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**THE UNION AS BROKER  
OF EMPLOYMENT RIGHTS**

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### Abstract

Most employment laws give inalienable rights to workers. An individual worker cannot trade the right to \$7.25 per hour for a greater pension, for example, nor trade a longer-than-five-year pension-vesting schedule for greater pay. Employees can waive some employee rights, but policymakers are hesitant to allow this for fear the individual employee's lack of bargaining power or inability to assess the value of rights will mean an alienable right is no right at all. This suggests a role for unions as a broker of rights. A union presumably has greater bargaining power, greater experience than individual employees, and greater ability to avoid cognitive biases, and thus can be expected to make bargains that more greatly benefit workers.

This Article explores the role of union as broker of rights. It discusses current examples, including the Supreme Court's recent *14 Penn Plaza* decision that upholds union waiver of workers' right to litigate discrimination claims, forcing the claims into arbitration. The Article argues that unions should not fear the brokering role while acknowledging the current hesitancy of unions to embrace it, and assesses when and when not policymakers should create employment rights that are inalienable to individual workers but can be brokered by a union representing workers.

## The Union As Broker of Employment Rights

The Supreme Court has stirred the employment-law pot again. In its recent *14 Penn Plaza* decision,<sup>1</sup> the Court upheld a collective bargaining contract in which the union agreed that individual workers would forego the right to go to court to vindicate claims of discrimination and be forced into mandatory arbitration. Earlier, and equally controversially, the Court had allowed individual workers to agree to arbitration and waive their right to court.<sup>2</sup> Bills in Congress are already afoot to reverse the Supreme Court and deny unions the power to waive its members' right to a judicial forum.<sup>3</sup> Other bills propose to go further back in Supreme Court jurisprudence and reverse *Gilmer* by denying individual workers the power to waive a judicial forum to vindicate discrimination claims.<sup>4</sup> This reopens the general debate on whether employment rights should be mandatory or waivable, and if waivable, by the individual or by the union?

Most employment-law rights are mandatory. Individual workers cannot decline the protections the law gives them. A non-exempt worker must get at least \$7.25 per hour and time-and-a-half for overtime, even if she would agree to less.

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<sup>1</sup> See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

<sup>2</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>3</sup> See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009)..

<sup>4</sup> See Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007). It is not the first time Congress has stepped in to overturn the Supreme Court interpretation of an employment statute. See Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C.A. §2000a (2009) (overruling *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (overruling five 1989 Supreme Court decisions).

A worker's pension must vest within five years. If she is injured on the job, a worker is entitled to compensation through a state system and cannot opt out in advance. (She can, of course, decline to file a claim after the fact.) A worker fired in violation of public policy—say, for taking time off work to serve on a jury—can sue her employer in tort, even if she earlier agreed she could be fired for any reason. In all these examples and many more like them, the law forces its protection on the individual worker. Interestingly, unions through a collective bargaining agreement can waive these protections.

The ubiquity of mandatory employment rights makes it hard to point to rights that individual workers can waive. While arguing for greater use of waivable employment rights, Cass Sunstein has noted a few laws that currently give workers the right to waive rights.<sup>5</sup> Workers can waive past violations of the age discrimination laws as part of a severance agreement, as long as the waiver “is knowing and voluntary” as defined by the Older Workers Benefit Protection Act.<sup>6</sup> And as already mentioned, individual workers can agree to arbitration and

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<sup>5</sup> See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002). He also points to the just-cause protection of the Model Employment Termination Act, which employees and employers can agree to waive in return for statutorily prescribed severance pay. Sunstein also points to proposed state legislation to require employers to automatically enroll employees in savings plans unless the employees opt out. Sunstein also describes the overtime provisions of the FLSA as a waivable employee entitlement, in that it “allows employees to waive their right not to work more than forty hours a week . . . at a governmentally determined premium (“time and a half”). However, employees have no right to work only forty hours a week, in that employers can require mandatory overtime of employees under the FLSA. Thus, I would classify the FLSA overtime provisions as a waivable right of employers to set hours (of any amount), and a mandatory, nonwaivable right of workers to be paid time-and-a-half for hours over forty.

<sup>6</sup> See Sunstein, *supra* note 5.

waive their right to go to court to assert discrimination claims.<sup>7</sup>

There are good reasons for being cautious in allowing individual workers to waive rights. A waivable right may be no right at all. First, workers have little bargaining power and so may get little or nothing in return for waiving a right. Additionally, workers may have trouble accurately evaluating the value of an employment right and thus waive it inappropriately.

On the other hand, a statute that mandates rights with no waiver or opt-out provisions imposes costs as well. These costs are more significant when the statute imposes a single rule for a wide variety of working conditions. The statute may make good sense in most situations but create less-than-first-best solutions in some cases.

Unions may play a useful role in resolving this dilemma between rights that are mandatory for all whether you like it or not, and rights that can be waived by individuals too powerless to stand up for themselves.

This Article examines the choice between waivable and mandatory employee rights and, in particular, whether some rights should be mandatory for individual workers but subject to negotiation by labor unions. Part I sets the stage

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<sup>7</sup> See *Circuit City*, 532 U.S. at 123; *Gilmer*, 500 U.S. at 35.

with two examples. Part II then explores why most employee rights are mandatory. Part III asks whether unions should be allowed to waive (or broker, to use a more palatable term for the behavior) employee rights even when individuals cannot. Part IV documents the large degree to which current employment law already has this feature of mandatory individual rights that unions can broker. Part V then explores whether unions and society should welcome the role of union as broker.

#### I. Opening Examples of Union as Broker

Let me give two contrasting examples of union as broker to set the stage. The first example, to my mind, clearly shows the value of union waiver in some settings. The second example is the arbitral versus judicial forum, which is a more problematic use of union waiver.

*Example 1: Union Waiver of the 8-hour day for miners.* Consider the gold-mining industry on the California-Nevada border. Mining is brutal work, so in 1909 the California legislature passed a statute<sup>8</sup> prohibiting work shifts longer than eight hours. While this statute may make sense in general, it does not optimally serve miners in San Bernardino County. Most miners there live far from the mines and must commute three hours a day on narrow, winding roads to get to work.

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<sup>8</sup>CAL. LAB. CODE § 750 (West 2009) states: "The period of employment shall not exceed eight hours within any twenty-four hours and the hours of employment shall be consecutive . . . for all persons who are employed or engaged in work in: (a) Underground mines or underground workings."

Because of the dangerous and tiring commute, they would prefer a shorter workweek with 12-hour shifts to a longer workweek with eight-hour shifts. In 1983, the legislature amended the statute to permit 12-hour shifts if agreed to in a collective-bargaining contract.<sup>9</sup> The unionized mines soon adopted 12-hour shifts, and the nonunion mines found themselves at a competitive disadvantage. After unsuccessfully petitioning the state labor agency for a waiver, they filed suit asking the federal court to strike down the more lenient treatment the statute gives for unionized mines. The district court held that the NLRA preempts the state double standard,<sup>10</sup> but the Ninth Circuit reversed and upheld the state statute allowing unionized mines to have 12-hour shifts while nonunion mines could have only 8-hour shifts.<sup>11</sup> In rejecting an equal protection challenge, the appellate court emphasized the greater bargaining power of unions, declaring that the legislature could rationally have believed that unionized workers have greater power to ensure safe working conditions than workers with individual employment agreements.

Four messages come from the example. First, one need not criticize the

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<sup>9</sup>CAL. LAB. CODE § 750.5 (West 2009): “The provisions of Section 750 shall not prohibit a period of employment up to 12 hours within a 24-hour period when the employer and a labor organization representing employees of the employer have entered into a valid collective-bargaining agreement where the agreement expressly provides for the wages, hours of work, and working conditions of the employees.” In 1995, the California legislature again amended the statute to allow an additional exception “when a 2/3 majority of the employees who work for a particular employer vote, in an election conducted at the expense of the employer pursuant to prescribed procedures, to adopt a policy that authorizes a regular workday of more than 8 hours in a 24-hour period.” CAL. LAB. CODE § 750(b) (West 2009).

<sup>10</sup>Viceroy Gold Corp. v. Aubry, 858 F. Supp. 1007 (N.D. Cal. 1994).

<sup>11</sup>Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 487 (9th Cir. 1995).

general law (here, the eight-hour shift rule) in order to see a valid role for union brokering of the law as applied in particular situations (here, to mines in a particular county with unique commuting patterns). Second, it illustrates that legislatures hesitate to allow individual workers to waive rights, for fear that their lack of bargaining power will force them to waive without any gain. Third, the example shows how unions can use legislative waivers to make unionized firms more competitive, benefiting their firms and their members. Finally, in this case the waiver was in the overall social interest as well as the union's interest, but this point needs to be examined for particular statutes.

*Example 2: Union or Individual Waiver of the Right to Court.* Title VII of the Civil Rights Act of 1964 was a landmark anti-discrimination statute, giving employees the right to go to federal court (after filing a charge with the Equal Employment Opportunity Commission) to complain of discrimination on the basis of race, color, sex, religion, or national origin. Title VII was the model for other antidiscrimination statutes protecting workers against, among other things, age and disability discrimination. The hallmark of these statutes was the right to haul the employer into federal court. Employers complained<sup>12</sup> as the number of discrimination claims skyrocketed.<sup>13</sup>

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<sup>12</sup> For a polemical example expounding the burdens of discrimination cases in court, see Walter Olson, *Disabling America*, NATIONAL REVIEW, May 5, 1997.

<sup>13</sup> See Kevin M. Clermont & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (documenting the rise in employment-discrimination cases to ten percent of the federal civil docket by 2000).

One response of employers to the burden of discrimination cases was to create mandatory arbitration procedures for these claims and have their employees waive the right to bring discrimination cases in court. As of 2009, both individual workers and unions on behalf of their workers can agree to arbitrate such claims rather than sue in court. The legal history is quite different, however.

Grievance arbitration, under which workers agree to arbitrate their grievances rather than strike or go to court, has been a central feature of unionized collective bargaining for at least fifty years. Discrimination claims, however, were an exception. In *Alexander v. Gardner-Denver*,<sup>14</sup> the Supreme Court held that workers had a right to go to federal court on a Title VII discrimination claim even if they had earlier gone to binding arbitration through the collective bargaining grievance-arbitration procedure. In essence, *Gardner-Denver* authorized “two bites at the apple.” The court returned to the question of whether unions can waive rights of individuals to pursue statutory claims in court in *Wright v. Universal Maritime Services Corp.*,<sup>15</sup> but the status of union waiver remained muddy until *14 Penn Plaza*. In that case, the Supreme Court held enforceable a collective bargaining agreement that all discrimination cases would be decided by arbitration rather than the courts. In short, today unions can waive the right to

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<sup>14</sup>415 U.S. 36 (1974).

<sup>15</sup>525 U.S. 70 (1998).

have discrimination claims heard in court.

Individual waiver of a judicial forum for discrimination claims was first sanctioned by the Supreme Court in 1991 in *Gilmer*,<sup>16</sup> where the Supreme Court first held that individual workers can bind themselves to arbitration of a discrimination claim. The Court distinguished *Gardner-Denver*, emphasizing that there is a “tension between collective representation and individual statutory rights”<sup>17</sup> that is not present when individuals agree to arbitration. More recently, in *Circuit City Stores, Inc. v. Adams*,<sup>18</sup> the Court clearly endorsed the power of individual employees to agree to arbitrate all disputes arising out of the workplace, holding that courts must enforce this promise to arbitrate. In essence, individual employees have a waivable right to a judicial forum to hear their employment claims.

Two sets of questions arise here, for individual waiver and union waiver: (1) Should individual workers want the power to waive a judicial forum for discrimination claims, and is it good public policy for individual workers to have this power; and (2) should unions want the power to waive a judicial forum for its members’ discrimination claims, and should their members and public policy want unions to have this power?

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<sup>16</sup>*Gilmer*, 500 U.S. 20.

<sup>17</sup>*Id.* at 22.

<sup>18</sup>532 U.S. 105 (2001).

On the first set of questions (individual waiver), it is hard to distinguish the question of whether individual workers want the power from whether it is good public policy. In either case, as we will see, the concern is that an individual worker has little bargaining power and may have limited information and cognitive biases that prevent an appropriate decision. On the second set of questions (union waiver), the union may want this power as another chip in its bargaining arsenal. On the other hand, as we will explore, unions may feel having the option to waive weakens their bargaining position. (It is worth pointing out that the union in *14 Penn Plaza* argued against letting the collective bargaining agreement waive a judicial forum.) But even if unions want this power, it may not be in all of their members' interest, particularly minority members who may more highly value the right to go to court with discrimination claims than most members who do not think much of this right. Unions have a long albeit complicated legacy of selling out the position of minority members. Finally, it is a distinctly third question whether public policy want union waiver in this context.

## II. The Mandatory Nature of Employee Rights

As Table 1 illustrates, a court or legislature makes two choices in deciding whether to create an employment right. First, should the entitlement go to the employer or worker? Second, should the entitlement-holder be allowed to waive the right, or conversely, is the right inalienable?

**Table 1**  
**Classification of Employment Rights**

	<b>Default/Waivable</b>	<b>Mandatory/Inalienable</b>
<b>Employee Rights</b>	<p><b>TYPE 1 examples</b>  <u>Individual Waivers</u>: ADEA claims ex post; judicial forum for resolving claims (<i>Circuit City</i> allows arbitration agreements); MEPA waiver of good cause for severance.  <u>Union waivers</u>: FLSA overtime, ERISA vesting, workers' compensation procedures.</p>	<p><b>TYPE 2 examples</b>            FLSA minimum wage; FLSA overtime premium; OSHA; ERISA vesting; Worker's Compensation; discharge in violation of public policy</p>
<b>Employer Rights</b>	<p><b>TYPE 3 examples</b>            Employment at will; workplace monitoring of employees; setting of wages, hours, terms, and conditions</p>	<p><b>TYPE 4 examples</b>            ??Refusing to hire workers who will be danger to others??</p>

A. Why Give Rights to Employees?

The background, or common-law, nineteenth-century laissez-faire employment law gave most rights to employers. For the last 100 years, workers have turned to the legislature to change the rules.<sup>19</sup> Employment laws often

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<sup>19</sup>A quick survey would show that workers' compensation programs for workplace injuries came first, in the first decades of the 20<sup>th</sup> century. The New Deal brought major additional programs, including the Social Security Act (originally covering retirement and later extended to cover disabled workers), the Fair Labor Standards Act (dealing with minimum wages and maximum hours), and the Unemployment Insurance Program. Since then, Congress has passed Title VII of the Civil Rights Act of 1964 (prohibiting race and sex discrimination in the workplace), the Age Discrimination in Employment Act in 1968, the Occupational Safety and Health Act (OSHA) in 1972, and the Employment Retirement Income Security Act (ERISA) in 1974. More recently, Congress has passed the Worker Adjustment and Retraining Notification Act in 1988 (requiring notice of plant closings), the Employee Polygraph Protection Act of 1988 (prohibiting employers from requiring employees to submit to lie detector tests except in limited situations), the Civil Rights Amendments of 1991 (clarifying the scope and expanding damages

impose substantial costs on employers, and employers have vociferously complained. Why are these laws enacted? There are various explanations.

The usual rationale is that employment laws further some public policy. Society does not like the results of the “unregulated” labor market and so it intervenes. Within the broad category of intervention in the name of public policy are two types of intervention. First, the legislature may think that market imperfections lead to inefficient results that need correcting. Second, the legislature may think the market reaches efficient but unfair results.

An example of the first type—intervening to improve the efficiency of labor markets—may be ERISA.<sup>20</sup> A competitive labor market may provide too few pensions, in the sense that most workers would prefer more of their compensation to be in the form of pensions than current wages. Employers in a competitive market, however, look at the behavior of persons just deciding whether or not to work in determining whether their pension package seems appropriate (e.g., firms look at whether employees are queuing up for this job or whether the job is difficult to fill). But these workers just deciding whether to work are often younger workers, who value pensions less highly than most

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for Title VII), the Americans with Disabilities Act, and the Family and Medical Leave Act of 1993 (requiring employers to grant workers 12 weeks of unpaid leave per year for illness or childbirth). In the last decade or two, state courts have increasingly scrutinized firings of employees by entertaining contract and tort based actions against wrongful discharge and have entertained privacy claims as well.

<sup>20</sup>See Richard Freeman, AEA Papers and Proceedings (around 1983).

workers. The older workers are trapped into their firms, however, and cannot easily signal their dissatisfaction with the level of pensions by quitting. To remedy this, Congress enacted ERISA to encourage a higher level of pensions.

Probably more employment legislation is enacted because the labor market is efficiently harsh rather than inefficient. Some of this is distributive; the goal is to favor some or all workers, regardless of whether the overall pie grows or shrinks.<sup>21</sup> The other purpose of this legislation is paternalistic. Even if workers are willing to trade safety for higher pay, for example, society is unwilling to allow it. The flip side of paternalism is that individuals believe they could make themselves better off with their individual bargains than the legislation. Measured in terms of willingness and ability to pay, the costs imposed by the legislation are greater than the benefits it provides. As I will try to show below, this means that people believe they can make themselves better off by rejecting the legislation.

Not all employment legislation is enacted with noble public policy as the goal, whether efficiency-enhancing or distributive. The public-choice theory of legislation emphasizes the coercive power of law and suggests that self-interested groups lobby for legislation that furthers their interests—rather than some larger public interest.<sup>22</sup> A favorite employment-law example of public-choice theorists is

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<sup>21</sup> See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000).

<sup>22</sup> See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT,

the minimum wage provision of the Fair Labor Standards Act.<sup>23</sup> Such legislation sets a floor on competition between workers for jobs. Although few union workers are directly affected by increases in the minimum wage, many empirical studies suggest that skilled or semi-skilled unionized workers are one of the prime beneficiaries of the minimum wage law, as the law prevents low-skilled workers from offering to work at a wage low enough to make them attractive compared to the higher-skilled and higher-priced workers.<sup>24</sup>

## B. Why Make Employee Rights Mandatory?

Having decided to intervene on behalf of employees, the second question is whether to make the rights inalienable. Inalienability of individual employment rights can be defended on a couple of grounds. First, some laws are enacted not to protect the affected workers but to protect others. Thus, the rights are forced on the affected workers regardless of what they individually want. The FLSA's wage and overtime provisions, for example, are sometimes explained as an attempt to prevent those workers who are willing to work long hours at low wages from

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LEGISLATION AND STATUTORY INTERPRETATION 85-90 (2000) (discussing "Public Choice Theory: Interest Groups as Pernicious Political Influences"); Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 229-32 (1986).

<sup>23</sup>29 U.S.C. § 206 (the basic minimum wage is currently \$7.25 an hour).

<sup>24</sup> See Richard v. Burkhauser, Kenneth A. Couch & David C. Wittenburg, *Who Minimum Wage Increases Bite: An Analysis Using Monthly Data from the SIPP and CPS*, 67 S. ECON. J. 16 (2000); Finis Welch, *Minimum Wage Legislation in the United States*, 12 ECON. INQUIRY 285 (1974). See generally DAVID CARD & ALAN B. KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF MINIMUM WAGE* (1997);

undercutting others.<sup>25</sup> If the law allowed workers to opt out, the others would be at a disadvantage. In a similar vein, suppose workers care about their relative income, not just how well off they are individually. In that case, if worker A agrees to work in a dangerous factory for an extra \$10,000, worker B is hurt in his relative income ranking. OSHA regulations mandating safety can prevent this prisoner's dilemma by mandating safe factories. Each worker prefers a safe factory to an unsafe factory but only if the other does not sell his safety for higher wages. If OSHA regulations were waivable, the rat race would continue.<sup>26</sup>

One problem with the preventing-undercutting or preventing-rat-races explanations of employment laws is that they ignore the global economy. State legislatures and the U.S. Congress have limited jurisdictions. They cannot directly prevent undercutting by workers in Panama or Hungary, although international labor standards treaties make efforts to prevent undercutting. More generally, the entire relative-preference framework may break down in a global economy. Perhaps workers in the same city or country worry about their relative standing, but it seems implausible that workers in Pittsburgh are harmed if workers in

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<sup>25</sup>See *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (“The first purpose was to prevent workers willing (maybe out of desperation . . .) To work abnormally long hours from taking jobs away from workers who prefer to work shorter hours. . . . The second purpose was to spread work and thereby reduce unemployment, by requiring the employer to pay a penalty for using fewer workers for the same amount of work as would be necessary if each worker worked a shorter week.”).

<sup>26</sup>See ROBERT FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985); Richard McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 21 (1992).

Hungary have an extra \$10,000.<sup>27</sup>

The mandatory nature of employment rights is usually defended on grounds that the affected workers need these rights to be inalienable.<sup>28</sup> It is often emphasized that individual employees have little bargaining power and so could not keep any waivable gains the legislature awards them. Second, in many situations an individual employee lacks the necessary information to make an informed choice on whether to waive an employment right. Sometimes the information rationale is strongly paternalistic.<sup>29</sup> Misguided workers do not know what is in their best interest and so will foolishly waive a protection if allowed to do so. In other cases, particularly situations where employment protections involve technical data (e.g., OSHA health rights) or rights stretching out for decades (e.g., pension rights), the information rationale is weakly paternalistic. In these situations, the argument for inalienability is that workers cannot process the information or intelligently assess the risks, but if they could, their decision would clearly be to demand the protection.

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<sup>27</sup>For a brief critique along these lines of the Frank-McAdams framework, see SAMUEL ESTREICHER & STEWART J. SCHWAB, FOUNDATIONS OF LABOR AND EMPLOYMENT LAW 210 (2000).

<sup>28</sup> See CASS R. SUNSTEIN & RICHARD H. THALER, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

<sup>29</sup> For a discussion of strong and weak paternalism, see Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. Chi L. Rev. 249, 249 (2006) (describing responses to cognitive error as consisting either of "weak paternalism, through debiasing and other strategies that leave people free to choose as they wish . . . [or] strong paternalism, which forecloses choice").

Behavioral decision theory provides additional reasons for making employee rights inalienable. Workers are often risk optimists, underestimating the dangers of their work and overestimating their own ability to avoid hazards.<sup>30</sup> People are particularly bad at accurately assessing low-probability events, which characterize many workplace risks (such as the risk of workplace fatalities or wrongful discharge). Workers are myopic and short-sighted and thus have particular difficulty assessing the value of far-off events like retirement pensions.<sup>31</sup> Workers may not believe a waiver is legally effective, so there is no harm in signing one.<sup>32</sup>

Perhaps the most stubborn reason against allowing workers to waive rights is the fear that workers will waive without getting anything in return—and thus the legislation is pointless.<sup>33</sup> For example, imagine a law that says a worker gets 15 days' vacation unless he or she waives the right. Before the law, employees had agreed to \$40,000 and 10 days' vacation. After the law, why won't the employer ask, and the employee agree, to initial a vacation-law waiver and then

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<sup>30</sup>See Sunstein, *supra* note 6, at n.91; Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NWU L. REV. 1165, 1166 (2002) ("virtually every scholar who has written on the application of psychological research on judgment and choice to law has concluded that cognitive psychology supports institutional constraint on individual choice.").

<sup>31</sup>See *id.* at n.94; Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275 (1991). Pensions article, University of Chicago Law Review.

<sup>32</sup>See Sunstein, *supra* note 6, at n.88; Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997); Pauline T. Kim, *Norms, Learning and Law: Exploring the Influence on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (1999).

<sup>33</sup>See Stewart J. Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 242 (1988) (describing how under standard law-and-economics theory an employment-contract presumption "influences neither efficiency nor distribution").

sign the same contract for \$40,000 and 10 days' vacation. Under this view, people's tastes, bargaining power, scarcity, and supply and demand affect outcomes. Only if the law can change these will waivable rights affect anything. Possibly the worker will hesitate to initial a waiver, worrying that the presumption reflects the clause that suits most people.<sup>34</sup> But people renting automobiles, for example, initial waivers all the time without much hesitation.

Policymakers are left with a tradeoff. If they are sure workers and the world are better off with their intervention, then rights can be made mandatory. But what if policymakers are less sure of the appropriate outcome, or recognize that they are subject to cognitive biases and other limitations of their own that sometimes make their policy prescriptions less than ideal.<sup>35</sup> Further, the appropriate outcome for some may not be the appropriate outcome for others, but legislators have difficulty creating laws tailored to individual situations. Indeed, rules (as opposed to standards) by definition apply broadly to many situations, not all of which benefit from the rule. If the overinclusive and underinclusive

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<sup>34</sup>See Schwab, *supra* note 22, at 260 (describing a "hesitation effect" of contract presumptions): Parties are often uncertain which clause will suit them best, particularly when the clause deals with remote contingencies. The parties may believe that contract presumptions reflect the standard, widely accepted solution to a contracting situation. . . . A nominal beneficiary, then, aware of his uncertainty about the value of various clauses, must be induced to take the risk that waiving the standard clause is in his interest. For this reason, beneficiaries will demand more when waiving an entitlement than they would pay to purchase the entitlement. If so, we should see that contract presumptions distribute wealth toward the beneficiary. standard clause is in his interest.

<sup>35</sup>For a description of the cognitive biases that can plague policymakers, see Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002).

problems of the rule are too great, policymakers may prefer a presumption, allowing parties to opt out if the policy is not appropriate for their circumstances. But as just discussed, allowing opt-outs may be no solution at all because workers will opt out (perhaps haphazardly or not in their true interest, if the cognitive biases are severe) with no change in the status quo.

### III. The Union as Broker

An intermediate solution exists to the dilemma of overly wooden mandates on the one hand and the fear of waiver by powerless, cognitively impaired individuals on the other. That solution is to create a right that is mandatory at the individual-worker level but allows workers collectively through the union to waive the protection in favor of other benefits.

The idea that unions can make their members better by brokering rights has two parts. First, the claim is that many employment laws are inefficient, at least as applied at the local level, in the sense that workers would prefer being directly paid the costs the law imposes on their employer to receiving the benefits the law gives them. Both employer and workers can share the gains from waiving inefficient laws. Second, by agreeing to waive a locally inefficient law, the union can make an intelligent choice and grab some of the surplus for its members and thereby make them better off than they would be under the mandatory law.

The first claim—that some employment laws are locally inefficient—strikes me as uncontroversial. No general law can be right for all situations, and neither a law professor nor legislators in Sacramento or Washington can tailor regulation to all situations. Unions, in negotiation with employers, may be the best institution to tailor these general laws to particular circumstances.

The second claim—that unions can benefit their workers from waiver—takes more argument. Part of the argument is that unions have bargaining power and will not be coerced into waiving rights without getting something in return. Even so, something about the legal presumption must increase the union’s bargaining power or else it could have bargained for the result in any event. But the give-and-take of collective bargaining is far different than the form contracts and shopping among job offers that characterize “bargaining” in the individual context. In collective bargaining, a presumption favoring the union could strengthen its negotiating posture even if the presumption is waivable. With the presumption favoring the union, management must raise the issue if it wants change. Speaking first often weakens one’s bargaining position.<sup>36</sup> The idea is that unions will broker rights while individual workers waive rights. Unions will keep the rights that workers value most highly and trade less-valued rights for other things.

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<sup>36</sup>For a discussion of how waivable presumptions can improve the bargaining power of unions, see Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987).

Additionally, unions have more information at their disposal and thus can make more informed decisions. Individual workers have great difficulty knowing about safety records, legal rights, and other items critical to deciding between job offers. Unions, with research departments at their disposal, do not suffer from lack of information to nearly the same degree.

Finally, to serve their workers effectively as a broker, the union must be able to avoid the cognitive limitations that make individual waiver so problematic. Why would one think that a union could avoid making the same kinds of erroneous judgments that their members might--after all, unions are composed of people too? Unions likely have a psychological perspective on workplace risk that differs from that of the individual in two ways: First, unions lack the personal investment in avoiding injury that seems to give rise to an excess of optimism. Unions thereby can see problems from an outsider's perspective, which can reduce cognitive errors in judgment.<sup>37</sup> Second, unions see workplace risk as a repeated issue that comes up in the aggregate case, not one case at a time. Psychologists have found that looking at problems in an aggregate, or frequentist perspective (e.g. 10 out of 100) can reduce the influence of some kinds of cognitive errors in judgment.<sup>38</sup> Unions have a broader perspective on the trade-

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<sup>37</sup> Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 *Management Science* 17, 29-30 (1995) ("we suggest that errors of intuitive prediction can sometimes be reduced by adopting an outside view . . . the adoption of an outside view, in which the problem at hand is treated as an instance of a broader category, will generally reduce the optimism bias and may facilitate the application of consistent risk policy.").

<sup>38</sup> Gerd Gigerenzer, *How to Make Cognitive Illusions Disappear: Beyond Heuristics and Biases*, 2

offs than do individual workers. Workers operate from the inside while unions can step back and take an outside view. In doing so, unions can avoid cognitive problems that arise from taking problems one at a time.<sup>39</sup>

#### IV. Existing Examples of Union Waiver of Worker Rights

In contrast to the harsh attitude employment law takes toward individual workers waiving rights, the law often allows unions to broker rights of their members. Union waiver of rights is simply not as suspect as waiver by individual workers. This power for unions to waive rights gives unions the potential role as broker of employment-law rights.

This section outlines various ways that current law allows unions to broker rights on behalf of members. The section's overall purpose is to show that "union as broker" is not a wild-eyed dream but a currently available role for unions. The section has three parts. First, I review the principles underlying union waiver of labor-law rights. Second, I review § 301 preemption. Finally, I scan the broad array of other employment laws in which unions currently can act as brokers—ranging from ERISA and FLSA to state wage law.

Previous commentators have analyzed most extensively union waiver of

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European J. Soc. Psychol. 83 (1991).

<sup>39</sup>For a discussion of the insider-outsider distinction as it applies to appellate review of judges and juries, see Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 99–101 (2000).

labor law rights, as distinct from employment rights—that is, the waiver of rights of workers to form unions, strike, and bargain collectively.<sup>40</sup> More recently, commentators have analyzed § 301 preemption,<sup>41</sup> whereby workers with rights under a collective bargaining agreement enforceable under federal law may be preempted from bringing similar claims under state law. Largely uncharted in the academic literature is the degree to which employment rights by their own terms apply differently to unionized workers.

#### A. Union Waiver of Labor-Law Rights

A prime purpose behind the National Labor Relations Act (NLRA) of 1935 was to increase the bargaining power of workers through collective action.<sup>42</sup> Individual workers, it was thought, had no strength to resist employer demands and would be coerced into relinquishing, in the name of freedom of contract, any

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<sup>40</sup>See Brosseau, *Toward A Theory of Rights For the Employment Relation*, 56 WASH. L. REV. 1 (1980); Michael C. Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L.J. 335 (1981); Michael C. Harper, *Union Waiver of Employee Rights Under the NLRA: Part II A Fresh Approach to Board Deferral to Arbitration*, 4 INDUS. REL. L.J. 680 (1981); Timothy G. Westman, Note, *Contractual Waiver by Labor Unions of Employees' Solicitation-Distribution Rights: Time For a Resolution*, 49 NOTRE DAME LAW. 920 (1974); Note, *Employees' Solicitation-Distribution Rights Supersede Contract Waiver*, 26 U. FLA. L. REV. 908 (1974).

<sup>41</sup>See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992).

<sup>42</sup>Section 1 of the NLRA declares: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions . . . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . by restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151 (originally enacted 1935).

putative rights the law might give them. As Senator Wagner, chief sponsor of the Wagner Act, put it:

We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively . . . is a veritable charter of freedom of contract; without it there would be slavery by contract.<sup>43</sup>

In the early days of the NLRA, the Board and courts made clear that individual workers could not waive certain basic rights the Act gave them.<sup>44</sup> Thus the infamous "yellow dog" contracts—whereby individual workers promised never to join a union—were held to be unenforceable and an unfair labor practice.<sup>45</sup> Individual contracts regulating how workers would select a union were likewise held void because they differed from the Act's procedures.<sup>46</sup> Nor can individual workers (or the union) waive their § 8(a)(4) right to file charges before

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<sup>43</sup>78 Cong. Rec. 3679 (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 20.

<sup>44</sup>See Peter Phillips, Comment, *The Contractual Waiver of Individual Rights Under the National Labor Relations Act*, 31 N.Y.L. SCH. L. REV. 793, 807–09.

<sup>45</sup>Atlas Bag & Burlap Co., 1 N.L.R.B. 292 (1936) (yellow-dog contracts interfere with § 7 right to organize). See also *Fanny Farmer Candy Shops, Inc.*, 10 N.L.R.B. 288, 306 (1938) (yellow-dog contracts are "invalid and of no effect").

<sup>46</sup>*R.C.A. Mfg. Co.*, 2 N.L.R.B. 159, 178 (1937) ("the Board's power is an exclusive one and not in any way dependent upon, or affected by . . . agreements between private parties").

the Board without retaliation.<sup>47</sup>

In contrast to the prohibition against individual workers contracting away their labor-law rights, the NLRA readily countenances waiver by unions. In the Supreme Court's words, the Act "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."<sup>48</sup> Justice Black, dissenting, bemoaned that allowing union waiver means that "by joining a union an employee gives up or waives some of his § 7 rights."<sup>49</sup>

Unions routinely bargain away labor-law rights of their members, both when negotiating contracts and processing individual grievances.<sup>50</sup> Indeed, unions treat rights that are central to labor law simply as bargaining chips to be traded for employer concessions on other issues.<sup>51</sup> The clearest example is the typical no-

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<sup>47</sup>Ingram Mfg. Co., 5 N.L.R.B. 908 (1938).

<sup>48</sup>NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

<sup>49</sup>*Allis-Chalmers*, 388 U.S. at 200 (Black, J., dissenting).

<sup>50</sup>See *International News Service Div.*, 113 N.L.R.B. 1067, 1070 (1955) ("The Board has said repeatedly that statutory rights may be waived by collective bargaining."); *American Freight Sys., Inc. v. NLRB*, 722 F.2d 828, 832 (D.C. Cir. 1983) ("It is well settled that a union may lawfully waive statutory rights of represented employees in a collective bargaining agreement.").

<sup>51</sup>As one student commentator aptly summarized the waiver doctrine, "[t]he Supreme Court has interpreted the 'NLRA] in such a way as to make inviolable only a limited few of the rights granted therein. . . . Other rights are not, in this sense, treated as 'rights,' but rather as 'bargaining chips,' which have been granted to labor upon its being organized, and which may (and in the Court's view were *intended* to be) bargained away in exchange for employer 'concessions' during contract negotiations." Note, *The Contractual Waiver of Individual Rights Under the National Labor Relations Act*, 31 N.Y.U. L. REV. 793, 846 (1986) (emphasis in original). *But cf.* Risa L. Lieberwitz, *Waivers of Rights under the National Labor Relations Act: Shifting Standards*, (draft Nov. 3, 1987) (indicating that the NLRB's loosening of waiver standards contravenes the board's function in promoting the public interest).

strike clause in a collective bargaining contract. At the heart of the National Labor Relations Act is its protection of the right of workers to strike. Section 8(a)(1) of the Act makes firing workers for striking an unfair labor practice<sup>52</sup> and § 13 specifically declares that "nothing in this act shall be construed as to diminish in any way the right to strike."<sup>53</sup> Nonetheless, unions routinely waive the right of their members to strike,<sup>54</sup> sometimes even waiving the right to strike in protest of employer unfair labor practices.<sup>55</sup> We think nothing of this waiver; indeed, much of federal labor law is designed to encourage unions to waive the right to strike.<sup>56</sup>

Besides the right to strike, unions routinely waive other labor-law rights.

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<sup>52</sup>Although employers may not fire lawfully striking workers, they can permanently replace workers on an economic strike, a rather fine distinction in the eyes of many workers. For an excellent discussion of the permanent-replacement issue, see Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577 (1994).

<sup>53</sup>29 U.S.C. § 163 (1988).

<sup>54</sup>*See* NLRB v. Rockaway News Supply Co., 345 U.S. 71, 79–80 (1953) (upholding discharge of union member who engaged in sympathy strike in violation of no-strike clause); Teamsters Local 174 v. Lucas Flour, 369 U.S. 95 (1962) (right to strike implicitly waived by arbitration clause in collective bargaining agreement); Metropolitan Edison v. NLRB, 460 U.S. 693 (1983) (rejecting union's argument that right to strike may not be waived where employer had imposed sanctions on union leaders after a sympathy strike, but finding no valid waiver because the general no-strike clause in the contract did not indicate "clear and unmistakable" waiver); International Brotherhood of Electrical Workers, Local 803 v. NLRB, 826 F.2d 1283 (3d Cir. 1987) (holding that the right to engage in a sympathy strike was waived by a general no-strike clause in a collective bargaining agreement). Dicta in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) indicate that the right to strike may only be waived if the waiver does not interfere with free selection of a bargaining representative. "Provided the selection of the bargaining representative remains free, such waivers contribute to the normal flow of commerce. . . ." *Id.* at 280.

<sup>55</sup>*See, e.g.*, Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 727–28 (D.C. Cir. 1990) (holding that unfair labor practice strikes are waivable, since "merely bargaining away the right to strike does not impermissibly infringe the 'full freedom of association'").

<sup>56</sup>*See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) ("Congress [in enacting the Labor Management Relations Act of 1947] was also interested in promoting collective bargaining that ended with agreements not to strike").

Most important is the very right to bargain collectively.<sup>57</sup> The mere existence of a certified union denies workers the right to bargain collectively with their employer in any other group, without any formal waiver of bargaining rights. An employer that bargains with any other group commits an unfair labor practice.<sup>58</sup> Further, a union often waives its own right to bargain during the term of a collective bargaining agreement through express "zipper" clauses" or "management rights" clauses, through bargaining history or through inaction.<sup>59</sup>

A more esoteric waiver of rights occurs when unions waive their members' *Weingarten* rights. In *NLRB v. Weingarten*,<sup>60</sup> the Supreme Court held that the NLRA granted employees the right to have a union representative present during

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<sup>57</sup>Note that waivability of NLRA rights has been affected in various ways by other doctrines. For example, waiver of the § 8(a)(5) right to bargain must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (general no-strike clause did not waive right to engage in a sympathy strike, since waiver was not "clear and unmistakable"); *Tocco Div. of Park-Ohio Industries v. NLRB*, 702 F.2d 624 (6th Cir. 1983) (purported waiver of right to bargain over work transfers did not meet "clear and unmistakable" test). But see *International Brotherhood of Electrical Workers, Local 803 v. NLRB*, 826 F.2d 1283 (3d Cir. 1987) (holding that the right to engage in a sympathy strike was waived by a general no-strike clause). Finally, courts have limited waiver through contract interpretation. *See, e.g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281 (1956) (holding that a broad no-strike provision in a collective bargaining agreement did not preclude a strike protesting unfair labor practices by employer, since the "contract, as a whole," spoke only to the economic relationship between the employer and employees).

<sup>58</sup>*Medo Photo Supply Co. v. NLRB*, 321 U.S. 678 (1944); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (affirming that once an exclusive bargaining representative is designated, attempts to compel separate bargaining are not protected by § 7 of the NLRA).

<sup>59</sup>*See* *Federal Labor Relations Authority v. Internal Revenue Service*, 838 F.2d 567, 568 (D.C. Cir. 1988) ("there are literally scores of cases ... holding that a union may waive its right to bargain during the term of an agreement"); *Electrical Workers Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986) (where employer unilaterally terminated annual bonus, holding that union waived right to bargain over termination of annual bonus by signing a "zipper clause"); *see generally* PATRICK HARDIN, *THE DEVELOPING LABOR LAW* 699–710 (3d. ed. 1992).

<sup>60</sup>420 U.S. 251 (1975).

interrogations they reasonably believe may result in discipline.<sup>61</sup> After some confusion,<sup>62</sup> it is now clear that a union can waive this right in a collective bargaining agreement.<sup>63</sup> Interestingly, for a time the Board held that nonunion employees likewise were entitled to have a coworker present at a disciplinary interview,<sup>64</sup> and even today nonunion workers cannot be disciplined for requesting the presence of a coworker.<sup>65</sup> Nonunion workers probably could not waive their rights in advance, at least without an extremely detailed employment contract which is unheard of in the nonunion setting. This was an example, then, where unions could waive a right that nonunion employees could not waive. An employer who felt strongly about conducting disciplinary interviews in private would have been better off with a unionized workforce that could put such a waiver into a collective bargaining contract.

In addition to bargaining away rights during contract negotiations, unions

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<sup>61</sup>NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) (affirming that employer's denial of employee's request for a union representative during interrogation regarding alleged violations of company rules was an unfair labor practice).

<sup>62</sup>Justice Powell, dissenting in *Weingarten*, speculated whether unions could waive the new-found right. 420 U.S. at 275 n.8.

<sup>63</sup>Prudential Insurance Co., 275 N.L.R.B. 208 (1985); see generally Charles Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1 (1977).

<sup>64</sup>Materials Research Corp., 262 N.L.R.B. 1010 (1982), overruled in *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985) (reasoning that *Weingarten* right is organizational right not available to unorganized employees). For a discussion of the difficulties the Board has had with *Weingarten* rights in the nonunion sector, see PATRICK HARDIN, 1 THE DEVELOPING LABOR LAW 152-55 (3d ed. 1992).

<sup>65</sup>Chromally Am. Corp., L.A. Water Treatment Div., 263 N.L.R.B. 244 (1982). It appears the worker may legally be fired for requesting an attorney rather than a coworker, however, for that would not be concerted activity. See *TCC Center Cos.*, 275 N.L.R.B. 604 (1985).

waive rights when processing grievances<sup>66</sup> or settling unfair labor practice charges. Courts sometimes acknowledge openly that they tolerate union settlements more readily than when individual workers settle cases. For example, in *Oil, Chemical and Atomic Workers v. NLRB*,<sup>67</sup> a union filed unfair labor practice charges after workers were permanently replaced when they stopped work to protest unsafe working conditions. The NLRB eventually approved settlements between the employer and individual employees whereby the employees received small cash payments but waived all legal claims including any right to reinstatement. Upon the union's petition for review, the court of appeals reversed the Board's approval of individual settlements.<sup>68</sup> In an opinion by Judge Harry Edwards, a former labor law professor, the court recognized that the Board often encourages settlements between a union and the employer as furthering the collective bargaining and arbitration process.<sup>69</sup> No such collective policy was furthered, however, when an individual employer settled unfair labor practice complaints with individual workers. The court remanded for further reasons why the Board should approve individual settlements.<sup>70</sup>

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<sup>66</sup>Under the *Spielberg* doctrine, the NLRB will grant deference to an arbitrator's decision even if the facts support labor-law as well as contractual claims. Under the *Collyer* doctrine, the Board will grant a deferment on unfair labor practice charges until grievance arbitration remedies are exhausted. In either situation the union by processing or settling the contractual claim may in effect waive legal rights. See Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 27–32, 36–40 (1985). See generally Michael C. Harper, *Union Waiver of Employee Rights Under the NLRA: Part II*, 4 INDUS. REL. L.J. 680 (1981) (arguing for limits on deferral).

<sup>67</sup>806 F.2d 269 (D.C. Cir. 1986).

<sup>68</sup>*Id.* at 270.

<sup>69</sup>*Id.* at 273.

<sup>70</sup>*Id.* at 274.

Not all labor-law rights are waivable by unions. Unions cannot waive the rights of members freely to discuss and choose their representative.<sup>71</sup> At a basic level, this means sensibly that a union cannot lock itself in as representative by waiving the right of workers to vote for another or no union. At a practical level, much of the litigation turns on whether the union can validly waive the rights of members to distribute union literature at work.<sup>72</sup> Nor can a union waive statutory rights that benefit third parties, such as the Act's prohibitions on hot-cargo agreements and secondary boycotts, on closed shops, and on hiring halls that favor union members.<sup>73</sup>

It is hard to articulate an overarching principle governing when a union can waive labor-law rights. The Supreme Court has declared that "individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation."<sup>74</sup> Some commentators have argued that unions can

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<sup>71</sup> 29 U.S.C.A. §§ 151, 157.

<sup>72</sup>The leading case is *NLRB v. Magnavox*, 415 U.S. 322 (1974), which held that a union could not waive the right of workers to distribute union literature in non-working areas during non-working times. The court declared the distribution right was part of an inalienable right of workers to choose "to have a bargaining representative, or to retain the present one, or to obtain a new one." *Id.* at 325. *Magnavox* allowed waivers that furthered production or discipline. *See, e.g.*, *Manchester Health Center, Inc. v. NLRB*, 861 F.2d 50 (2d Cir. 1988) (upholding under the *Magnavox* exception a union promise that prohibited workers from discussing union-related topics in a hospital patient area or during work time).

<sup>73</sup>*See* *Plumbers & Pipefitters Local Union 520 v. NLRB*, 955 F.2d 744 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 61 (1992) (Edwards, J.).

<sup>74</sup>*Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983) (analyzing whether a union could agree to harsher discipline for union leaders than rank-and-file who participate in wildcat strikes).

waive collective rights but not individual participatory rights.<sup>75</sup> Thus, certain rights relating to the choice or rejection of a collective bargaining representative may not be waived by a union. Similarly, the Supreme Court has noted that unions may not waive "the employees' statutory right to choose a new, or to have no, bargaining representative."<sup>76</sup> Professor Michael Harper argues that *Magnavox* signals a broader non-waiver principle that insulates from union bargaining several rights connected with promoting a union or promoting better terms and conditions of employment.<sup>77</sup>

Whatever the specific line between waivable and inalienable NLRA rights, three lessons are clear. First, labor policy encourages unions to waive rights, even "fundamental" rights like the right to strike. Second, the basic reason for accepting union waiver is that unions have the bargaining power that individual workers lack. Third, labor policy becomes skittish about union waiver when the union waives rights important for the democratic nature of the union, particularly the right of dissidents to challenge union leadership.

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<sup>75</sup>For example, Professor Robert Brousseau, *Toward a Theory of Rights for the Employment Relation*, 56 WASH. L. REV. 1 (1980), indicates that NLRA rights are not waivable if they are "participatory" rights, i.e. democratic rights to participate in the formation, administration, or dissolution of a union. "Collective rights" such as the right to strike are waivable.

<sup>76</sup>*Emporium Capwell*, 420 U.S. 50, 64 n.14 (citing *Magnavox*).

<sup>77</sup>Harper's non-waiver principle insulates, specifically, the right "to communicate with each other concerning the identity and strategies of their bargaining agent; to communicate with their employer concerning the identity of their bargaining agent; to associate with, lead, or support a bargaining agent; to act to achieve employer recognition and acceptance of a bargaining agent; to act to obtain better terms and conditions of employment from sources outside a bargaining relationship; to assist individuals outside the protected employees' bargaining unit; and to act to protect or to rectify the denial of other non-waivable rights." Harper, *supra* note \_\_\_\_, at 388.

Unions should package their waiver power as a "win-win" situation for the unionized workplace. The average worker benefits from waiver because the union will not waive rights without something in return. Employers benefit because worker demands and complaints are centralized and filtered through the union. The mere existence of a majority union prevents bargaining with splinter groups of workers. By contract, the union can waive other labor-law rights, the most important being the right to strike, the right to bargain continuously over mandatory subjects, and the right to route unfair labor practice complaints to the Board rather than through private arbitration.

#### B. Section 301 Preemption of Unionized Workers' Employment Rights

One of the fastest growing areas of employment law involves privacy and wrongful discharge. Nonunion employees can often challenge their dismissal as violating public policy, a covenant of good faith, or an implied or express contract.<sup>78</sup> Employees accuse their employers of invading their privacy when administering drug or honesty tests and of inflicting emotional distress in any

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<sup>78</sup> See David H. Autor, John J. Donohue III & Stewart J. Schwab, *The Costs of Wrongful-Discharge Laws*, 88 REV. ECON. & STAT. 211 (2006); RESTATEMENT (THIRD) OF EMPLOYMENT LAW ch. 4 (Proposed Draft 2009) (public policy); RESTATEMENT (THIRD) OF EMPLOYMENT LAW ch. 2 (Proposed Draft 2009) (implied contracts); RESTATEMENT (THIRD) OF EMPLOYMENT LAW §2.06 (Proposed Draft 2009) (implied duty of good faith and fair dealing).

number of ways.<sup>79</sup> Fending off these claims, many of them accompanied by the threat of punitive damages, is a major preoccupation of management-side lawyers.

A union can help employers here by channeling many of these claims into the grievance/arbitration system. Remedies under arbitration are typically limited to reinstatement with back pay. Such channeling would be of little aid if unionized workers could bypass the system by bringing their individual tort, contract, or privacy claims in state court. Then, a unionized employer might have the worst of both worlds: numerous small claims in the grievance arbitration system plus the threat of major claims in court. But a union can credibly assure employers that, once a collective bargaining contract is in place, workers will be legally preempted from bringing many of these claims.

The preemption comes from § 301(a) of the Labor-Management Relations Act, which gives the federal courts jurisdiction to enforce collective bargaining agreements.<sup>80</sup> The Supreme Court has held that the LMRA requires a uniform body of federal common law to govern § 301 cases.<sup>81</sup> State-law claims that would

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<sup>79</sup> See Steven L. Willborn et al., *Employment Law: Cases and Materials* 158-69, 281-303 (4<sup>th</sup> ed. 2007)

<sup>80</sup>29 U.S.C. § 1985(a) (1988) ("[s]uits for violation of [a collective bargaining agreement] may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties").

<sup>81</sup>*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) ("the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws"); *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (holding that state courts must use federal § 301 law when deciding cases involving collective bargaining agreements).

upset the uniformity of interpreting collective bargaining agreements must be preempted. Section 301 preemption has spawned a huge amount of case law and commentary. My goal here is not to survey all the issues but rather to focus on the specific question of when state-law claims by individual workers can be preempted by the collective-bargaining contract.<sup>82</sup> Many commentators view such preemption as unfair to unionized workers, but the union as broker has an opportunity to turn this preemption into an organizing advantage.

Supreme Court preemption doctrine tries to channel many state tort and contract claims into the collective bargaining arbitration process. A leading case is *Allis-Chalmers Corp. v. Lueck*,<sup>83</sup> where the Court required preemption of state claims where "resolution of the state-law claim is substantially dependent upon analysis of the terms of [a collective bargaining agreement]."<sup>84</sup> Lueck's collective bargaining agreement had a disability plan. Lueck went on disability for a back problem but complained that his employer and the insurance company harassed him by interrupting the disability payments in bad faith. Lueck filed a tort suit in state court for bad faith, seeking compensatory and punitive damages. The

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<sup>82</sup>For excellent general discussions, see generally Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992) (charting the development and status of § 301 preemption law and concluding that preemption doctrine is overly broad); Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for Lingle and Lueck*, 66 CHI.-KENT L. REV. 685 (1992) (analyzing § 301 doctrine and arguing that courts should use § 301 to protect collective agreements from state intrusion rather than to deny rights of action to union members).

<sup>83</sup>471 U.S. 202 (1985).

<sup>84</sup>471 U.S. at 220.

Supreme Court held the tort claim to be preempted, reasoning that the bad-faith claim depended on whether the collective bargaining agreement called for timely disability payments, which was a matter of federal contract interpretation.<sup>85</sup> The Court emphasized that permitting the action would deprive the parties of their right to have disputes resolved through grievance arbitration.<sup>86</sup>

Section 301 does not preempt all state claims with fact patterns amenable to arbitration, as the Supreme Court made clear in *Lingle v. Norge Division*.<sup>87</sup> Lingle, working under a collective bargaining contract that protected her against being fired without just cause, was fired after she filed a workers' compensation claim. The union filed a grievance on her behalf, and ultimately the arbitrator ordered reinstatement with back pay. Meanwhile, Lingle filed a tort suit in Illinois state court for retaliatory discharge.<sup>88</sup> The Supreme Court held the claim was not preempted by § 301 even though the state court must analyze the same facts as the arbitrator. Rather, the issue is whether the state claim is "independent" of the collective-bargaining agreement in that it "can be resolved without interpreting the agreement itself."<sup>89</sup>

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<sup>85</sup> *Id.* at 215.

<sup>86</sup> *Id.* at 219.

<sup>87</sup> 486 U.S. 399 (1988).

<sup>88</sup> Illinois was a leader in creating this type of tort of wrongful discharge against public policy-- firing an employee for exercising a statutory right. *See Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978).

<sup>89</sup> 486 U.S. at 410. While *Lingle* allowed the state-court claim to proceed while *Lueck* held the claim preempted, some commentators fear the *Lingle* test will cause greater preemption of state claims in the future. *See Stone, supra* note 28, at 604 (citing Stephanie R. Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 YALE

The employee in *Lingle* had argued a more expansive theory of preemption that, if accepted, would have eliminated the union as broker under § 301. The employee had emphasized that, under Illinois law, the right to be free from retaliatory discharge is nonnegotiable and applies to union and nonunion workers alike.<sup>90</sup> The employee argued that nonnegotiability by individuals should by itself mean that the state right could not be preempted by a collective bargaining contract. If so, a union could never agree that its workers would bring claims only through grievance/arbitration. The Court rejected this analysis, however, declaring that neither nonnegotiable rights nor rights given to all state workers would ensure nonpreemption.<sup>91</sup> Further, the Court emphasized that union waiver of individual, nonpreempted state law rights was a separate issue from § 301 preemption and left open the possibility of such union waiver if it were "clear and unmistakable."<sup>92</sup> Thus, the Court recognized that unions might want to waive state-law claims of individual workers and refused to strike down that power.

The issue whether unions could ever waive state-law rights was touched

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L.J. 209, 210 (1989)). The fear is that the test for preemption articulated in *Lingle*, asking whether the state claim must interpret the collective bargaining agreement, will be met more often than the *Lueck* test, which asked whether the state claim was "substantially dependent" upon the collective bargaining agreement.

<sup>90</sup>486 U.S. at 407 n.7.

<sup>91</sup>*Id.*.

<sup>92</sup>*Id.* at 410 n.9 (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)).

on in a later Supreme Court case on § 301 preemption, *Livadas v. Bradshaw*.<sup>93</sup> After Livadas, a unionized worker, was fired, she demanded that she be immediately paid the wages owed her, as guaranteed to all California workers by state law. Her store manager refused to pay immediately, however, saying company policy required that the last paycheck be mailed from the central office. Livadas complained to the California Labor Commissioner but the agency refused to process her complaint because she was covered by a collective bargaining agreement with an arbitration clause. She sued the Labor Commissioner, complaining that this policy against pursuing state-law claims of unionized workers was preempted as interfering with the federal right to bargain collectively. The Supreme Court agreed with the employee and held that the Commissioner could not refuse to vindicate unionized workers' state-law claim to prompt payment of wages simply because they worked under a collective bargaining agreement.<sup>94</sup>

Most importantly for us, however, was that the Supreme Court made clear that state statutes creating employment rights could have opt-out provisions for unionized workers.<sup>95</sup> Several amici had emphasized the broad array of state and federal laws that allow unions to waive protection for their members.<sup>96</sup> The Court distinguished those statutes in that, in *Livadas*, there was no evidence that the

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<sup>93</sup> 512 U.S. 107 (1994).

<sup>94</sup> *Id.* at 110.

<sup>95</sup> *Id.* at 131–32.

<sup>96</sup> *Id.* at 131.

union had waived any state-law rights.<sup>97</sup> Merely having a collective bargaining agreement with an arbitration procedure is insufficient to infer a waiver.

The AFL-CIO argued for this distinction between state laws that allow unions to opt out and state laws that mandate a right only for nonunion workers. In the *Livadas* case, the AFL-CIO urged a narrow holding, cautioning that "courts have just begun to consider preemption challenges raised in relation to state minimum standard laws that distinguish between unionized and nonunionized workplaces."<sup>98</sup> Still, the AFL-CIO suggested it would support a "nuanced" state law that allowed unionized workers to opt out if they bargained for "similar but not necessarily identical protections,"<sup>99</sup> even though it was arguing for preemption of the California policy against processing wage-payment claims of unionized workers.

Thus, courts probably would uphold a union agreement that specific state-law claims would be exclusively handled through arbitration. Whether a general waiver of state-law claims would be upheld remains less clear. Some courts have gone a long way towards preempting state-law claims based on general or boilerplate language. In *Jackson v. Liquid Carbonic Corp.*,<sup>100</sup> for example, an employee was terminated after failing an employer drug test. He sued in state

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<sup>97</sup> *Id.*

<sup>98</sup> Brief of the AFL-CIO as amicus at 29.

<sup>99</sup> AFL-CIO brief at 29 n.16.

<sup>100</sup> 863 F.2d 111 (1st Cir. 1988).

court for violation of the state constitutional right to privacy and a state privacy statute. The First Circuit held that § 301 preempted the state-law claims.<sup>101</sup> The collective bargaining agreement had a general clause giving management the right "to post reasonable rules and regulations from time to time."<sup>102</sup> Because this clause might give the employer the right to institute a drug test, the court would have to interpret the agreement in judging the state-law claim, something that § 301 forbids. In an even more sweeping preemption analysis, the Ninth Circuit in *Schlacter-Jones v. General Telephone of California*<sup>103</sup> preempted another state-law claim of improper drug testing without pointing to any express language in the collective bargaining agreement. The court reasoned that drug testing was a working condition, and a collective bargaining contract generally governs working conditions. In fact, the court declared it would preempt the state-law claim whether or not the agreement specifically discussed drug testing. Whether a state could prohibit a union from waiving state-law rights may also be problematic.<sup>104</sup>

Unions should want preemption of state-law claims based on specific language in the collective bargaining agreement. Presumably they can bargain for

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<sup>101</sup> *Id.* at 112.

<sup>102</sup> *Id.* at 113.

<sup>103</sup> 936 F.2d 435 (9th Cir. 1991).

<sup>104</sup> State law can mandate certain terms that a union contract could not write around. As the Court stated in *Allis-Chalmers Corp. v. Lueck*, "[c]learly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." 471 U.S. at 212.

language that optimally serves their workers. Broader preemption based on the mere existence of a collective bargaining agreement is more dangerous for unions. First, it is unclear whether a union could bargain for specific language allowing workers the right to pursue state-law claims in court. Second, without bargaining it is unclear the union received anything for the more restrictive state-law rights afforded union workers.

This is not the place to survey the many lower-court decisions on § 301 preemption of state-law claims of individual workers. Professor Stone has done just that<sup>105</sup> and concludes that preemption is widespread and growing. Almost all contract-based state-law claims are preempted, including claims for breach of the covenant of good faith and fair dealing, implied-in-fact contracts, and other promises to individual employees. But the line is not simply one between tort and contract, for § 301 preempts many tort claims as well. Tort claims for wrongful discharge in violation of public policy are generally preempted, says Professor Stone, as are unlawful drug testing claims, defamation claims, and claims concerning the mishandling of health insurance or medical leave. More uncertain are complaints of intentional infliction of emotional distress or claims of discharge as a whistleblower. Finally, a few categories of state-law claims that closely track the facts of Supreme Court cases will not be preempted. These include claims of retaliatory discharge for filing a workers' compensation

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<sup>105</sup>Stone, *supra* note 28.

claim,<sup>106</sup> claims of breach of promises made before the employee entered the bargaining unit,<sup>107</sup> and claims of discrimination on the basis of race, age, gender, or some other protected status.<sup>108</sup>

### C. Union Waiver of Employment-Law Rights

Section 301 is not the only way that employment rights apply differently to unionized workers. Many employment laws, both federal and state, by their express terms apply differently to unionized workforces. Others allow unions to opt out or alter the general protections given workers. This section cannot catalogue all the state and federal employment laws with this feature. Rather, the goal here is to highlight important opportunities for union brokering and also describe a few esoteric laws to give a sense of the dazzling variety of employment laws where union brokering can occur. The unifying theme in these union-waiver provisions is the legislative belief that unionized workforces do not need the protections afforded weaker, nonunion workers.

### ERISA: The Employee Retirement Income Security Act (ERISA) of

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<sup>106</sup>Following *Lingle v. Norge Div. Of Magic Chef, Inc.*, 486 U.S. 399 (1988).

<sup>107</sup>Following *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (no removal jurisdiction under § 301 when employees alleged breach of a contract signed before they were in the bargaining unit or covered by a collective bargaining agreement).

<sup>108</sup>Following *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (§ 301 does not preempt unionized employee from bringing federal Title VII claim for race discrimination).

1974<sup>109</sup> is a complex statute regulating employer- and union-provided pension and other benefit plans. One goal of ERISA is to encourage employers to extend benefits beyond top employees to contingent or lower-paid workers. The pension vesting requirements are a major way that ERISA attempts to protect workers who do not spend a career with a single employer.<sup>110</sup> ERISA requires that pension benefits completely vest (i.e., become non-forfeitable) after five years of service.<sup>111</sup> Compared to the lengthy requirements typical before ERISA, five-year vesting ensures that transient workers can retain pension benefits.

Some unionized workers, however, are subject to less protective ten-year vesting requirements. In a provision added in 1986,<sup>112</sup> ERISA allows a multi-employer plan established by one or more collective bargaining agreements to

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<sup>109</sup>29 U.S.C. §§ 1001–1461.

<sup>110</sup>Congress intended the vesting requirements "to broaden the number of employees who are eligible to participate in their employer's pension plan," and "to reduce the loss of pension rights by employees who terminate their employment prior to retirement age." 1974 U.S.C.C.A.N. 5,177, 5,178 (statement of Sen. Williams regarding conference report on ERISA). When Congress shortened the vesting period in 1986, the Senate Report explained that "present law does not meet the needs of many workers who change jobs frequently. In particular, women and minorities are disadvantaged by the present rules because they tend to be more mobile and thus more likely to terminate employment before vesting .... [M]ore rapid vesting would enhance the retirement income security of low- and middle-income employees." S. Rep. No. 313, 99th Cong., 2d Sess. 589-91 (1973) (Finance Committee report regarding Tax Reform Act of 1986).

<sup>111</sup>ERISA § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A). The five-year requirement is cliff vesting, whereby the plan can completely forfeit pension benefits for an employee who leaves before five years of service. Alternatively, the plan can delay 100 percent vesting until seven years by following an ERISA schedule of partial vesting that begins with 20% vesting after three years. ERISA § 203(a)(2)(B), 29 U.S.C. § 1053(a)(2)(B).

<sup>112</sup>When enacted in 1974, ERISA mandated ten-year cliff vesting or graduated vesting schedules ranging from five to fifteen years. Employee Retirement Income Security Act of 1974, ch. \_\_\_\_, 88 Stat. \_\_\_\_, 854-55 (1974). In 1986, Congress reduced the minimum vesting standards to allow a choice between five-year cliff vesting and three to seven-year graduated vesting. At this time, Congress created a special provision allowing ten-year cliff vesting for multiemployer plans created by a collective bargaining agreement. Tax Reform Act of 1986, ch. \_\_\_\_, § 1113, 100 Stat. 2, 446-47 (1986).

have ten-year cliff vesting,<sup>113</sup> meaning that a worker can be required to wait ten years before earning any non-forfeitable pension benefits. This late-vesting exception for unionized workers is an important example of the brokering potential for unions. Apparently, both management and labor saw the provision as a potential weapon for unions when the exception was debated in Congress. Ironically, but consistent with the thesis that unions can benefit from brokering opportunities, unions pushed for lesser vesting protection for their members while management feared giving unions this waiver opportunity.<sup>114</sup> Congress apparently bought the union argument that unionized employees did not need the rapid vesting schedule because they could take care of themselves through collective bargaining. Business interests opposed the relaxed vesting standards for multiemployer union plans because it would give unionized firms a competitive

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<sup>113</sup>ERISA § 203(a)(2)(C)(ii)(I). Multiemployer plans are common in the garment industry, where there is a strong union and many small employers, and in industries such as construction where workers frequently stay within a small geographical area but frequently move from employer to employer. See JAY CONISON, *EMPLOYEE BENEFIT PLANS IN A NUTSHELL* 8 (1993).

<sup>114</sup>In Congressional hearings, the AFL-CIO promoted the relaxed vesting standards because (1) employees in industries characterized by multiemployer plans already benefit from pension portability, and shortening the vesting requirements would needlessly increase the costs of administering multiemployer plans, and (2) in these industries, the workforce size and the viability of employers tend to be very unstable, and collective bargaining is a better way to obtain better vesting: "The bill properly exempts multiemployer plans .... In industries characterized by multi-employer plans, the typical worker is employed by dozens, even hundreds of different employers during his or her working years. In these industries, multiemployer pooled plans have evolved which allow workers to obtain pension credits despite frequent shifts from one employer to another. This is why any vesting standard will cost a multiemployer plan more .... In addition, the conditions of employment are inherently unstable in [such industries]. Contributors to these plans often include hundreds or even thousands of small companies. The incidence of business failures is relatively high and large fluctuations in the size of the work force are not uncommon. Given such conditions in these industries, collective bargaining, because of its flexibility, is the best way to achieve the goal of more liberal vesting." The Retirement Income Policy Act of 1985 and the Retirement Universal Security Arrangements Act of 1985: Hearing Before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, 99th Congress, 2d Sess., 345 (letter from Robert McGlotten, AFL-CIO).

edge.<sup>115</sup> These anti-union analysts recognized that unions could benefit their firms—and thus "skew" decisionmaking on whether management should oppose unions—by brokering short-vesting rights that are onerous to management and not particularly useful to their members. In short, these anti-union analysts feared empowering the "union as broker" by allowing more lax regulation of unionized firms.

ERISA also gives lesser protection to unionized workers in its nondiscrimination requirements. The nondiscrimination requirements, which are perhaps the most technical sections in a technical statute, are designed to encourage employers to spread pension benefits to lower-paid workers. If the employer wants its pension and benefits plans to receive the tax breaks that ERISA gives a "qualified" plan<sup>116</sup> (and all employers want this), it must not discriminate in favor of highly compensated employees.<sup>117</sup> For example (and simplifying grossly), wage earners cannot receive lower pension benefits in

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<sup>115</sup>For example, the Chamber of Commerce complained that, while faster vesting increases costs and reduces actual retirement security, relaxed regulations for multiemployer union plans "would skew employer decisionmaking about the type of plan with which to be involved and would disadvantage many nonunionized companies with single employer plans that compete with unionized companies [with] multiemployer plans"). *See id.* at 85 (statement of John N. Erlenborn, U.S. Chamber of Commerce; indicating The National Manufacturers Association made essentially the same argument, *id.* at 98 (statement of James A. King, National Association of Manufacturers)).

<sup>116</sup>*See generally* Congressional Budget Office, Tax Policy [. . .] Pensions and Other Retirement Savings (1987) (explaining the tax advantages associated with qualified pension plans).

<sup>117</sup>The relevant tax advantages for qualified plans may be found in 26 U.S.C. § 401(a). ERISA requires that a pension plan benefit "such employees as qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of highly compensated employees." 26 U.S.C. § 410(b)(2)(A)(i) (1988).

percentage terms than high-paid salaried workers. ERISA excludes from the discrimination analysis "employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining . . . ." <sup>118</sup> Thus, unions can waive the right of its wage-earning members to receive as generous a pension as highly-compensated officials of the company. In a similar vein, ERISA's nondiscrimination requirements for cafeteria plans do not apply to plans maintained under a collective bargaining agreement. <sup>119</sup>

Congress enacted this provision for two primary reasons: to allow employees represented by unions to pursue other (presumably more desirable) forms of compensation as an alternative to mandated pension benefits, and to make it more likely that non-union employees will benefit from membership in a qualified plan. <sup>120</sup> Unionized workers are sufficiently protected, under ERISA

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<sup>118</sup>26 U.S.C. § 410(b)(3)(A).

<sup>119</sup>I.R.C. § 125(g)(1) ("For purposes of this section [on cafeteria plans], a plan shall not be treated as discriminatory if the plan is maintained under an agreement which the Secretary finds to be a collective bargaining agreement between employee representatives and one or more employers").

<sup>120</sup>During the passage of the original ERISA bill, the House Committee on Ways and Means reported that "[f]irst, [the provision] recognizes that employees who are represented in collective bargaining agreements may prefer other forms of compensation, such as cash compensation, to coverage in a plan; and second, it makes it possible for employees who are not covered by a collective bargaining agreement to receive the advantages of coverage in a qualified plan where some employees of the same firm have elected through collective bargaining agreement not to be covered by the plan." H.R. Rep. No. 779, 93d Cong., 2d Sess. 17 (1974), reprinted in Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 2606 (1976). The problem before 1974 was the requirement that a qualified plan had to cover at

policy, by the procedural requirement that the union consciously bargain about retirement benefits.

Another ERISA provision, added in the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA), prohibits employers from initiating certain pension plan terminations where the action would violate the terms of an existing bargaining agreement.<sup>121</sup> This might seem to discourage employers from dealing with a collective bargaining representative, but the legislative history indicates that the provision exists merely to codify prior court cases in which union contracts were construed as denying the employer the right to terminate unilaterally.<sup>122</sup>

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least 70 percent of employees, or that it be non-discriminatory. *See* 26 U.S.C. § 410(b). Without the exemption in 26 U.S.C. § 410(b)(3)(A), when a union decided to exchange pension benefits for other compensation, non-union employees of the same employer would not likely get to participate in a qualified plan. Specifically, in 1974 some 50 percent private-sector non-agricultural workers were not covered by pension plans. H.R. Rep. No. 779, *supra* note \_\_\_\_, at 11. So the exclusion of union employees from the analysis seeks to increase pension coverage among non-union workers and to give union employees the choice between pension benefits and other compensation.

<sup>121</sup>29 U.S.C. § 1341, part of Subtitle C of ERISA's Pension Benefit Guarantee Corporation authorization, allows two types of plan terminations: "standard" and "distress" terminations. 29 U.S.C. § 1341(a)(3), however, provides that "the corporation shall not proceed with the termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement." The provision was added in 1986 as part of the Consolidated Omnibus Budget Reconciliation Act of 1985. COBRA, Pub. L. No. 272, § 11007, 100 Stat. \_\_\_\_, 244 (1986).

<sup>122</sup>The provision was "an endorsement of judicial decisions such as *Terones* [v.] *Pacific States Steel Corp.*, 526 F. Supp. 1350 (N.D. Cal.] 1981), holding that a company cannot unilaterally terminate a collectively bargained pension plan when such termination is in violation of the terms of any agreement between the parties." \_\_\_\_, Cong. Rec. 3,792 (1986) (Rep. Clay, discussing conference report on the budget bill). *See generally* H.R. Rep. No. 300, 99th Cong., 1st Sess. (1985) (report by House Committee on the Budget regarding Omnibus Budget Reconciliation Act of 1985). *Terones* merely interpreted a collective bargaining agreement and concluded that it did not allow unilateral termination by the employer. Therefore, the effect may simply be to affirm a strong policy interest in preventing terminations, to which *Terones* alludes.

FLSA: The Fair Labor Standards Act<sup>123</sup> also allows unions to waive rights that are inalienable for nonunion workers. The Act prohibits employers from imposing a workweek longer than forty hours unless hours in excess of forty hours are compensated at "one and one-half times the regular rate."<sup>124</sup> However, the Act allows special workweek arrangements where collective bargaining agreements are involved. Employers need not pay time-and-a-half where union contracts provide for no more than 1,040 hours of work during a 26-week period,<sup>125</sup> or under certain circumstances where union workers are required to work no more than 2,240 hours during a period of 52 weeks.<sup>126</sup>

Congress apparently enacted the special workweek provisions for union-negotiated contracts to allow more flexible scheduling for industries such as mining and timber, which found it more efficient to employ workers for longer

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<sup>123</sup>29 U.S.C. §§ 201–219.

<sup>124</sup>29 U.S.C. § 207(a)(1) (1988).

<sup>125</sup>29 U.S.C. § 207(b)(1) exempts from the workweek requirements employees employed "in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the [NLRB], which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks."

<sup>126</sup>29 U.S.C. § 207(b)(2) provides, in singularly cryptic terms, that employers need not follow the § 207(a)(1) overtime requirements for employees employed "in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the [NLRB], which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate ... ."

hours over discrete periods of time because of the remote location of their operations.<sup>127</sup> However, evidence of actual inclusion of such provisions in collective bargaining agreements is sparse indeed,<sup>128</sup> and at least one early

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<sup>127</sup>When Congress passed the original version of the FLSA in 1938, Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060, 1063 (1938), § 7(b)(1) exempted from the normal workweek requirements collective bargaining agreements allowing no more than 1,000 hours of work for a 26-week period, and § 7(b)(2) exempted similar agreements allowing no more than 2,000 hours for a 52-week period. However, time-and-a-half was still required for any hours above 12 per day or 56 in a week. Evidence from a conferee's explanation of the conference report on the bill suggests that the provision attempted to satisfy employers whose peculiar operations indicated longer workweeks. "[T]he conference agreement contains general exemptions to allow for further flexibility. ... [The 26-week period/1,000 hour exemption] will take care of the peculiar situation which exists in isolated mining and lumber camps which are located in some cases 75 or 100 miles from civilization. ... [The 52-week period exemption provides] an exemption from the basic maximum hours for employers who have adopted the annual wage plan." 83 Cong. Rec. 9,257 (1938) (Rep. Norton, explaining conference committee report). *See also* 83 Cong. Rec. 9,164 (1938) (Sen. Thomas, explaining that § 7(b) is a compromise between the alleged rigidity of the House bill and flexibility of the Senate bill; "general exceptions ... are so drawn as to encourage under proper safeguards continuity or regularity of employment").

In 1941, Congress raised the maximum annual total for agreements covering 52-week periods to 2,080 hours. Act of Oct. 29, 1941, ch. 461, Pub. L. No. 283, 55 Stat. 756 (1941). In 1949, Congress raised the 26-week maximum to 1,040 hours; for 52-week periods, the limit was set at 2,240 hours. Act of Oct. 26, 1949, ch. 736, Pub. L. No. 392, 63 Stat. 913 (1949). That bill also added the modern language requiring a guarantee of at least 1,840 hours for annual agreements, and the modern overtime requirements for such agreements. The bill's purpose was "to provide for greater flexibility." \_\_\_ Cong. Rec. 14,875 (1949) (summary of conference committee report). It also sought to conform the maximum hours under § 7(b) exemptions to an average of 40 hours per week. When employees work more than the equivalent of 40 hours per week, employers are required to pay the overtime rate. \_\_\_ Cong. Rec. 14,875 (1949) (summary of conference committee report). *See also* 1949 U.S.C.C.A.N. 2,256 (conference committee report; "[new § 7(b)(1)] would permit employment under such agreements for an average workweek of 40 hours during any 26-week period"; "[new § 7(b)(2)] provide[s] for greater flexibility").

For general analysis of the legislative history of the FLSA, see generally John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 486 (1939) (original union exemption intended to reach industries that need to send workers to remote areas, to work long hours for short periods of time); Frank E. Cooper, *The Coverage of the Fair Labor Standards Act and Other Problems in Its Interpretation*, 6 LAW & CONTEMP. PROBS. 333, 346 (1939) (explaining the original language and early interpretations).

<sup>128</sup>The overtime pay provisions in collective bargaining agreements typically conform to the normal FLSA requirements in 29 U.S.C. § 207(a)(1). Occasionally, an agreement is negotiated which arguably falls outside the normal workweek requirements and may be valid under the § 207(b) exemptions. *See, e.g.*, Agreement, Apr. 1, 1988, State of Alaska-Inlandboatmen's Union 20-23 (providing for a workweek of seven consecutive 12-hour workdays, with seven consecutive days off following each completed workweek, and time-and-a-half for hours worked during the

decision suggests that courts are unwilling to give the special provision a broad scope.<sup>129</sup>

The Walsh-Healy Act<sup>130</sup> provides another example of union waiver of overtime provisions. The Walsh-Healy Act sets employment standards for federal contracts exceeding \$10,000. The Act limits the workweek of employees of these contractors to forty hours.<sup>131</sup> However, the section also cross-references the union waiver provision of the Fair Labor Standards Act, thereby allowing longer workweeks as long as the employees do not exceed the maximum number of hours under FLSA for 26 weeks or 52 weeks.<sup>132</sup>

WARN Act: The Worker Adjustment and Retraining Notification Act requires employers to give sixty days' advance notice before a mass layoff or plant closing. The warning procedure is technical and generally requires that the employer individually notify in writing every employee that might be affected.<sup>133</sup> If the employees are represented by a union, however, written notice to the union is

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scheduled week off).

<sup>129</sup>In *Cabunac v. National Terminals Corp.*, 139 F.2d 853, 854 (7th Cir. 1944), a collective agreement provided as follows: "hours and wages will be as provided in Section 7-B-1 of [the FLSA], which provides that no employe[e] shall be employed longer than 1000 hours, nor more than 56 hours in one week, during a period of 26 consecutive weeks, commencing with effective date of this agreement. Both parties agree to extension of a second period after completion of first period." When union members sought overtime compensation under the FLSA, the Court of Appeals held that the agreement did not meet the requirements of § 7(b)(1) because the contract governed two specific periods of 26 weeks instead of "any" 26-week period. *Id.*

<sup>130</sup>41 U.S.C. [circa § 35 -- insert code sections containing Walsh-Healy Act.]

<sup>131</sup>41 U.S.C. § 35.

<sup>132</sup>41 U.S.C. § 35.

<sup>133</sup>29 U.S.C. § 2102(1).

sufficient.<sup>134</sup> Thus, a unionized employer can give WARN Act notice to workers for the cost of a stamp, while nonunion employers must go through the greater administrative expense of individual notification.<sup>135</sup>

State Laws: A slew of state laws create employment rights that allow unions to opt out of the claims.

In Part I, I discussed the California law that mandates eight-hour work shifts for employees but allows a collective bargaining agreement to agree to shifts as long as twelve-hour shifts. Such opt-outs are a common feature in state statutes regulating wage payments, maximum hours, overtime, meal and rest requirements, and the like. For example, in Vermont, employers must pay weekly wages within six days, but if a collective bargaining agreement calls for it, the paycheck can relate back thirteen days.<sup>136</sup> Oregon mandates that employers immediately pay a terminated employee all earned wages unless a collective bargaining agreement provides otherwise.<sup>137</sup> Nevada mandates overtime pay after eight hours per day or forty hours per week unless a collective bargaining contract

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<sup>134</sup>*Id.*

<sup>135</sup>Proposed amendments to WARN would alter this. *See* 12 Employee Relations Weekly (BNA) 363 (April 4, 1994).

<sup>136</sup>VT. STAT. ANN. tit. 21, § 342(b).

<sup>137</sup>OR. REV. STAT. § 652.140. *See also* OKLA. STAT. tit. 40, § 165.3 (employer must pay all earned but unpaid wages of terminating employee at next regular pay day, unless another time is specified in collective bargaining contract; D.C. CODE ANN. § 36-103(1) (similar).

says otherwise.<sup>138</sup> Illinois mandates a twenty-minute meal break after five hours of work in a seven-and-a-half hour day unless different meal periods are established by a collective bargaining agreement.<sup>139</sup> Collective bargaining agreements can alter state law requirements regulating health insurance<sup>140</sup> and personnel files.<sup>141</sup> In Montana, collective bargaining agreements can opt out of mandatory health and safety devices.<sup>142</sup> In Arkansas, a collective bargaining agreement is not bound by the minimum-wage provisions of state law.<sup>143</sup>

## V. Assessing the Union As Broker of Employment Rights

Let's get out of the weeds of individual examples and survey the swamp.

### A. Do Unions Want the Brokering Role?

Should unions want a brokering role for employment rights? Ultimately, this is a question of bargaining power. If the union has sufficient bargaining

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<sup>138</sup>NEV. REV. STAT. § 608.018(2)(f). *Accord* ALASKA STAT. § 23.10.060(d)(14); OR. REV. STAT. § 652.020(4).

<sup>139</sup>ILL. COMP. STAT. ch. 820, § 140/3. *See also* MASS. GEN. LAWS ch. 149, § 101 (state labor commissioner may exempt certain employers from mandatory meal breaks for special circumstances, including the existence of a collective bargaining agreement); MINN. STAT. §§ 177.253 & 177.254 (collective bargaining agreement can deviate from mandatory rest and meal breaks); NEV. REV. STAT. § 608.019 (same); N.D. ADMIN. CODE § 46-02-01-02(5); OR. ADMIN. R. 839-20-100(1).

<sup>140</sup>MD. CODE ANN. art. 48A, § 490L (employer-provided health insurance can not charge different copayments for mail-order pharmacies, unless insurance policy is issued pursuant to a collective bargaining agreement); WASH. REV. CODE §§ 48.44.310 & 48.44.340 (group health insurance policies shall offer coverage for chiropractic care and mental health care on same basis as any other care, unless collective bargaining agreement says otherwise).

<sup>141</sup>ALASKA STAT. § 23.10.430(b) (employees have right to inspect personnel file, but this requirement does not supersede the terms of a collective bargaining agreement); ILL. COMP. STAT. ch. 820, § 40/2 (employees have right to inspect personnel records twice a year, unless otherwise provided in a CBA); WIS. STAT. ANN. § 103.13(2) (same).

<sup>142</sup>MONT. CODE ANN. § 50-71-201.

<sup>143</sup>ARK. CODE ANN. § 11-4-205.

power, it can decline to waive a valuable right but agree to negotiate over rights of less value. This power to negotiate should make its members better off.

This Article has documented instances where unions have embraced the brokering role, such as in the eight- versus twelve-hour miners' day discussed in Part I.<sup>144</sup> Overall, the Article suggest that it would be in unions' interest to seriously consider the brokering role when lobbying over other employment statutes.

Still, unions often hesitate to take on this brokering role. For example, in the second example of Part I, we noted that the union in *14 Penn Plaza* argued against the brokering role the Supreme Court ultimately endorsed--by which a collective bargaining agreement could force workers' statutory discrimination claims into arbitration, waiving their right to go to court. Why would unions want to eliminate the possibility of trading rights? Under the perspective of this Article, this is like asking when unions might willingly bind themselves to the mast like Odysseus.

One reason for unions rejecting the brokering role is that it may be complicated to justify a waiver to the membership. In the course of lengthy negotiations, it may be difficult to point to or quantify what was received in return for the waiver. For example, the union may have waived the right to a twelve-

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<sup>144</sup> See Part I Example 1, *supra*. See also text at note 93-99 (discussing the *Livadas* case).

hour day, but what did it get in exchange?

More generally, the value of the brokering role comes in finding win-win bargaining solutions with the employer. This requires flexibility and compromise. A union can easily be tarred as being conciliatory or even a company-controlled union if it concedes a right without a clear *quid pro quo*.

Additionally, flexibility sometimes reduces bargaining strength. If the union burns its bridges, management knows the union cannot concede and so may be more conciliatory. Unions attempt such postures today, with rallying cries such as "No backward steps." Applying this idea to our issue, unions may be in a stronger bargaining position overall if they can simply keep certain issues off the table as being inalienable. This is most plausible when workers clearly value the right more than it costs employers. It may complicate bargaining with no payoff to the union when a right formally waivable but members would never be better off from a waiver.

This suggests that unions should want a statute-by-statute approach to waiver. When a right is clearly worth more to workers than it costs employers, there is little to gain from bargaining, and the union should not want the statute to permit union brokering. But when it is less clear that workers value the right so highly, or it is clear it costs management a great deal, the union may gain if the

statute permits a brokering role.

### B. Does Society Want the Union as Broker?

Even when the union benefits from a brokering role, is it good public policy to allow unions to opt out of employment rights? This question has no single answer. First, if the union does not accurately represent its members, the legislature should balk at allowing a union to waive its members' rights. Whether and when the interests of union leaders and members are aligned is a big issue, worthy of a separate inquiry.<sup>145</sup> Second, even if the union democratically reflects its median member, some statutes are designed to protect the rights of individual or minority workers against majority control. The antidiscrimination laws immediately come to mind. It would be folly to allow a collective bargaining contract to waive the protection of title VII for its members. Even if unions represent the majority, that majority might well agree with the employer to sell out the minority. Thus, public policy calls for some rights to be inalienable to union brokering. Some would argue that allowing unions to agree to arbitration of discrimination claims is in this category.

But union brokering is good public policy for many employment rights. Union waiver does not suffer from the two problems that make individual waiver

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<sup>145</sup>For my thoughts on how to make unions responsive to their membership, see Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367 (1992).

so problematic. The first problem was the unequal bargaining power of the individual worker. Unions can provide that equality. The second was the lack of information and expertise that individual workers have on many issues. Unions, with their research staffs and institutional memory, can provide that information and expertise.

## Conclusion

Most employment laws create rights for workers that are inalienable. The point of this Article is that, in certain contexts, it may be beneficial to allow unions to waive rights that are inalienable for an individual employee. Where the employee may be at a disadvantage in a bargaining situation vis-à-vis the employer, public policy concerns argue against the waiver of such rights. But the union as a collective body is immune to the particular weaknesses of the individual—a union has the power and resources to transform a presumption in favor of the employees into even greater value to the union as a whole and to its individual members.

The critical question is whether important aspects of workplace policy are best decided centrally in Washington, through contract between individual worker and employer, or through collective bargaining between union and employer. A long tradition suggests that this intermediate level of inquiry, collective

bargaining, is optimal on many issues. The union as broker is a modern adaptation to that long-time message.