thus, any decision that would hurt employees more than the employer should be a mandatory subject of bargaining. *Id.* at 1378-82.

133. *See, e.g.*, Stone, *supra* note 44, at 56 ("[D]uring times of major corporate restructuring . . . the ability of unions to protect their members against the consequences of unfavorable strategic corporate decisions is severely restricted by the practicalities and the law of labor relations.").

134. *See, e.g.*, NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 351-53 (1958) (Harlan, J., concurring in part and dissenting in part) (distinguishing between the duty to bargain and the right to insist to impasse on a particular demand). Justice Harlan argues that the legislative history of sections 8(a)(5) and 8(d) demonstrates that Congress did not intend the Board to regulate the substantive aspects of the bargaining process but intended to assure the parties the greatest degree of freedom in their negotiations:

> I am 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. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence.

Id. at 352. Justice Harlan would not require parties to bargain about permissive subjects. However, he would permit parties to pursue any lawful demand, regardless of how the Board might categorize it, and to refuse to contract absent agreement on that item. Justice Harlan's approach would give the parties to collective bargaining more freedom to create a contract expressly tailored to their needs. Under his model, a union could insist to impasse on any viability-ensuring mechanism.

A thorough examination of the implications of Justice Harlan's model is beyond the scope of this Article. It does not seem likely that his approach would be adopted after more than 30 years, particularly since it is not consistent with current case law.

IV
MODIFICATIONS OF THE LAW

Congress intended that the scope of mandatory bargaining be flexible and expansive in order to take account of changing economic realities.[135] In this spirit, I propose that two modifications of the current law have become necessary in light of recent corporate practices that prevent fair bargaining and hinder the ability of unions to protect the job security and economic interests of their members. These modifications would allow unions to protect job security at the bargaining table with less sacrifice.

First, the scope of mandatory bargaining should be expanded to include certain provisions designed to ensure the employer's ability to meet its obligations under the collective bargaining agreement. Specifically, I propose the adoption of a viability standard, so that the scope of mandatory subjects would include demands that the parent of a wholly-owned subsidiary be a party to the contract and successorship clauses requiring sale to a viable entity. These two provisions are not the only two subjects regarding viability that should become mandatory, but the current case law could accommodate such an expansion of mandatory subjects. Therefore, this limited viability standard could be realistically accomplished through litigation.

Second, the Board should enforce a waiver of the right to insist on the nonmandatory status of an item. The waiver could be an express waiver, either in the collective bargaining agreement or in a separate contract between the parties, or, under certain circumstances, an implied waiver.

A. The Viability Standard

Two lines of cases underlie the viability standard. First, the Board, in determining that traditional successorship clauses are mandatory subjects of bargaining, has recognized that employees have an interest in the viability of the employer. This recognition supports the consideration of viability protection strategies as mandatory subjects of bargaining. Second, while the Board has held that the posting of performance bonds by either party is not a mandatory subject (implying that a party cannot insist on the viability of the other) these cases do not preclude the viability principle.

1. The Successorship Clause Cases

Traditional (as opposed to enhanced) successorship clauses are mandatory subjects of bargaining.[136] Such clauses require the employer to secure a successor's assumption of collective bargaining agreement obligations before a transfer of the business operation. These clauses clearly affect the

135. *See supra* notes 83-86 and accompanying text.

136. United Mine Workers of Am. (Lone Star Steel Co.), 231 N.L.R.B. 573 (1977), *enforced in relevant part*, 618 F.2d 698 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *see also* Amax Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980). For examples of enhanced successorship clauses, see *supra* notes 50-52.

ability of the employer to sell the business. In designating such clauses as mandatory, the Board reasoned that they implicate the "survival of the fruits of collective bargaining."[137] The Board believed that "a successor's assumption of any collective bargaining agreement negotiated between the Union and [the company] would be vital to the protection of [the] employees' previously negotiated wages and working conditions."[138]

Underlying the Board's reasoning is a recognition that the collective bargaining process is worthless unless employees have some assurance that the negotiated terms will be met despite changes in the employer's identity.[139] The Board thus implies that employees have an interest in the continued viable status of their employer.[140]

2. *The Performance Bond Cases*

A performance bond is a bond furnished by either party to secure performance of the collective bargaining agreement. Performance bond cases were the earliest cases in which the Board classified contract terms as permissive. In these early cases, the Board held that, as a matter of law, an employer could not insist that a union post a bond as a condition precedent to the execution of the agreement.[141] The Board has also held that the employer's posting

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137. *Lone Star Steel Co.*, 231 N.L.R.B at 575.

138. *Id.*

139. The only limit placed on successorship clauses is where they are found to violate section 8(e) of the Act. Section 8(e) of the NLRA provides:

> It shall be an unfair labor practice for any labor organization or any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . . .

29 U.S.C. § 158(e) (1988).

Under section 8(e), a successorship clause is illegal if it compels an employer to "cease doing business" with prospective purchasers who are unwilling to sign agreements with the union. The Board, however, has made it clear that successorship clauses requiring the cessation of a sale do not violate section 8(e) where sales of plants or parts of operations do not occur in the normal course of the signatory employer's business. Thus, the section 8(e) restriction generally does not apply to the sale of a business. *See, e.g.*, District No. 11, Int'l Ass'n of Machinists and Aerospace Workers (Harris Truck and Trailer Sales, Inc.), 224 N.L.R.B. 100, 103 (1976) (holding that the selling off of a portion of the business was not "doing business," even though the transaction did not result in the liquidation of the employer's enterprise); International Union of Operating Eng'rs, Local No. 701 (Cascade Employers Ass'n), 221 N.L.R.B. 751, 753 (1975) (concluding that the sale or transfer of an entire business is generally not to be viewed as "doing business" within the meaning of section 8(e)); *see also* Samuel Estreicher, *Successorship Obligations, in* LABOR LAW AND BUSINESS CHANGE—THEORETICAL AND TRANSACTIONAL PERSPECTIVES, *supra* note 131, at 63, 70 (discussing section 8(e) defenses to liability under successorship clauses).

140. *Cf.* Edward B. Rock & Michael L. Wachter, *Labor Law Successorship: A Corporate Law Approach*, 92 MICH. L. REV. 203, 204 (1993) (distinguishing a successorship clause in labor law from one in corporate law because the employees' relationship to the business is very different from that of other creditors).

141. *See, e.g.*, Benson Produce Co., 71 N.L.R.B. 888 (1946); Scripto Mfg. Co., 36 N.L.R.B. 411 (1941); Intrastate Steamship Co., 36 N.L.R.B. 1307 (1941); Jasper Blackburn Prods. Corp., 21 N.L.R.B. 1240 (1940).

of a performance bond to secure payment of wages is not a mandatory subject, reasoning that the "statutory obligation to bargain is not limited and cannot be limited to financially responsible parties, whether employer or labor union."[142]

The rationale in the performance bond cases—that collective bargaining cannot be limited to financially responsible parties—may, at first, seem inconsistent with the union's right to insist that an employer be and remain viable. However, these performance bond cases are arguably wrongly decided and ripe for reversal and therefore should not present an obstacle to a viability standard. Furthermore, even if the cases are correctly decided, their logic does not invalidate my position.

Chief Judge Ely of the Ninth Circuit declared in a dissenting opinion in *NLRB v. International Hod Carriers Local 1082* that the status of performance bonds as nonmandatory subjects is not settled and that the cases are irrationally decided.[143] He maintained that there is only one decision in which a broad statement of the status of performance bonds was necessary to the result.[144] In all of the other performance bond cases, neither the courts nor the Board ever actually held that performance bond clauses do not relate to "wages, hours, and other terms and conditions of employment." Judge Ely concluded that performance bonds are not per se nonmandatory but must be analyzed on a case-by-case basis; where "[i]ts function binds it so closely to [payments of wages and fringe benefits] that the bond can clearly and fairly be seen to relate, as do the payments themselves, to 'wages, hours, and other terms and conditions of employment,' " the bond provision may be bargained to impasse.[145]

Judge Ely pointed out that in *Jasper Blackburn Products Corp.*,[146] the progenitor of this supposed line of authority, the only characteristic of the performance bond that the Board found objectionable was that it enabled the employer, as a condition of the agreement, to require that the union pay a tax to a surety company.[147] In *Jasper Blackburn Products*, the Board's decision rested on its underlying determination that the employer's insistence on the

142. Carpenters' Dist. Council (Excello Dry Wall Co.), 145 N.L.R.B. 663, 664 (1963), *enforced*, 58 L.R.R.M. (BNA) 2064 (D.C. Cir. 1964); *accord* Laborers, Local 264 (J.J. Dalton), 216 N.L.R.B. 40, 40 (1975), *enforced*, 529 F.2d 778, 786 (8th Cir. 1976); International Hod Carriers, Local No. 1082, 150 N.L.R.B. 158, 165 (1964), *enforced*, 384 F.2d 55, 56-57 (9th Cir. 1967), *cert. denied*, 382 U.S. 982 (1968); American Compress Warehouse, Div. of Frost-Whited Co., 144 N.L.R.B. 433, 433 n.1 (1963), *enforced*, 350 F.2d 365, 369-70 (5th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); Davison, 136 N.L.R.B. 742, 745-46 (1962), *enforced*, 318 F.2d 550 (4th Cir. 1963); Painters and Paperhangers Local 164 (A.D. Cheatham Painting Co.), 126 N.L.R.B. 997, 1001-02, (1960), *enforced*, 293 F.2d 133, 135 (D.C. Cir.), *cert. denied*, 368 U.S. 824 (1961); *Jasper Blackburn Prods.*, 21 N.L.R.B. at 1254-55.

143. 384 F.2d at 57 (Ely, C.J., dissenting).

144. *Id.* at 60 (citing *Carpenters' Dist. Council*, 145 N.L.R.B. 663).

145. *Id.* at 61.

146. 21 N.L.R.B. 1240 (1940).

147. *Hod Carriers*, 384 F.2d at 60 (Ely, C.J., dissenting).

bond was motivated by a desire to thwart the agreement generally.[148] Similarly, in *Davison*,[149] the Board determined that the performance bond was nonmandatory because it related to security for a contracting party rather than the employees.[150] In *Painters & Paperhangers Local 164 (A.D. Cheatham Painting Co.)*,[151] the language of the performance bond clause indicated that its coverage was to extend beyond the terms and conditions of employment and was thus a permissive subject.[152] The court determined in *NLRB v. Local 264, Laborers' International Union*[153] that the performance bond was nonmandatory because it related to the actual administration of a contractual fringe program.[154] Finally, in the *Hod Carriers* case, the court recognized that Board precedent did not expressly hold that all performance bond clauses are nonmandatory subjects of bargaining.[155]

If the performance bond cases imposed no general prohibition, the cases do not pose a problem for a union's right to insist that an employer be and stay viable. Even if the performance bond cases are correctly decided and read broadly, however, the case law in this area does not contradict my proposal. Although bargaining may not be limited to viable parties, a union could insist that a viable party stay that way. Thus, a union could negotiate to impasse for viability-ensuring provisions with an employer that is already viable. Second, even where the employer is not already viable, the union could still negotiate to impasse over reasonable interim measures that the employer could carry out. I am not proposing to make viability a condition for bargaining—something that would be impossible for a nonviable employer. Rather, I propose only that the union be allowed to insist that the employer take reasonable and possible steps towards ensuring viability. To take the logic of the performance bond cases to the extreme would suggest that unions would be required to enter into agreements with employers who clearly could not perform their contracted obligations, without being permitted to negotiate for ways of correcting this deficiency. This result is clearly wrong, and the reasoning of the cases should not be extended so far.

3. *Implications of a Viability Standard*

Defining which viability-ensuring provisions to include within the scope of mandatory bargaining must involve a balancing of the viability interest of unions, as I have defined it, against the "core of entrepreneurial control"

148. 21 N.L.R.B. at 1254-55.

149. 136 N.L.R.B. 742 (1962), *enforced*, 318 F.2d 550 (4th Cir. 1963).

150. *Id.* at 745-46.

151. 126 N.L.R.B. 997 (1960), *enforced*, 293 F.2d 133 (D.C. Cir.), *cert. denied*, 368 U.S. 824 (1961).

152. *Id.* at 1001.

153. 529 F.2d 778 (8th Cir. 1976).

154. *Id.* at 786.

155. NLRB v. International Hod Carriers Local 1082, 384 F.2d 55, 57 (9th Cir. 1967), *cert. denied*, 382 U.S. 982 (1968).

concept as developed by the Supreme Court.[156] The "core of entrepreneurial control" concept seems to have carried significant weight in the past. Ideally, the concept should not be given as much weight, and because of the nature of the workers' investment in the firm, there may ultimately be no "core." However, in order that this section have some practical use, I assign a good bit of weight to the concept,as ultimately a court would.

The viability standard I propose would expand the scope of mandatory subjects to include a demand that the parent company of a wholly-owned subsidiary be a party to the contract and a successorship clause requiring sale to a viable entity. While I would like to include all of the other contractual provisions previously detailed[157] within the scope of mandatory bargaining, I do not think that the argument for the other provisions is as strong. Arguably the other provisions interfere more with management's prerogative and do not pass the balancing test.[158] Thus, under the current case law, it would be difficult to argue successfully that they are mandatory subjects.

Under the current jurisprudence, the only essential parties to a collective bargaining agreement are the employer and the certified bargaining representative.[159] However, the needs of unions in this area have changed significantly since the 1950s when the issue was decided.[160] New corporate practices have made the employee's relationship to the company more unstable.[161] The huge overhang of pension and health insurance costs is a still more recent phenomenon.[162]

Having the parent corporation on the contract is valuable to the union in at least two cases: where the employer transfers assets up to its parent[163] and where the employer creates a subsidiary and claims that the collective bargaining agreement is with the subsidiary.[164] Treating as mandatory subjects demands that a parent be a party to the contract would not unduly interfere with corporate control. The rationale of the Board in the successorship clause cases is applicable here.[165] The employees have a justifiable interest in ensuring the

156. First Nat'l Maintenance v. NLRB, 452 U.S. 666, 676-77 (1981).

157. *See supra* part II.

158. *See infra* notes 168-176 and accompanying text.

159. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 350 (1958).

160. *Id.*

161. *See supra* part I.

162. *See supra* notes 36-41 and accompanying text.

163. For example, in 1982, United States Steel (now USX) bought Marathon Oil Co. with money from steel profits. The year before the acquisition, United States Steel spent only one-third of its profits and internal cash on steel and nonsteel modernization, instead squirreling away $1.26 billion for this purchase. Jim Balanoff & Greg Palast, *Big Steel's Scapegoat*, N.Y. TIMES, Sept. 17, 1982, at A23.

164. For example, Carl Icahn, the major shareholder of USX, has pressured USX many times to restructure so that United States Steel (which is currently considered a division) becomes a subsidiary and to then consider the United Steelworkers of America contract to be with the subsidiary. *See* Sallie Gaines, *USX's New Steel Chief Says Labor Pact Top Goal*, CHI. TRIB., Sept. 28, 1990, at C1.

165. *See supra* part IV.A.1.

continued viability of the entity with whom they contracted. Viability can be ensured only by putting the parent on the contract.

The viable entity successorship clause discussed earlier[166] infringes on the ability to sell a company, but not unduly, in light of the strong union interests recognized by both the Board and the courts.[167] This type of clause requires the employer to sell the business only to a viable entity, which would seem to be exactly what the Board had in mind in holding that the traditional successorship clause was a mandatory subject of bargaining.

The other successorship clauses outlined in part II probably have too great an effect on the ability to sell the business to be considered mandatory subjects of bargaining. The absolute veto type of successorship clause[168] arguably goes beyond a legitimate union interest since it does not restrain the union from vetoing a sale on grounds other than the viability of the prospective purchaser.[169] Because there are less restrictive measures to protect the viability interest, the Board might see an absolute veto clause as an unnecessary invasion into the "core of entrepreneurial control."[170] Similarly, the corporate guarantee of benefits in the event of a shutdown following a sale,[171] though perhaps aimed at the same purpose as the viable entity clause, arguably cuts too deeply into the managerial prerogative because it obligates one corporate entity to pay benefits when an entirely different entity is responsible for the shutdown.

Nor would the various forms of rights to buy[172] be mandatory under a viability test, since they can affect the ability and manner of the employer to sell the enterprise, even when the viability interest at stake is relatively small. In particular, the right of first refusal[173] may meet with employer opposition because many prospective bidders will lose interest if they know that another bidder is allowed to be successful by meeting their offer.

The provisions aimed at protecting the ability of the employer to meet its obligations[174] also interfere too significantly with the "core of entrepreneurial control." Dividend limitations, financial tests and limitations, restrictions on dealings with affiliates, corporate governance participation, and financial and operational standards allow the union to affect the way the corporation performs its most essential functions. Finally, the credit enhancements from the

166. *See, e.g.*, Sharon Steel Agreement, *supra* note 51.

167. *See supra* notes 136-38 and accompanying text.

168. *See, e.g.*, Bethlehem I Agreement, *supra* note 50.

169. For example, a union might block a sale to an employer who operates many nonunion businesses.

170. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222-23 (Stewart, J., concurring).

171. *See, e.g.*, USX Agreement, *supra* note 52.

172. *See supra* notes 52-54 and accompanying text.

173. *See, e.g.*, Wheeling-Pittsburgh Agreement, *supra* note 54, Amended Joint Plan of Reorganization, app. A, and accompanying text.

174. *See supra* part II.B.

employer or outside entities[175] (other than the parent corporation as a party) would also not become mandatory subjects under the viability theory because the performance bond case law disfavors surety bonds and clauses obligating an employer to pay the wages of another employer's employees.[176]

B. Waiver of Right to Insist on Nonmandatory Status

My second major proposal is the use of a waiver of the right to claim that a subject is nonmandatory. This approach would be relevant if my proposed expansions of the scope of mandatory bargaining do not come to fruition. In addition, such a waiver would fill in the gaps left by the viability standard. The waiver would be applicable in situations where the union wishes to bargain over a permissive subject already agreed upon in an expired collective bargaining agreement. Once a union makes concessions to attain discussion and contract on a permissive subject in the prior agreement, the employer could not demand further concessions during subsequent negotiations just to bargain over the same subject.

For example, the express waiver could arise where a union made concessions in return for a provision that, in the event that the company transfers any assets to another entity that it partially owns, the union may seek to negotiate restrictions on dividends and on debt of such entity similar to what it has already negotiated with the company. In this context, the company would agree that both it and the other entity would waive the right to assert that such subjects relate to nonmandatory subjects of bargaining.[177]

The waiver is also useful as a means to compel discussion of a permissive subject. In one instance, the employer wanted the union to agree to reductions in retiree health insurance.[178] Specifically, the employer wanted the union to agree that costs could not exceed two times their present cost at the end of three years. Under *Allied Chemical and Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*,[179] this is a permissive issue. However, in return for

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175. *See supra* II.C.

176. Local 164, Bhd. of Painters v. NLRB, 293 F.2d 133, 135 (D.C. Cir.), *cert. denied*, 368 U.S. 824 (1961).

177. *See, e.g.*, Wheeling-Pittsburgh Agreement, *supra* note 54, Amended Joint Plan of Reorganization, at 8-9:

> In the event any of the assets of [the Company] shall be transferred, after consummation of the Plan, to any business ventures, subsidiaries, or other entities ("entities") which are not in fact controlled by or under common control with Parent or [the Company], but which are at least 33% owned by Parent and/or [the Company], the Union may seek (in connection with the negotiations of a basic labor agreement covering such entities) to negotiate restrictions on dividends and on debt of such entities similar to the restrictions herein. Parent and [the Company] guarantee that, in such negotiations, both they and the entities shall waive any right to assert that such subjects relate to non-mandatory subjects of bargaining.

178. *See* Proposed Nov. 5, 1992 Letter to USWA (on file with author and the *New York University Review of Law & Social Change*). This topic is of considerable interest to employers today with the adoption of FASB Rule No. 106. *See supra* notes 37-41 and accompanying text.

179. 404 U.S. 157 (1971).

union agreement on such a provision, the employer could promise to waive the right to claim that retiree health benefits is a nonmandatory subject of bargaining.[180] While no case law directly addresses such a waiver, it is similar to other allowable waivers.

The waiver has become a central feature of the labor law.[181] For example, most collective bargaining agreements contain a no-strike clause, which is a waiver of the union's right to strike,[182] or a management prerogative clause, under which employees waive their statutory right to co-participation in the adjustment of the terms and conditions of employment.[183] A collective bargaining agreement may also contain a nonlockout clause, under which an employer waives its right to lock employees out of the business. On the other hand, some rights are unwaivable, such as in-plant leafletting rights[184] and the right to resign from union membership.[185] The NLRA does not specify what types of waivers are permissible. Rather, the Board has developed its own rationale for prohibiting certain waivers. As Karl Klare has noted, however, "[t]he selection of particular NLRA rights for designation as 'waivable' or 'nonwaivable' rests ultimately on social policy, i.e., political, choices."[186] The nonwaivable rights are typically those that are individual as opposed to collective rights of unions. For example, unions are not permitted to waive the right of their members to solicit or distribute literature advocating support of or opposition to the incumbent union.[187]

A waiver of a right to claim that a subject is nonmandatory resembles the no-strike and management prerogative clauses more than the nonwaivable rights. The right of a party to refuse to bargain over a permissive subject is no more basic a right than that of a union to strike or to bargain during the term of the contract over changes in the terms and conditions of employment. Since unions may waive such basic rights, the right to insist on the nonmandatory status of a subject is not so sacrosanct as to be unwaivable. Rather, it is

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180. *See* Proposed Nov. 5, 1992 Letter to USWA, *supra* note 178:

> Furthermore, notwithstanding the decision of the U.S. Supreme Court in Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company or any agency or court decision, the parties agree that the subject of the limitation set forth in this letter shall be considered a mandatory subject of bargaining in any negotiations between the parties occurring subsequent[ly] . . . .

181. *See* Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 769 (1985).

182. *See* Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 44 (1988). Professor Klare, however, suggests that the labor law should adopt a more grudging and suspicious attitude towards the waiver of rights. *Id.* at 44; Klare, *supra* note 181, at 770.

183. Klare, *supra* note 181, at 769.

184. NLRB v. Magnavox Co., 415 U.S. 322, 326 (1974).

185. Machinists Local 1414 (Neufeld Porsche-Audi, Inc.), 270 N.L.R.B. 1330, 1333 (1984).

186. Klare, *supra* note 181, at 770 n.113.

187. *See Magnavox Co.*, 415 U.S. at 325-26. However, rights may be waived where there are production considerations that make special restrictions necessary. *Id.*

clearly a collective right and not a right belonging to individuals such that the parties would have no authority to waive it.

Policy considerations also favor upholding the waiver. The waiver provides parties with a means to preserve bargaining over demands that, though not recognized by the Board as mandatory, are still legitimate interests. The waiver permits the parties to make the collective bargaining process more situation-specific, so that a union negotiating with an employer with a history of engaging in a particular practice that threatens job security may attempt to prevent this practice, or at least ease its effects on employees.[188]

Typically, the parties would place the waiver in the collective bargaining agreement. Parties may also place the waiver in a separate contract, such as a lien agreement or stock agreement. In any case, when a party claims an express waiver, the test is whether the waiver is in "clear and unmistakable" language.[189] The Board should enforce an express waiver that passes the clear and unmistakable test.

The implied waiver presents a more difficult case because, consistent with the traditional common law view of waiver, the Board and the courts are reluctant to infer a waiver.[190] The Board held in *Kit Manufacturing Co.*[191] that to sustain a waiver based on the course of bargaining would penalize a party for endeavoring to reach agreement about permissive issues.[192] In that case, the employer and union had discussed a permissive subject during negotiations, and the employer insisted to impasse upon its inclusion in the contract. The Board held that this was an unfair labor practice as mere discussion of a permissive subject did not make it mandatory.[193]

However, the Board does infer waivers in some contexts. For example, it will infer a waiver of the right to strike from an arbitration clause in the contract.[194] The Board could similarly infer a waiver from an agreement on the

188. The waiver would partially address Justice Harlan's concern that the mandatory-permissive distinction limits real bargaining. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 351-53 (1958) (Harlan, J., concurring in part and dissenting in part). Justice Harlan's concurrence is discussed *supra* note 134.

189. *See, e.g.*, Dubuque Packing Co., 303 N.L.R.B. 386 (1991) (finding that general language of management rights clause did not establish that union had waived its right to bargain about relocation decision).

190. *See, e.g.*, New York Mirror, 151 N.L.R.B. 834, 839-40 (1965); *id.* at 839 n.11 (collecting cases). The Supreme Court has stated that a waiver of bargaining rights will only be found in clear and unmistakable conduct. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 n.12 (1983). Established past practices of the parties may be persuasive evidence of a waiver. *See* American Oil Co., 151 N.L.R.B. 421, 428 (1965) (giving no legal effect to the fact that the union had failed to grieve on a specific subcontracting job when the union had previously vocally expressed its position on subcontracting); Speidel Corp., 120 N.L.R.B. 733, 738 (1958) (finding that an employer's failure to pay a bonus was not an unfair labor practice as the union had accepted a contract that did not provide for the bonus after initially pressing for it).

191. 150 N.L.R.B. 662 (1964), *enforced*, 365 F.2d 829 (9th Cir. 1966).

192. *Id.* at 671-72.

193. *Id.*

194. *See, e.g.*, Teamsters Local 174 v. Lucas Flour, 369 U.S. 95, 105 (1962) (noting that such an inference is necessary to prevent the use of arbitration as "economic warfare").

subject in the collective bargaining agreement. The case for inferring the waiver I propose is strong since the waiver would arise not after mere discussion, but after agreement on the subject and inclusion of it in the collective bargaining agreement. Thus, *Kit Manufacturing Co.* is not controlling.

Indeed, the waiver itself might qualify as a mandatory subject of bargaining, in which case the employer would be obligated to discuss it and the union could insist to impasse on its inclusion in the collective bargaining agreement. For example, the Board and the courts consider no-strike, no-lockout, and management prerogative clauses to be mandatory subjects of bargaining.[195] In *Borg-Warner*, the Court addressed whether a strike-ballot clause (a waiver of the union's right to strike without a vote) was a mandatory subject of bargaining. The Court concluded that it was not, reasoning that the subject relates to internal affairs and the way an individual party goes about collective bargaining.[196] The waiver of the right to insist on the nonmandatory status of a subject does not relate to internal affairs or the way a party conducts collective bargaining, but to the actual content of bargaining. Furthermore, in *NLRB v. American National Insurance Co.*,[197] the Court, in holding that a management prerogative clause was a mandatory subject of bargaining, was influenced by the argument that the clause was a business necessity,[198] reasoning that the employer must be able to make unilateral changes in the terms and conditions in employment as required without being charged with an unfair labor practice.[199] It is similarly a matter of business necessity for the union that it not have to make subsequent rounds of concessions just to ensure that the employer will talk about a permissive subject more than once.

The waiver, be it express or implied, mandatory or permissive, ensures that unions will not have to make additional concessions to preserve an agreement over a subject that is crucial to employees' job security. The waiver would allow the parties to create an agreement that was tailored to specific needs.

CONCLUSION

As a practical matter, the viability and the waiver approaches advanced here have more significance in a period of economic downturn when the union

195. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952) (allowing hard bargaining for management prerogatives clause); NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941) (holding that no-strike and no-lockout clauses must be bargained over); Shell Oil Co., 77 N.L.R.B. 1366 (1948) (same).

196. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 350-51 (1958) (finding that strike-ballot clause was a permissive subject of bargaining).

197. 343 U.S. 395 (1952).

198. *Id.* at 407 (holding that the employer's insistence upon a broad management rights clause covering terms and conditions of employment is not itself a violation of section 8(a)(5)); *see also* DEVELOPING LABOR LAW 891 (Patrick Hardin ed., 1993) (noting that the Board looks at the content of a management prerogative clause in determining whether it is a mandatory subject of bargaining).

199. *Id.*

must make concessions in order to protect jobs than in a period of economic growth. The employer is more likely to agree to nontraditional provisions when it needs the union to sell concessions to its members. However, these approaches are, from a theoretical point of view, equally applicable in a nonconcessionary situation. Even in an economic upturn, the union may be negotiating with a thinly capitalized company. Moreover, as noted earlier, even when dealing with healthy firms, unions must be concerned with protecting underfunded pension obligations and health benefits.

The waiver and viability approaches adapt labor law and collective bargaining to the realities of today's corporate practices. Adapting the mandatory-permissive distinction in the ways proposed in this Article would be a step in the direction of ensuring workers the benefits of collective bargaining guaranteed by the NLRA.