#### “Collective Bargaining Rights” are existing mandatory subjects

Schnitzer 25, JD (Justin, “Collective Bargaining Agreements for Federal Employees,” Fed Law, https://www.fedelaw.com/collective-bargaining-federal-employees/)

Your collective bargaining rights exist within carefully drawn boundaries. The mandatory subjects you can negotiate include working conditions, grievance procedures, and certain personnel policies that directly affect your daily work life.

#### Shifting topics from permissive to mandatory is an issue of “scope”

Sockell 86, Ph.D. Industrial and Labor Relations Collective Bargaining, Labor Law, and Labor History (The scope of mandatory bargaining: A critique and a proposal” Industrial and Labor Relations Review, Vol. 40, No. 1)

Finally, and perhaps most important, recent scope of bargaining decisions have held issues critical to unions and their constituents, such as economically motivated partial plant closures 2 and relocations,3 to be permissive, that is, to fall outside management's compulsory duty to bargain. These cases will likely invite challenges and serious concern from an already troubled labor movement; they are also likely to encourage some employers to continue to test the breadth of their duty to bargain in order to extend their unilateral decisionmaking authority.

#### Making something a “mandatory subject” increases the scope of bargaining rights

Yurich 24, Executive Director of the Minnesota Legislative Coordinating Commission (Michelle, “Report on Consideration of Collective Bargaining for Employees of the Minnesota State Legislature and Recommended Best Practice Options,” https://www.lrl.mn.gov/docs/2024/mandated/241442.pdf)

In the vast majority of states with public sector collective bargaining laws, pensions and retirement are prohibited subjects of collective bargaining. The early experience with permitting collective bargaining in New York (especially New York City), Michigan, among the early adopters of public sector collective bargaining, and the devastating financial consequences that ensued led to widespread agreement among policy makers that retirement and pensions should be prohibited subjects of bargaining.

Importantly, the Minnesota public sector bargaining law excludes retirement benefits from the definition of terms and conditions of employment, thereby meaning that retirement benefits and pensions are not mandatory subjects of bargaining. Minnesota Statutes, Chapter 179A, § 179A.03, Subd. 19 (defining the scope of collective bargaining but excluding retirement benefits from the definition of terms and conditions of employment). As a result, pensions and retirement benefits are determined through legislation and are not negotiable topics. The applicable statutes make clear that pensions and retirement benefits are part of the statutory framework and are not a topic for collective bargaining between public employee unions and their employers in Minnesota. In short, in Minnesota Legislature retains control over public employee pension plans through state law.

#### It opens up a laundry list of “subject of the week” AFFs in any sector.

Garden 20, Professor of Law at Seattle University School of Law (Charolette Garden, October 26, 2020, “Brief of Amici Curiae Labor Law and Sociology Professors in Support of Respondents,” Missouri Nat’l Educ. Ass’n v. Missouri Dep’t of Labor & Indus. Rels., No. SC98412, Supreme Court of Missouri, University of Kansas Libraries, Lexis)

Notably, not long after Article 1, Section 29 was adopted, in the discussions that led [\*14] to the Taft-Hartley Act of 1947 (Pub. L. 80-101) (amending the original Wagner Act), Congress rejected a proposal in the House version of the Taft-Hartley bill to limit the subjects of bargaining to "(i) [w]age rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, 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." See First National Maintenance v. NLRB, 452 U.S. 666, 675 & n. 14 (1981) ( citing H.R. 3020 § 2(11), 80th Cong., 1st Sess. (1947)). This congressional rejection of a specific list of core subjects shows both that the pre-existing scope of bargaining was broader than the limited list of topics, and also a congressional judgement, roughly contemporaneous to the enactment of Article 1, Section 29, that the broader view of scope of bargaining was the correct one. And obviously, even the list of topics in the failed amendment went [\*15] far beyond the subjects that HB 1413 would allow.

#### There are hundreds of potentially bargain-able issues

AFGE 22 (“Collective Bargaining Handbook,” American Federation of Government Employees, https://www.afge.org/globalassets/documents/manuals/fsed/collective-bargaining\_may2022.pdf)

Unions—private sector as well as federal sector—rely on a variety of tools to serve their members. These

can be summarized as mobilization, legislation, negotiation and litigation. It is critical to keep in mind

that different problems can be best attacked by different methods. There is a major difference between

saying that a particular issue is outside the scope of bargaining and saying that the union is unable to

successfully deal with it.

The challenge to the union at all levels is to carry out a bargaining strategy that succeeds in achieving the highest priorities of the employees, with as little wasted effort as necessary, and in a way that the employees’ actual participation in the process is high and the union’s non-bargaining resources and goals are involved.

These factors all work together. Negotiations that focus on the highest priority problems for the employees are more likely to be successful than negotiations that address 150 minor issues, many of which are of minimal importance to the bargaining unit. The very decision to determine employee priorities begins the process of employee involvement. The more employee involvement, the greater the pressure on management to agree to the union’s demands.

#### It’s a limits nightmare

Crouch 88, JD @ Vandy (Thomas, “The Viability of Distinguishing Between Mandatory and Permissive Subjects of Bargaining in a Cooperative Setting: In Search of Industrial Peace,” Vanderbilt Law Review, Lexis)

A number of potential problems, however, are associated with a bargaining framework which dictates that every item is a mandatory subject of bargaining. Because each side is able to wield its respective economic influences 92 over a broader range of issues, bargaining could become more complex and more time consuming.9 3 Also, management or the union may attempt to undermine the other's integrity by insisting on concessions that negate the other's traditional functions. Overall, the enterprise itself could suffer the most because of management's inability to make quick entrepreneurial decisions.9 4

#### A. Bidirectionality. Every aff can add a subject of bargaining that’s favorable for employers.

Clean Slate 21 (“MANDATORY SUBJECTS OF BARGAINING: Four Options for Shifting the Paradigm,” https://clje.law.harvard.edu/app/uploads/2022/12/Clean-Slate-Mandatory-Subjects-of-Bargaining.pdf)

OPTION 1: ELIMINATE THE DISTINCTION BETWEEN MANDATORY AND PERMISSIVE BARGAINING

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

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

In many respects, removing the distinction returns to the early intent of the Act, where the parties were envisioned to identify and prioritize issues of significance to them.37 Even early on, critics noted that “walling issues off from workers’ input promoted industrial insularity, endangering collective bargaining’s historic role in the joint tailoring of standards, norms, and practices to the needs of particular communities.”38 As noted by legal scholars, even as the doctrine was developing in 1958, the best course of action might have been for the Supreme Court to abandon all attempts to limit the phrase “terms and conditions of employment,” thus reading the phrase to advance every proposal that management or labor might put forward—a reading that was not inconsistent with either the NLRA or public policy.39 If either side felt strongly enough about a proposal to press the issue to impasse, it was preferable to have the party apply economic pressure rather than attempt to conceal for legal reasons. There are several benefits to getting rid of the mandatory-permissive distinction, including: ● The proposal closely aligns with the original intent of the Act and offers a fundamental recalibration of how employers and unions engage with one another. Unions could bargain as a matter of right with employers over the very existence of employment, including plant relocation, plant closure, and outsourcing. Though it is presently unlawful to close or relocate a plant in retaliation for union activity, proving that retaliation has been challenging. ● The parties actually negotiating their relationship would have the ability to apply economic pressure where issues are important to them, essentially increasing the power of the parties in the bargaining relationship (and decreasing the power of the NLRB/courts). ● Employers would be required to bargain about issues that affect a business and that workers have important viewpoints on, such as patient safety, environmental effects, and classroom size. This would also create opportunities for aligning worker movements with other social justice movements, particularly where interests align. The negatives of this proposal are: ● It could work to the detriment of unions, in that employers could insist and apply economic pressure to things that they currently cannot. Employers, for instance, presently cannot insist that the union call a vote on a strike, nor can they influence internal union matters. ● It could make it more difficult to reach a first contract, with both employers and unions insisting to impasse on any topic of bargaining.

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#### Their ev says it’s about a direct relationship.

Sherman 82 – J.D., University of California, Berkeley School of Law

Charles W. Sherman, “Committee to Defend Reproductive Rights v. Myers: Abortion Funding Restrictions as an Unconstitutional Condition,” California Law Review, Vol. 70, pp. 978–1013, July 1982, Nexis

This belief is also reflected in the strongly worded dicta in several passages of the court's opinion. First, CDRR recited additional interests of the woman that the right protects. Previous decisions had said that the right implicates the woman's "fundamental interest in the preservation of her personal health" 153 and "her right to decide whether to parent a child." 154 To that list of protected interests, CDRR added that the procreative right protected the woman's "ability to retain personal control over her own body" and "her control of her social role and personal destiny." 155 Arguably, the strength of a right is directly related to the number and importance of the interests the right protects. Thus, when the court enumerates additional interests that are as fundamental as a woman's control over her body and her social role, the court announces an intention to strengthen the overall right of procreative choice.

#### The plan includes indirect relationships:

#### [plan]

#### 2—“Automation-related” shall be expansively construed to refer to all facets of automation which implicate in any manner, direct or indirect, workers’ wages, hours, and terms and conditions of employment.

#### The strength of a right is equivalent to its protection and is distinct from its scope.

Samar 00, Adjunct Professor of Philosophy at Loyola University of Chicago, Adjunct Professor of Law at Illinois Institute of Technology Chicago-Kent College of Law (Vincent J. Samar, 2000, “Article: Is the Right to Die Dead?” 50 DePaul L. Rev. 221, University of Kansas Libraries, Lexis) \*Footnote 51.

51 The scope of a right includes the cases that lie within its boundaries or its area of coverage. The protection of a right is its strength, whether it prevails against opposing interests that may also fall within its boundaries. See Frederick Schauer, Free Speech: A Philosophical Enquiry 131 (1982).

#### A right’s protection is different from its coverage.

Procaccini 25, Assistant Professor of Law at Vanderbilt Law School (Francesca Procaccini, 2025, “The End of Means-End Scrutiny,” Duke Law Journal, Vol. 75, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4909510) \*Footnote 7, italics in original.

7 Whether an activity implicates a right—known as a right’s *coverage*—is a different question from whether a right safeguards that activity from a law—known as a right’s *protection*. The coverage question is a separate inquiry that also dominates constitutional law. Coverage analyses use a variety of competing methodologies, including text, history, legal tradition, evolving standards of liberty, and fairness. But once certain activity is determined to come within a right’s coverage—e.g., prayer falls within the free exercise right’s coverage and corporations’ political contributions fall within the free speech right’s coverage—the question invariably turns to a means-end scrutiny analysis to determine the right’s *protection*.

#### When analyzing a right’s protection (i.e., strength), you look at the right’s preexisting scope.

Rosen 16, University Distinguished Professor at the Illinois Institute of Technology Chicago-Kent College of Law (Mark D. Rosen, Winter 2016, “The Judiciary's Inputs in Constitutional Rights Adjudication,” 48 Loy. U. Chi. L.J. 487, University of Kansas Libraries, Lexis)

[\*487]

Introduction

Analyzing a claim that governmental action violates a constitutional right requires up to two analytically distinct determinations. The first is whether the constitutional right reaches the governmental action - what Professor Schauer illuminatingly calls determining the right's coverage. 1 If coverage does not extend to the governmental action - as is true of prohibitions on fighting words, obscene material, 2 or two chief executive officers' discussions to fix prices 3 - then the constitutional claim automatically fails.

[\*488] But even if the right's coverage extends to the government's action, the action is not per se unconstitutional. For instance, though the Equal Protection Clause's coverage unquestionably extends to a public school's affirmative action program, not all affirmative action programs are unconstitutional. 4 Professor Schauer calls this second step determining the right's degree-of-protection, which is reflected in important part by which legal test a court uses to determine when restrictions of a constitutional right (hereinafter a right-restriction) is constitutionally permissible. 5 Strict scrutiny, probably the best known of the doctrinal tests, allows right-restrictions if the government aims to achieve a "compelling governmental interest" by "narrowly tailored" means. 6 Intermediate scrutiny permits right-restrictions to achieve an "important governmental objective" that are pursued in a "substantially related" manner. 7 The Supreme Court has ruled that campaign finance restrictions that limit speech are permissible only to achieve a "sufficiently important interest" in a "closely drawn" way. 8

#### The AFFs interpretation confuses key features of rights.

Weinrib 23, Associate Professor of Law at Queen’s University (Jacob Weinrib, January 2023, “The Essence of Rights and the Limits of Proportionality,” forthcoming in *The Promise of Legality: Critical Reflections upon the Work of TRS Allan*, SSRN) \*Italics in original.

Constitutional rights have two structural features, scope and strength. The *scope* of a right consists in the particular protections that fall within its reach. The *strength* of a right consists in its power to withstand opposing considerations. My aim in this chapter is to formulate an account of the strength of constitutional rights.

#### The strength of a right is different from how far it reaches.

Copley 23, PhD in Law from the University of Adelaide (Julie Copley, December 2023, “A Right to Adequate Housing: Translating ‘Political’ Rhetoric into Legislation,” Australian Property Law Journal, 13 APLJ 71, University of Kansas Libraries, Lexis)

In constitutional and human rights theory and practice, rights have two components.139 One is the scope of a right: the specific protections falling within the reach of the right.140 The other is the strength of a right: the right’s ‘power to withstand opposing considerations’, described also as the ‘core’ of the right.141 Örücü argues that positivisation of human rights is assisted greatly by identifying a right’s ‘inviolable and indefeasible content’.142 For a legislative process, Örücü says an identified core serves to check the tendencies of legislatures to confine rights, and to create extra awareness of the role and significance of a right among citizens, courts, scholars and those exercising public power.143

#### The AFF is confusing a right’s content and scope with its strength.

Jonsson 97, Researcher at UNICEF (Urban Jonsson, 1997, “An Approach to Assess and Analyse the Health and Nutrition Situation of Children in the Perspective of the Convention on the Rights of the Child,” The International Journal of Children's Rights, Vol. 5, pp. 367-381, University of Kansas Libraries, Hein Online) \*Italics in original.

A right is characterized by its *content*, *scope* and *strength*.11 The *content* of a right defines whatever it is a right *to*, e.g. adequate nutrition or good health. The scope of a right both defines the *subjects* of the right (i.e. those who hold the right) and the *objects* of the right (i.e. those against whom the right is held). The strength of a right refers to the importance that this right will be realized.

#### Strength is distinct from content and scope.

Alm 11, Professor of Philosophy at Lund University (David Alm, 2011, “Promises, Rights and Claims,” Law and Philosophy, Vol. 30, pp. 51-76, University of Kansas Libraries, Hein Online) \*Italics on original.

With Sumner (1987, pp. 11f), I distinguish the following three components of the concept of a right: *content*, *scope*, and *strength*. The content of a right is whatever it is a right to; it could be an action or a state of affairs. The scope of a right consists in a set of persons who have the right (the right holders), and a set of persons who have the corresponding obligations (the obligation bearers). The strength of a right, finally, is the strength or weight that right has when weighed against other moral considerations. The greater a right's strength, the more the right holder can ask of the obligation bearers in terms of sacrificing other values. (In the sequel I will be concerned only with content, though I believe my view has implications for strength as well).

#### By contrast, their interpretation is not predictable. It’s legally destroyed.

Dwyer 11, Arthur B. Hanson Professor of Law at the College of William and Mary School of Law (James G. Dwyer, 2011, “The Good, the Bad, and the Ugly of Employment Division v. Smith for Family Law,” Cardozo Law Review, Vol. 32, No. 5, University of Kansas Libraries, Hein Online)

The additive view of rights is difficult to justify conceptually because it appears to presuppose a quantification of a right's strength. One would need, in at least a rough sort of way, to assign some value to each single right, establish some threshold value for a right's triggering heightened review, and assume that the value of each single right is below this threshold, but then find that adding the values of two such rights together creates a sum that is above the threshold. It is difficult to know even where to begin with such quantification and calculation.

#### Every definition has intent to exclude.

Murphy 17, Candidate for Juris Doctor, Notre Dame Law School, 2018; Bachelor of Arts in Political Science, University of Notre Dame, 2015. (Brent T., May, 2017, NOTE: A TEXTUAL ANALYSIS OF WHISTLEBLOWER PROTECTIONS UNDER THE DODD-FRANK ACT, 92 Notre Dame L. Rev. 2259, 2269. Lexis accessed online via KU libraries) [[Footnotes]]

Second, the phrasing of the definition as "'whistleblower' means ..." is important because it creates a strong presumption that the definition provided in the statute is the only definition of "whistleblower" contemplated. 72 Use of the word "means" implies that the definition is the term's only definition: "A definition which declares what a term means … excludes any meaning that is not stated." 73 This is consistent with the well-known expressio unius canon of construction. According to this canon, when a statutory provision explicitly includes particular things, other things are implicitly excluded. 74

[[FN 74]]

See Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 885 (9th Cir. 2005) (en banc) ("'When a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'" (quoting Boudette v. Barnette, 923 F.2d 754, 757 (9th Cir. 1991))); Singer, supra note 68, § 47:23, at 304-07.

[[END FN 74]]

By contrast, when a definition "declares what it 'includes' … 'it … conveys the conclusion that there are other items includable, though not specifically enumerated.'" 75 Ergo, according to the conventional rules of statutory interpretation, the section's definition is both mandatory and exclusive - only individuals who provide information to the SEC are eligible to qualify as whistleblowers, and that definition "shall apply" throughout § 78u-6.