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The Case in Favor of Waivable Employee Rights: A Contrarian View

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I. INTRODUCTION

A. The Movement Against Waivable Employee Rights

Noncompetes or covenants not to compete and mandatory arbitration agreements are the two most prevalent examples of employees being required by their employers to waive rights that they possess.[1] In the absence of such waivers of rights, employees have the right to go to work for competitors when their employment with their current employers ends and the right to sue their employers or former employers in court. With some limitations, federal and state laws permit the waiver of those rights by employees. In light of the general enforceability of such waivers, it is routine practice for employers in the United States to condition initial or continued employment on such waivers of rights by applicants or employees.

In the past few years, there has been a substantial backlash against the enforceability of both of these types of waivers of rights. For example, on January 5, 2023, the Federal Trade Commission promulgated a proposed

[1] *See, e.g.*, Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379 (2006).

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rule[2] that would prohibit employers from entering into a noncompete with a worker[3] and would require rescission of existing noncompetes,[4] subject to a narrow exception for noncompetes in sales of businesses.[5] The proposed rule would supersede all inconsistent state laws.[6]

In another recent example of the backlash against waiver of employee rights, on March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.[7] That law generally prohibits the enforcement of "predispute arbitration agreement[s]" in cases of sexual harassment and sexual assault. It is remarkable that Congress acted to limit the enforceability of mandatory arbitration agreements in these particular instances in view of the fact that the Supreme Court in numerous decisions has upheld the enforceability of mandatory arbitration agreements.[8]

The foregoing actions of a federal agency and Congress demonstrate that the federal government has become solicitous that employers are confiscating important employee rights and giving nothing in exchange. In

[2] *See* 16 C.F.R. § 910 (2023). The proposed rule is subject to a public comment period of sixty days after it is published in the Federal Register. It is far from clear that the proposed regulation will withstand several different types of legal challenges.
[3] Notably, the proposed rule would apply to not only "employees," as almost all other U.S. employment laws do, but also independent contractors, externs, interns, volunteers, apprentices, and sole proprietors. *Id.* § 910(f).
[4] *Id.* § 910.2(b).
[5] *Id.* § 910.3.
[6] *Id.* § 910.4.
[7] Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. 401-02).
[8] *See infra* notes ___-___.

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short, when employee rights are waivable, employers will act opportunistically by seizing them, and employees will suffer significant deprivations. Converting these rights from waivable to nonwaivable rights is consistent with the fact that when Congress and state and local legislative bodies pass statutes or ordinances conferring rights on employees, they invariably make those rights nonwaivable.

In light of these recent developments, only a contrarian would propose moving in the other direction--expanding the realm of waivable employee rights by creating new *statutory* waivable rights and converting some existing statutory nonwaivable rights into waivable rights. I am that contrarian. I think that a labor and employment law regime that incorporates some waivable statutory employment rights offers an opportunity to empower employees and enable them to bargain for rights and protections more closely tailored to their particular workplaces than the current regime of nonwaivable rights. Such a regime would have to provide protections to prevent employers from confiscating the waivable rights and giving little to nothing for them. Let us imagine such a regime.

B. A Hypothetical Employment Law Regime for the United States in the Future

In 2032, Congress's passage of two individual employment rights laws marks a fundamental change in the federal labor and employment law

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regime of the United States. The first of the two laws enacted is the Notice of Electronic Monitoring Act (NEMA) of 2032, which generally prohibits employers from engaging in any form of electronic monitoring of workers without first giving specified types of notice to workers at specified times. The second is the National Biometric Information Privacy Act of 2032 (NBIPA), which generally prohibits employers from collecting biometric information from workers without first obtaining a written release. Many observers thought it surprising that both laws were enacted in the same year despite the fact that precursor bills introduced in Congress years before had foundered in committees.[9] Even more surprising was that Congress made the laws applicable to not only "employees" but also all "workers," including in coverage those considered to be independent contractors.[10] This expansion of coverage deviated from almost all prior federal employment laws, and it

[9] The NEMA was preceded by two failed attempts to enact bills requiring notice of electronic monitoring. The first legislation proposed at the federal level was the ill-fated Privacy for Consumers and Workers Act (PCWA). H.R. 1900, 103d Cong. (1993); S. 984, 103d Cong. (1993). *See generally* S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 894 n.94 (1998); Charles E. Frayer, Note, *Employee Privacy and Internet Monitoring: Balancing Workers' Rights and Dignity With Legitimate Management Interests*, 57 BUS. LAW. 857 (2002). The second bill was introduced in Congress in 2000--the Notice of Electronic Monitoring Act (NEMA). H.R. 4908, 106th Cong. (2000). Like its progenitor, the 2000 NEMA died in Congress, the victim of lobbying by business interests. *Business Coalition Blocks Markup of Bill Requiring Electronic Monitoring Notification*, DAILY LAB. REP. (BNA), Sept. 15, 2000 (No. 180), at A9; Frayer, *supra*, at 871.
An unsuccessful precursor to the NBIPA was introduced in Congress in August 2020. S. 4400, 116th Cong. (2020). The bill was not approved by the Senate. www.GovTrack.us. 2020. https://www.govtrack.us/congress/bills/116/s4400. Illinois was the first state to enact such a law in 2008. Illinois Biometric Privacy Act, 740 ILCS 14/1 *et seq*. *See generally* Adam Forman, Nathaniel M. Glasser & Matthew Savage Aibel, *Employer Take Heed: Follow Illinois Biometric Privacy Rules or Risk Losing a Battle*, XII NAT'L L. REV. (Feb. 16, 2022).

[10] The current U.S. labor and employment law regime provides protection to too small a segment of the workforce. Many, but not all, workers who are classified as "employees" are covered by statutory and common law protections. Workers classified (or misclassified) as "independent contractors" generally are not protected by the laws. *See infra* notes ___-___ and accompanying text.

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signaled that Congress at last grasped the need for broader coverage of worker rights and protections in the modern gig economy and labor market.[11] The innovation that facilitated passage of these workplace privacy laws with their broader coverage was Congress's implementation of a new approach to employment law. The drafters of the laws departed from a once-fundamental principle of employment law in the United States that all federal statutory individual minimum rights laws create nonwaivable or inalienable rights and protections.[12]

In making this significant change, Congress was aware that the principal reason for the inveterate approach of making statutory employment rights nonwaivable was to avoid employers' confiscation of the rights from applicants and employees (coercing a waiver) while giving little or nothing in return. Congress also understood that individual employees often lack sufficient information to make good decisions regarding waiver of rights. In short, employees often lack adequate power and information to bargain meaningfully with employers over waivable rights. Beyond those deficits, individuals sometimes just make bad decisions because of mistaken perception or valuation. Thus, Congress understood that for waivable rights to be meaningful and effective, they must be waivable only under

[11] *See infra* text accompanying notes ___-___.
[12] This principle had been inviolate regarding nonunion employees, but there were some exceptions for employees represented by a union. *See infra* Part III.B.2.a.

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circumstances that assure a free choice by workers, informed as to their rights, to trade for something they value more than the statutory right. To ensure such conditions, Congress made rights waivable only as a result of collective representation and bargaining. In separate legislation, Congress entrusted the role of negotiating and brokering[13] trades of all waivable statutory rights to a traditional majority-status union that is the exclusive bargaining representative of a bargaining unit in the first instance, or in the absence of such representation, to a nonmajority union representing only a group of workers that choose to be represented by it.[14] The legislation required that in order to be a broker of waivable rights, a nonmajority union must either be an independent union that had not achieved majority status or

[13] At the outset, it will be useful to clarify how I am using some terms. Professor Schwab uses the term "broker" rather than "waive" because he considers it a "more palatable" term. Stewart J. Schwab, *The Union as Broker of Employment Rights*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 248, 248 (Cynthia L. Estlund & Michael L. Wachter eds. 2012). Schwab says the idea is that unions are in a position to broker rights, while individual workers waive their rights. *Id.* at 255. I do not disagree with Schwab's point. As discussed below, employers often confiscate workers' rights for little or no value in exchange; examples include requiring applicants and employees to agree to noncompetes, mandatory arbitration, and waivers of class and collective claims. *See infra* Part III.B.2.b. The term "broker" risks some confusion, as it could mean the act of negotiating or the negotiator. I will use the terms "trade," "exchange," and "waive" interchangeably with the understanding that when rights are waived, the only enforceable waiver under the law should be the result of a bargain in which something of value is given in return. I will use "broker" principally to denominate the bargaining agent or negotiator. Furthermore, some discussions refer to downward "derogations" from employment rights, suggesting that the right may be reduced but not completely given up. For example, as will be discussed later, it is possible that the law could establish a minimum wage that is waivable but also establish a lower minimum wage that is nonwaivable. I use these terms to indicate that rights can be given up wholly or in part in exchange for something of value. I acknowledge that the current state of law enforces waivers that are mere forfeitures of rights by employees.

[14] "Nonmajority union" or "minority union" can mean many things. It most often refers to efforts by an established, independent union to represent workers when that union is unable or unwilling to gain majority status in an appropriate bargaining unit and to be recognized as the exclusive bargaining representative of that unit. *See generally* Bruce Nissen *Building a "Minority Union": The CWA Experience at NCR*, LAB. STUD. J. 34, 35 (Winter 2001), https://journals.sagepub.com/doi/pdf/10.1177/0160449X0102500404. Nonmajority unions are discussed in more detail *infra* Part IV.B.1.

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an employee organization that is affiliated with an independent union. Finally, if neither a majority nor a nonmajority union represents employees, the law recognized a new type of worker representation organization for purposes of negotiating with employers about waivable employment rights—worker representation committees.[15] The formation of these committees could be initiated at the behest of either employers or workers for the purpose of bargaining about the waivable rights created by the statutes. The committees consist of workers elected by their colleagues, with the number of members on the committee varying depending on the size of the workforce represented.[16] Although Congress did not impose any substantive conditions on the enforceability of an agreement resulting from the bargaining process, such as the minimum terms that an employer must

[15] To avoid the possibility that the National Labor Relations Board or courts might find maintenance and functioning of these committees to be an unfair labor practice, it would be prudent for Congress to amend section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. §158(a)(2). Such an amendment should make clear that it does not violate the NLRA for worker representation committees to exist, to represent employees in bargaining, and to broker deals regarding waivable rights notwithstanding the National Labor Relation Board's interpretation of that section in *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994). *See generally* Samuel L. Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(A)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994). For further discussion of the current state of the law on this issue, see *infra* text accompanying notes ___ -___.

[16] Forms of worker representation in addition to unions are not unusual in other nations. *See generally* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 170-72 (2010). Consider, for example, workers' councils and workforce delegates in France and works councils in Germany. *See generally* IA INT'L LABOR & EMP. LAWS, *France* & *Germany* (William L. Keller & Timothy J. Darby eds. 4th ed. 2015); MICHAEL DESPAX, JACQUES ROJOT & JEAN-PIERRE LABORDE, LABOUR LAW IN FRANCE Ch. 3 (2011); *see also* Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry Into a "Unique" American Principle*, 20 COMP. LAB. L. & POL'Y J 47 (1998). Professor LeRoy noted that in Congressional hearings on the TEAM Act, which would have amended section 8(a)(2) of the NLRA, there was virtually no consideration of forms of employee representation in other nations. *See* Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651,1666 n.63 (1999).

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offer for an exchange to be valid and enforceable, the legislation providing for the worker representation committees required that each committee must be advised by an experienced negotiator, such as a union.[17] The law also provided that initial fees charged by the consultant are to be paid by the party that initiated the call for the committee, but payment of the fees could be a subject of bargaining and could be shifted in whole or in part.

The foundation for this innovative approach had been laid several years before the enactment of the laws when Congress embraced the concept of waivable statutory employment rights. Finally recognizing the disarray and ineffectualness of the dichotomous labor and employment law regime in the modern economy,[18] Congress in 2026 had directed the Secretary of Labor to undertake a study and report on existing federal statutory rights that should be considered for conversion to waivable rights. In response to the Secretary's report, Congress converted two rights under existing employment laws[19]--the right to overtime under the Fair Labor Standards

[17] Relying on consultation to ensure fair exchanges in cases of waivers is not unknown in U.S. employment law. The Older Workers Benefit Protection Act, for example, permits waiver of existing age discrimination claims under certain conditions, and one is that an employer advise an employee in writing to consult with an attorney before signing the waiver. 29 U.S.C. § 626(f)(1)(E).

[18] What would it take for Congress to recognize the need for radical reform of labor and employment law? Economic collapse? *See* Samuel Estreicher, "*Come the Revolution": Employee Involvement in the Workers' State*, 1 U. PA. J. LAB. & EMP. L. 87 (1998).

[19] There are good reasons for considering conversion of existing nonwaivable employment rights to waivable rights. *See infra* Part IV.B.2. For one, creating more waivable rights could give the bargaining representative more bargaining power and more bargaining space to negotiate an exchange. Additionally, some existing nonwaivable rights could be better adjusted to the needs of particular work settings through bargaining.

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Act (FLSA)[20] and the right to up to twelve weeks of unpaid leave for specified medical and family reasons under the Family and Medical Leave Act (FMLA).[21]

After the passage of the two new employment laws in 2032, Ace Widget Company, whose employees were not represented by a union, requested formation of a worker representation committee ("the Committee") for the purpose of bargaining about waivable rights. The Committee was elected and entered into an agreement with an established union for consultation and assistance in bargaining. The Committee met with the employer's team, which began the bargaining by asking the Committee to waive the right to overtime under the FLSA. In exchange for the waiver, the employer offered compensatory time at the rate of one-and-one-half times the number of overtime hours worked.[22] After some discussion, the Committee countered with an offer to waive overtime pay in exchange for the proposed compensatory time and a week of paid vacation for every five years of employment up to a maximum of a month. The employer team took the proposal under consideration. The employer group then asked for a waiver of the employees' NBIPA and NEMA rights in exchange for establishment of an internal grievance procedure to resolve any claimed

[20] 29 U.S.C. §§ 201-219.
[21] 29 U.S.C. §§2601-2653.
[22] Such a waiver already is permitted for public employees. 29 U.S.C. §207(o).

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invasions of privacy. The employer took the position that, although it had no interest in invading the legitimate privacy rights of its employees, it did not want to be subject to the costs and other burdens of numerous lawsuits under NBIPA and NEMA. The Committee indicated that it would consider each of the employer's waiver proposals, but it thought that a deal was more likely to be worked out for waiver of the package of rights requested by the employer if the employer would agree that employees would not be terminated without good cause, meaning job-related personal reasons or economic reasons[23] and procedural rights prior to termination.

C. Should We Wave Goodbye to Some Nonwaivable Statutory Employee Rights?

U.S. labor and employment law is a large, complex, poorly coordinated, and increasingly ineffective body of regulation. It consists of regulatory tools in what are regarded as two distinct and largely non-conversant realms-

[23] Regarding the U.S. anomaly of employment at will, see *infra* note ___. In the law of almost all other nations and under the applicable Convention and Recommendation of the International Labour Organization, good or just cause is required for termination. ILO, C158 Termination of Employment Convention (1982); ILO, R119 Termination of Employment Recommendation (1963). Even in the U.S., there are substantial bodies of law regarding interpretation and application of good or just cause. Almost all collective bargaining agreements negotiated by unions vary employment at will and provide good-cause protection. *See, e.g.*, Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cas*es, 1985 DUKE L.J. 594 (stating that "[v]irtually every collective bargaining agreement contains some such limitations" and "[t]his requirement is so well accepted that often it is found to be implicit in the collective agreement, even when there is no stated limitation on the employer's power to discipline"); Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 UNIV. ILL. L. REV. 1, 22 (stating that "[m]ost collective agreements require 'cause' or 'just cause' for discharge or discipline. Even in the absence of an express 'just cause' limitation, arbitrators will imply such a limitation on discharge") (citing F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 652 (4th ed. 1985)).

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-labor law and employment law.[24] The labor law realm consists primarily of union representation and collective bargaining.[25] The employment law side consists primarily of a foundation of the common law of contracts, property, and tort law with a substantial overlay of individual minimum rights statutes at the federal, state, and local levels. For the past six decades, legislatures at all levels have relied on the employment law tools, to the exclusion of those available in labor law, by enacting a plethora of individual minimum rights statutes to address workplace issues.[26] Employers, workers, and society are ill-served by this bifurcated regime. It is antiquated and poorly suited to addressing the needs of employers and workers in the landscape of the modern economy and workplaces, which have been radically transformed by shifts such as the gig economy,[27] fissured employers,[28] and jobs that offer

[24] *See infra* text accompanying notes ____-____.
[25] The protection of the NLRA actually is broader than union representation and collective bargaining. Section 7 of the NLRA protects the right of employees to engage in concerted activity for mutual aid or protection. 29 U.S.C. §157. This protection is important for the worker representation committees.
[26] Professor Estlund divides the employment statutory protections into two branches: minimum standards laws, such as the OSH Act and the FLSA, and individual rights laws, such as the antidiscrimination laws. *See* ESTLUND, *supra* note __, at 10. I am not making that distinction; instead, I am referring to both of these "branches" as individual minimum rights laws.
[27] The "gig economy" connotes the shifting of many jobs to crowdwork and work-on-demand via app. *See, e.g.*, Valerio de Stefano, *The Rise of the "Just-in-Time Workforce": On Demand Work, Crowdwork, and Labor Protection in the "Gig Economy,"* 37 COMP. LAB. & POL'Y J. 471 (2016); *see also* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 88-89 (2016) (listing several different terms applied to the "digital platform revolution" in production, consumption, work, finance, and learning). On the rapid proliferation of these new work arrangements to become a large part of the U.S. workforce, see *infra* note ___. Professor Finkin notes the need to fashion new law "more attuned to these new modes of work." MATTHEW W. FINKIN, AMERICAN LABOR AND THE LAW: DORMANT, RESURGENT, AND EMERGENT PROBLEMS 81 (2019).
[28] *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE It 8 (2014) (describing the movement of large businesses to shed workers and push employment down to a network of smaller business units); FINKIN, *supra* note __, at 48-52.

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little security because they can be moved around the globe[29] or eliminated because of automation.

Policymakers should reconceptualize this body of law and the tools available to regulate the workplace. They should break down the unnecessary and deleterious wall between labor law and employment law. They should experiment with a new hybrid tool that integrates the heretofore largely separate methods of regulation—collective representation and bargaining, common law of contracts and property, and individual minimum rights statutes. In this new model, Congress and state and local lawmakers could continue to follow the dominant approach of passing individual minimum rights laws, but with a new wrinkle—some of the rights would be conditionally waivable (or waivable with constraints). The waivability would depend on collective action, representation, bargaining, and collective agreements. Some existing nonwaivable statutory rights could be converted to waivable rights. Statutory rights that currently are waivable by individual employees, such as the rights to sue employers in court and to assert class or collective claims, could be moved into this bargaining format. Furthermore, common law rights of employees, which are now conditionally waivable, such as the worker rights restricted by noncompetes, could be regulated with

[29] *See, e.g.*, ESTLUND, *supra* note __, at 14 (noting that businesses outsource and relocate to lower-wage jurisdictions).

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this new model. For unionized employees, their unions could trade waivable statutory rights for terms and conditions that would better suit the needs of the workers they represent. For workers not represented by majority-status unions, they would have other representative organizations to act as brokers of waivable rights—minority unions or elected worker representation committees advised by a union.

This innovative approach to labor and employment law could have many virtues. It could benefit workers, unions, and society. It could free employers from some of the burdens of currently nonwaivable individual minimum rights laws, such as record-keeping, liability avoidance strategies, and the costs of litigation or arbitration. It could give unions new bargaining power with employers of employees in represented bargaining units. Unions also could gain access to unorganized employees to represent them for a limited purpose as a minority union or to assist their worker representation committee for a fee. Such access to employees and the opportunity to provide services other than those of an exclusive collective bargaining representative might persuade nonunionized employees regarding the value of more advanced collective action and union representation. For workers, they would be empowered to bargain collectively with their employers, armed with both information and bargaining chips that instill bargaining

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power. Workers could enjoy the power to obtain more advantageous terms and conditions that are more tailored to their particular work situations than legislative bodies are willing or able to confer using broad minimum rights laws. Additionally, they would gain a voice and experience participation in the governance of their workplaces. Society should benefit from work arrangements that better suit employers and their workers. Furthermore, Congress, as well as state and local lawmakers, may be more willing to enact new minimum rights laws, and even extend new and existing rights to a broader range of workers, such as temporary workers and independent contractors, if the rights could be made conditionally waivable. Legislators would not have to impose irrevocable burdens on employers. In such a regime, employment law could make available to nonunionized employees a modicum of power and voice in shaping their jobs and work environments.

This Article presents arguments for a new labor law regime in the United States in which Congress, and perhaps other legislative bodies, considers creating conditionally waivable employment rights. Part II first makes the case for significant reform of U.S. labor and employment law. It then considers the current labor and employment law regime of the U.S. and makes some general comparisons with the regimes of other nations. It explores some of the ways in which the U.S. regime increasingly does not

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well serve workers, employers, and society. Part III first presents the arguments in support of nonwaivability of statutory employment rights. It then considers some exceptions to the general rule--waivable employment rights in U.S. law and the law of other nations. It briefly explores some unsuccessful uses of waivable rights. Part IV discusses possible expansion of the use of conditionally waivable employment rights. First, it considers some of the arguments that have been made in favor of at least considering expansion of waivable rights. Part IV then sketches a general proposal for the expansion of conditionally waivable rights. It explores the types of constraints or conditions that should be imposed by law and considers what rights might be appropriately treated as conditionally waivable.

II. Is There a Need for a New Approach to U.S. Labor and Employment Law?

Are there problems, weaknesses, or deficiencies in the labor and employment law of the United States? Could it be improved? Anyone proposing a fundamental change in a nation's approach to workplace regulation should first address these questions. The affirmative answers to these questions will seem obvious to many labor and employment law commentators and scholars who have identified a multitude of problems and recommended numerous changes and improvements. Of course, that point should not be surprising since the point of much scholarship and

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commentary is to identify deficiencies and problems in existing law and propose changes.[30] However, there is abundant evidence that the U.S. approach to workplace law is antiquated, unnecessarily complex, poorly coordinated among its almost insular parts, and increasingly ineffective.[31]

One indicator of the need for change is the last significant attempt by the federal government to review, study, and consider large-scale revision of U.S. labor and employment law. The Commission on the Future of Worker-Management Relations (better known as the Dunlop Commission[32]) was appointed by the Secretaries of Labor and Commerce in March 1993 during the first Clinton administration. The secretaries asked the Commission to consider several issues and recommend any needed changes in the following areas: new methods or institutions to increase workplace productivity through labor-management cooperation and employee participation; changes in the legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay; and changes to increase resolution of workplace problems by the parties themselves rather than through litigation and governmental regulatory

[30] *See* Robin West & Danielle Citron, *On Legal Scholarship*, Association of American Law Schools, https://www.aals.org/wp-content/uploads/2014/08/OnLegalScholarship-West-Citron.pdf.
[31] *See, e.g.*, Craig Becker, *Thoughts on the Unification of U.S. Labor and Employment Law: Is the Whole Greater than the Sum of the Parts?*, 35 YALE L. & POL'Y REV. 161, 162 (2016) (citing the need for fundamental reform).
[32] The Commission was chaired by former U.S. Secretary of Labor and Harvard professor John Dunlop.

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bodies.[33] In 1994 the Dunlop Commission produced a lengthy report with recommendations. Because of a change in the political climate from 1993 to 1994,[34] no action was taken on the report by Congress or the executive branch. Although the Commission's charge and report focused principally on reform of labor law, meaning representation and collective bargaining, the Commission noted the lack of coherence in employment law.[35]

A. Comparative and Historical Perspectives on U.S. Employment Law

Undoubtedly, the labor law of every nation has problems and could benefit from changes. Critiques of U.S. labor and employment law, however, have been particularly harsh from comparative and historical perspectives. From a comparative perspective, the U.S. is generally known internationally for its deregulation of the labor market.[36] U.S. labor and employment law does not compare favorably with the law of other developed nations for

[33] Preface, FINAL REPORT, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPT'S OF COMMERCE AND LABOR, REPORT AND RECOMMENDATIONS (1994).
[34] By the time the Final Report was issued at the end of 1994, Republicans, campaigning under the "Contract with America," had taken control of the House of Representatives. *See* Samuel Estreicher, *The Dunlop Report and the Future of Law Reform*, 12 LAB. LAW. 117, 121 (1996); Michael J. Zimmer & Susan Bisom-Rapp, *North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates*, 30 HOFSTRA LAB. & EMP. L.J. 1, 19 (2012); Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 607-08 (2004).
[35] The Final Report stated that "[t]here has seldom, if ever, been a systematic overview of this statutory structure and the resulting detailed regulations or the court interpretations that flow from employment law. Congress and its committees have considered the legislation piecemeal." FINAL REPORT, *supra* note __, at 71.
[36] *See* Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 103-04 (1999); Irene Lynch-Fannon, *Employees as Corporate Stakeholders: Theory and Reality in a Transatlantic Context*, 4 J. CORP. L. STUD. 155, 178 (2004) (assessing the level of labor market regulation in the United Kingdom as medium-high, the level in the United States as "low," and the level in some Continental European countries as "high").

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providing protections to workers,[37] particularly regarding employment security.[38] This comes as no surprise, as the U.S. is the only developed nation in the world in which the default rule for termination is at will in all but one state.[39] Another example of a comparative deficiency is leave law.[40]

[37] *See generally* Stephen F. Befort, *The Declining Fortunes of American Workers: Six Dimensions and an Agenda for Reform*, 70 FLA. L. REV. 189 (2018). Professor Befort cites the following areas in which the United States provides less protection than most developed nations: workforce attachment, union-management relations, employment security, income inequality, balancing work and family, and retirement security. *Id.* at 191. As a very rough measure of this proposition, consider that the United States has ratified only 14 out of 190 Conventions of the International Labour Organization, of which 12 are in force, and only 2 of the 8 fundamental conventions. David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842 (2014); Ratifications for United States of America, Int'l Lab. Org., https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871.

[38] *See, e.g.*, Kohler, *supra* note __, at 103 ("As is generally known, the United States historically has provided comparatively meager formal legal protections of the employment relationship. Foreign observers typically characterize us as a 'hire and fire' society ...."). In a study by the Organization for Economic Cooperation and Development on regulations on the hiring and dismissal of employees, the United States ranks at or near the bottom among developed nations. OECD Indicators of Employment Protection, https://www.oecd.org/els/emp/oecdindicatorsofemploymentprotection.htm.

[39] *See, e.g.*, Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 347 & 348 n.7 (2014) (stating that the at-will rule places the U.S. "in a singular position among most other developed countries" and citing numerous other sources); *see also* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C.L. REV. 351, 406 (2002) (stating that "[t]he United States stands virtually alone among industrialized nations in failing to provide general statutory protection against unjust dismissals"); Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of Wrongful Discharge*, 66 WASH L. REV. 719, 727 & n.48 (1991). While this statement is accurate, a more nuanced examination reveals that some nations have laws that, while not fully at-will, approach the U.S. law. Israeli termination law is characterized as at-will. *See, e.g.*, Guy Davidov, *The Principle of Proportionality in Labor Law and Its Impact on Precarious Workers*, 34 COMP. LAB. L. & POL'Y J. 63, 73 (2012). In Israeli law, however, the judicial recognition of good faith duties regarding procedures makes it distinct from employment at will in the United States. Sharon Rabin Margalioth, *Regulating Individual Employment Contracts Through Good Faith Duties*, 32 COMP. LAB. L. & POL'Y J 663 (2011). Canadian law requires employers that terminate without good cause to provide a notice period or severance pay in lieu of notice. *See, e.g.*, Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1 (2010). Thus, employers in Canada may fire without good cause, but they may not do it without following any legal prerequisites. Of the twelve nations surveyed by Estreicher and Hirsch, they note that the U.S. and Canada are the only nations lacking national unjust dismissal legislation. Estreicher & Hirsch, *supra*, at 445.

[40] *See, e.g.*, Claire Cain Miller, *The World 'Has Found a Way to Do This': The U.S. Lags on Paid Leave*, N.Y. TIMES (Oct. 25, 2021) (reporting that the U.S. is one of six nations in the world that does not have national law mandating paid leave from work).

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Moreover, union density[41] and the percentage of the workforce covered by collective bargaining agreements[42] have declined precipitously[43] in the U.S. in recent decades, and both are lower than for most other developed nations.[44]

In contrast to the decline of union representation and collective bargaining ("labor law" in the U.S.), federal, state, and local governments in the U.S. have enacted many employment statutes over the past half century.[45] This body of regulation has been described as "labyrinthine" and a "dizzying array," in which the components were created in response to

[41] "Union membership, relative to the potential of those eligible to join a labor union." Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV. 38 (Jan. 2006), https://www.bls.gov/opub/mlr/2006/01/art3full.pdf.

[42] Union density is not the only relevant measure of the strength of unions in a nation. Coverage of workers by collective bargaining agreements is about the same as union density in the United States and Canada. However, in countries in which collective bargaining is more centralized, with agreements negotiated at higher levels such as sector and industry, there may be a large percentage of the workforce covered by collective bargaining agreements even though union density is low. France is a good example. French union density is close to that of the U.S., but roughly 90% of French workers are covered by collective bargaining agreements. *See* G.J. Bamber & P. Sheldon, *Collective Bargaining* in COMPARATIVE LABOUR LAW & INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES at 566 tbl. I (Blanpain & Engels eds. Kluwer Law Int'l 2001).

[43] Perhaps belying the media headlines in 2022 suggesting a resurgence of unions, see *infra* note ___, union membership declined in 2021. The overall rate declined 0.5% to 10.3%, offsetting an increase in 2020, and returning to the 2019 level. The union membership rate for public employees (33.9%) continued to be more than five times the rate for private sector employees (6.1%). *Union Membership (Annual) News Release*, U.S. Bureau of Labor Statistics (Jan. 20, 200), https://www.bls.gov/news.release/archives/union2_01202022.htm. The decline in union density has been consistent since perhaps the late 1950s, and the decline became precipitous during the 1970s. *See, e.g.*, FINKIN, *supra* note __, at 52 (estimating private sector union density in the 1950s at about 35% and about 25% in 1973); *see also* Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 8 (stating that the long-term decline of unions "accelerated and then turned into a rout"); Ruth Milkman, *Union Decline and Labor Revival in the 21st Century United States*, 95 CHI.-KENT L. REV. 273 (2020).

[44] *See, e.g.*, Visser, *supra* note __.

[45] *See, e.g.*, Kohler, *supra* note __, at 104 (observing that "[d]espite our renown for relatively abstemious public intervention in workplace relationships and our general preference for private ordering, the previous ten to fifteen years has been a period of unusual legislative and judicial activity").

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perceived problems and abuses with little planning of the overall structure.[46] So, it is not an actual dearth of law that renders U.S. employment law comparatively weak in its protection of workers. One commentator describes U.S. labor and employment law as "a complicated and inaccessible legal regime that superficially promises more than it delivers."[47] Rather, shifting from the comparative perspective to the the historical perspective and critique provides some explanation for the weakness, rigidity, and obsolescence of the law.[48]

With the passage of the National Labor Relations Act (Wagner Act) in 1935,[49] Congress embraced an approach to workplace regulation that depended on private ordering by the parties through union representation of workers and collective bargaining. In the NLRA, Congress did not impose minimum employment terms on employers and confer minimum rights on workers.[50] With its next major piece of federal employment legislation, the

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[46] Ian H. Eliasoph, *Know Your (Lack of) Rights: Examining the Causes and Effects of Phantom Employment Rights*, 12 EMPLOYEE RTS. & EMP. POL'Y J. 197, 220 (2008); Becker, *supra* note __, at 162 (describing the "growing thicket of other laws governing the workplace"); ESTLUND, *supra* note __, at 11 describing employment law as an "unruly hydra head of duties and liabilities for employers").

[47] Eliasoph, *supra* note ___, at 199.

[48] Professor Patrick Hardin remarked: "The current body of U.S. labor and employment law may be described as a scarcely rational patchwork. It is comprehensible as a whole, if at all, only when viewed through the lens of its history." Patrick Harden, *United States*, in I INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 23a-2 (William L. Keller & Timothy J. Darby eds., 2d ed. 2003).

[49] Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69. Craig Becker labels the NLRA at the time of its enactment as the "central and almost the only federal regulation of the workplace." *See* Becker, *supra* note ___, at 163. The earlier-enacted Railway Labor Act and Norris LaGuardia Act were more limited in coverage and purpose. *Id.* n.3.

[50] Terminal R.R. Ass'n v. Bhd of R.R. Trainmen, 318 U.S. 1, 6 (1943); ESTLUND, *supra* note ___, at 9; Eliasoph, *supra* note ___, at 220.

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Fair Labor Standards Act of 1938 (FLSA),[51] Congress pursued a different form of regulation—individual minimum rights law, by which Congress specified the terms and conditions that employers must provide to covered employees. However, the enactment of the FLSA did not mark the beginning of Congress's abandonment of the NLRA's approach to regulation; rather, it was intended to support organized labor and collective bargaining by establishing a floor from which bargaining could proceed.[52] For the next twenty-five years, no federal labor and employment statutes were enacted. Then, for a thirty-year period beginning in 1963, Congress enacted a cavalcade of employment laws[53]: the Equal Pay Act amendment of the FLSA,[54] Title VII of the Civil Rights Act of 1964,[55] the Age Discrimination in Employment Act (ADEA),[56] the Occupational Safety and Health Act (OSHA),[57] the Employee Retirement Income Security Act (ERISA),[58] the Pregnancy Discrimination Act (PDA) amendments to Title VII,[59] the

[51] Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219).
[52] *See* ESTLUND, *supra* note ___, at 55; Eliasoph, *supra* note ___, at 219; James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1569 (1996) (stating that members of Congress likely viewed the early legislation as only "interstitial efforts" to supplement the collective bargaining regime).
[53] ESTLUND, *supra* note __, at 57-59; Becker, *supra* note ___, at 163-64 (stating that Congress's enactment of minimum rights statutes accelerated after passage of the Civil Rights Act of 1964).
[54] Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d)).
[55] Pub. L. No. 88-352, 78 Stat. 66 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000e-15).
[56] Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-33a).
[57] Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78).
[58] Pub. L. No. 93-406, 88 Stat. 29 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461).
[59] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. S2000e(k)).

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Employee Polygraph Protection Act (EPPA),[60] the Worker Adjustment and Retraining Notification Act (WARN Act),[61] the Americans With Disabilities Act of 1990 (ADA),[62] the Civil Rights Act of 1991[63] and the Family and Medical Leave Act of 1993 (FMLA).[64] Another period of legislative inactivity followed until 2008-2009, when Congress enacted the Americans with Disabilities Act Amendments Act of 2008,[65] the Genetic Information Nondiscrimination Act of 2008,[66] and the Lilly Ledbetter Fair Pay Act of 2009.[67] And again a period of drought followed. Many of the foregoing laws did not bestow new rights or protections on employees; instead, they amended existing laws to correct for Supreme Court decisions with which Congress disagreed. Additionally, state legislatures and local governmental bodies enacted a vast body of statutes and ordinances creating individual minimum rights.

Many commentators have noted the different models of regulation pursued by Congress in the collective bargaining approach of the NLRA on

[60] Pub. L. No. 100-347, 102 Stat. 646 (1988) (codified as amended at 29 U.S.C. §§ 2001-09).
[61] Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified as amended at 29 U.S.C. §§ 2101-09).
[62] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101-12213).
[63] Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. S1981a and other scattered sections of 42 U.S.C).
[64] Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-54).
[65] Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-54 (codified as amended at 42 U.S.C. § 1210).
[66] Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29 & 42 U.S.C.).
[67] Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

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the one hand and the individual minimum rights laws on the other.[68] From the 1960s forward, Congress clearly shifted its regulatory approach from the collective bargaining model to the imposition of specific individual minimum rights[69] (also called command-and-control[70]). Many commentators have described the tension and incongruity between the two models, but there are theories that see the two as compatible and more fluid rather than dichotomous.[71]

Another significant component of U.S. employment law is the states' common law of contracts, property, and torts. It is an often-repeated maxim that the employment relationship is fundamentally a contractual relationship, and contract law is the default method of regulating the employment relationship.[72] Absent regulation, employers and employees can agree to whatever terms they wish that are not illegal and are not in violation of

[68] *See, e.g.*, Becker, *supra* note __, at 163-64; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 38-40 (2016).
[69] FACT FINDING REPORT, COMMISSION ON THE FUTURE OF THE WORKER-MANAGEMENT RELATIONS Ch. IV (May 1994); Brudney, *supra* note ___, at 1571 (stating that "[a]t some point during this legislative barrage, it became clear that Congress viewed government regulation founded on individual employment rights, rather than collective bargaining between private entities, as the primary mechanism for ordering employment relations and redistributing economic resources"); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 73 (1999) (observing that "[s]ince the 1960s, the labor movement has suffered from American liberalism's rejection of the group basis of its own past and its inability to find a place for group rights within the model of individual rights it clings to so dearly").
[70] *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 333 (2005).
[71] *See, e.g.*, Benjamin I Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2701-2707 (2008) (developing a theory of interaction between the two models in which employment law rights provide the basis for, and protection of, collective activity). Professor Andrias examines theories of compatibility and tensions between labor law and employment law. *See* Andrias, *supra* note __, at 37-40.
[72] *See, e.g.*, Estlund, *supra* note ___, at 380.

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public policy. The beginning point for contract formation is what the employer and employee own and can offer—governed largely by property law.[73] Employers own land, facilities, means of production, intellectual property, and other assets.[74] The common law and the Thirteenth Amendment of the U.S. Constitution recognize workers' ownership of themselves—their own skills, talents, experience, time, and labor.[75] Thus, absent regulation by legislative bodies, the law governing the employment relationship is the common law of contracts and property. The parties may bargain and exchange the assets that they own. Additionally, courts have developed a common law of torts applicable to regulation of the employment relationship.[76] State courts became very active in the 1970s and 1980s in developing contract and tort law for workplace regulation, with much of it directed at limiting employment at will.[77]

As detailed above, however, Congress has not trusted the private ordering of contract to produce efficient or fair employment outcomes.[78] State legislatures, too, became very active in passing employment statutes

[73] *Id.* at 385 (observing that underlying freedom of contract is the law of baseline entitlements of the parties).
[74] *Id.*
[75] *Id.*; Cass Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 212 (2001) (stating that, absent slavery, the law does not confer on the employer a right to the time and labor of the employee).
[76] *See generally* William R. Corbett, "*You're Fired!": The Common Law Should Respond With the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63 (2020).
[77] *See, e.g.*, Kohler, *supra* note __, at 106-07; Michael D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending the Public Policy Exception Beyond the Wrongful Discharge Context*, 13 LAB. LAW. 371 (1997).
[78] *See, e.g.*, Schwab, *supra* note __, at 251.

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and have remained so.[79] The legislative intervention is due in large part to the fact that legislatures understand that the default common law of contract and property are insufficient and unacceptable to empower and/or protect most applicants and employees. Freedom of contract is largely a myth.[80] The applicant or employee needs the job, and the employer offers the job or continuation of employment with terms on a take-it-or-leave it basis.[81] Most applicants and employees do not have equal bargaining power with employers,[82] which is a principal reason that lawmakers make the statutory rights nonwaivable.[83]

Thus, the history of labor and employment law in the U.S. reveals different regulatory approaches to various issues at various times. In the early part of the twentieth century, the collective bargaining model prevailed through federal legislation. Congress then ventured into individual minimum

[79] *See, e.g.*, Estlund, *supra* note ___, at 10; Timothy J. Heinz, *Judicial Review of Labor Arbitration Awards: The* Enterprise Wheel *Goes Around and Around*, 52 MO. L. REV. 243, 257 (1987).
[80] *See, e.g.*, Michael H. Gottesman & Michael R. Seidl, Review Essay, *A Tale of Two Discourses: William Gould's Journey From the Academy to the World of Politics*, 47 STAN. L. REV. 749, 785 (1995).
[81] Estlund, *supra* note ___, at 384; Matthew W. Finkin, *Union Dispossession of Labor Protections: A Paradox, in Two Legal Systems*, 36 INT'L J. COMP. L. & INDUS. REL. 1, 1 (2020) [hereinafter Finkin, *Union Dispossession*].
[82] As Professor Finkin argues, it is the employment at-will doctrine that, for most employees, "reduce[s] the employee's legal capacity to exercise agency to somewhere below zero." Matthew W. Finkin, *Employee Self-Representation and the Law in the United States*, 50 OSGOODE HALL L.J. 937, 953 (2013) [hereinafter Finkin, *Employee Self-Representation*].
[83] *See, e.g.*, Schwab, *supra* note ___, at 250. The preamble of the NLRA recognizes this inequality of bargaining power. 29 U.S.C. §151:

> 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, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

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rights legislation with passage of the FLSA in 1938. However, it was not until the 1960s that Congress committed to an individual rights regime, again through federal legislation. In turn, from the 1970s through the end of the century, the states created individual employment rights through statutes and case law. The changing landscape of the labor market, workplaces, and the economy in the United States has required new protections over time. In response, governments have on various issues and during different periods of time resorted to three types of regulatory tools—collective bargaining, common law, and statutory minimum rights. In light of this diverse history, one should not expect a single approach to work in the next century, and no one of the existing approaches appears adequate.[84]

B. Some Specific Critiques of U.S. Employment Law

Among the many critical critiques of the U.S. labor and employment law regime, I focus on a few that are particularly relevant to the proposal for which I advocate. To begin with, U.S. labor and employment law lacks coherence and coordination among its parts.[85] There are few overarching and connecting principles, and there is considerable overlap and conflict.[86] The

[84] *See, e.g.*, Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 24 (1988) [hereinafter Summers, *Labor Law*] ("I fear that because of the wide variety of rights to be protected and our hesitant legal recognition of them, the solution must be piecemeal and will inevitably be incomplete."); *cf.* Sachs, *supra* note ___, at 2689.
[85] *See, e.g.*, Eliasoph, *supra* note ___, at 219.
[86] Becker, *supra* note ___, at 165; Summers, *Labor Law*, *supra* note ___, at 18-19 (predicting that reconciling overlapping protections would be the most difficult problem in employment law and stating

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law developed over time, and as workplace problems emerged, legislatures and courts reacted with a law "patch."[87] As Becker puts it, it was created in fits and starts.[88] The product is a large and poorly coordinated body of regulation. The Dunlop Commission cited the need for a "systematic overview" of this body of law.[89]

The historical development, consisting of different regulatory approaches being used during different time periods has produced a dichotomy of labor law and employment law, which is unnecessary and counter-productive to effective regulation. This dichotomy explains much of the incoherence and lack of coordination in the overall regime. Labor law is the name given to the law governing labor-management regulation principally in unionized workplaces.[90] Employment law, on the other hand, is the body of individual employment rights law which applies regardless of union representation.[91] Labor law deals primarily with the NLRA and the Railway Labor Act, which protect the rights of employees to engage in

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that "(o)ne can scarcely imagine an arrangement better designed to hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery").

[87] *Cf.* Summers, *Labor Law*, *supra* note ___, at 24.

[88] Becker, *supra* note __, at 164.

[89] FINAL REPORT, *supra* note ___, at 71.

[90] *See, e.g.*, Becker, *supra* note __, at 163-68; Sachs, *supra* note ___, at 2688-89; Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 489 (2001); *cf.* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 215 (2007) (concluding that labor law and employment law should not be considered independently).

[91] Becker, *supra* note __, at 163-68; Sachs, *supra* note __, at 2694-2700; Scalia, *supra* note __, at 489.

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collective bargaining and other forms of collective action.[92] Employment law encompasses the federal and state statutes and state case law regarding individual employment rights.[93] This dichotomy is recognized in neither Europe nor much of the rest of the world, where the term labor law is used to describe the whole body of law regulating the workplace.[94] This dichotomy is not a matter of mere semantics; it reveals the failure to coordinate the different tools available for regulation of the workplace.[95]

A second critique of the current labor and employment law regime that is relevant to the proposal in this Article is its failure either to empower workers collectively or individually to obtain favorable terms and conditions from their employers[96] or to use the command-and-control method to require employers to provide favorable terms and conditions to employees.[97] The law should empower workers to bargain with their employers because that

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[92] *See, e.g.*, Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 688 (1997); Scalia, *supra* note ___, at 490; 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, 575 (1992).

[93] *See, e.g.*, Bales, *supra* note ___, at 688-89; Scalia, *supra* note ___, at 490; Stone, *supra* note ___, at 576.

[94] *See generally* HARDIN, *supra* note __, at 23a-1 to 23a-3 (Am. Bar Ass'n ed., 1st ed. 1997). Consider, for example, the International Labour Organization, an agency within the United Nations, with 187 member nations, including the United States, which develops international labour standards. Within the ILO, the term "labour" refers to both collective and individual rights. https://www.ilo.org/global/about-the-ilo/lang--en/index.htm.

[95] Becker, *supra* note ___, at 58 (stating that "[a] politically feasible . . . economically rational, and effective reform proposal would seek to unify our labor and employment laws"); Andrias, *supra* note __, at 9 (theorizing a new labor law regime that rejects the bifurcation between labor law and employment law); Sachs, *supra* note __, at 2707-43 (describing ways in which statutory minimum rights law can be used to generate collective action and to provide protection for that action).

[96] The "failure" of the NLRA's collective bargaining model has been declared by many. *See, e.g.*, ESTLUND, *supra* note __, at 9; Andrias, *supra* note __, at 24; Sachs, *supra* note ___, at 2694-2700.

[97] Andrias, *supra* note __, at 37-40; Estlund, *supra* note __, at 445.

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approach would achieve greater flexibility and terms and conditions better suited to particular work situations.[98] The command-and-control approach does not achieve such tailored results and should not be the preferred approach.[99] Legislatures enacting statutes and courts articulating common law have failed to empower most employees either collectively or individually.

Congress began with the concept in the NLRA of empowering employees collectively by protecting their rights of representation and collective bargaining.[100] As has been extensively chronicled, union density and coverage by collective bargaining agreements in the U.S. has declined[101] to the point that the protection and power afforded by collective bargaining simply are not available to the vast majority of workers.[102] Without union representation, workers generally lack collective power because other forms of representation and participation are not available to them. The NLRB's interpretation of section 8(a)(2) of the NLRA renders it an unfair labor practice to maintain most types of employee participation or representation

[98] Finkin, *Union Dispossession*, *supra* note __, at 4 (discussing greater flexibility and compensating tradeoffs); *see also* Brudney, *supra* note ___, at 1598(faulting the minimum standards regime for its inflexibility, which "denies workers the ability to establish priorities for themselves").
[99] *See* Sunstein, *supra* note ___, at 250-51 (describing deficits of a one-size-fits all approach); Schwab, *supra* note ___, at 253 (noting the difficulty of enacting legislation that accommodates individual situations).
[100] *See, e.g.*, Eliasoph, *supra* note ___, at 220.
[101] Becker, *supra* note ___, at 170; Andrias, *supra* note __, at 13-32.
[102] Sunstein, *supra* note ___, at 259.

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mechanisms other than unions.[103] Moreover, efforts to amend, strengthen, and update labor law have failed.[104] The reasons for this failure, including declining strength of organized labor, concentration of union representation in particular parts of the country, and features in the political system,[105] are unlikely to change sufficiently to permit significant reform.[106]

The common law has failed to empower individual workers to use their ownership of their time and labor and other assets to bargain for favorable terms and conditions. Contract law as applied to employment does little to prevent employers from confiscating employee assets without exchanging value.[107] The common law regulatory approach does not adequately protect individual applicants and employees with insufficient

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[103] *See* Electromation, Inc., 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994).
[104] *See generally* Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002); Becker, *supra* note __, at 168.
[105] *See generally* Dorian T. Warren, *The Unsurprising Failure of Labor Law Reform and the Turn to Administrative Action* in REACHING FOR A NEW DEAL: AMBITIOUS GOVERNANCE, ECONOMIC MELTDOWN, AND POLARIZED POLITICS IN OBAMA'S FIRST TWO YEARS, 191-229 (Theda Skocpol & Lawrence R. Jacobs, eds. 2011); Andrias, *supra* note ___, at 40-44.
[106] Professor Brudney suggests that Congress is not hospitable to enhancing collective action by employees, and that it might take an economic or political crisis to rouse Congress to become more receptive to such change. Brudney, *supra* note ___, at 1599.
[107] *See, e.g.*, Rebecca N. Morrow, *Taxing Employers for Imposing Mandatory Arbitration, Class Action Waiver, and Nondisclosure of Dispute Provisions*, 74 SMU L. REV. 59, 101 (2021) (observing that when employers impose dispute resolution terms on their employees, they receive an asset "born of contract law"); Kate O'Neill, *"Should I Stay or Should I Go?"—Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L.J. 83, 96 (2010) (questioning whether contract law is the appropriate regulatory regime for assessing noncompetes). Generally, contract law often has been applied to the employment relationship in ways that have been more beneficial to employers than employees. For example, traditional contract doctrine has been distorted by courts to preserve and strengthen the presumption of at-will employment. *See* William R. Corbett, *Finding a Better Way Around Employment at Will: Protecting Employees' Autonomy Interests Through Tort Law*, 66 BUFF. L. REV. 1071,1079-80 (2018). On the other hand, some states have used state contract law to attempt to avoid enforcing mandatory arbitration agreements, only to be frustrated by the Supreme Court. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011).

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bargaining power to contract with employers for the terms and conditions that they want or need.[108] The preamble to the NLRA recognizes that employees need collective bargaining strength in order to wrest from employers favorable terms and conditions.[109] A related deficit of workers is their relative lack of information.[110] With their advantages in power and information, employers routinely persuade applicants and employees to agree to surrender assets for nothing in exchange other than giving the applicant a job or permitting the employee to retain a job. For example, employers often take employee's expectations of privacy either by having employees agree to waivers or simply giving them notice that they have no expectation of privacy.[111] The law of noncompetes is an area in which either legislatures or courts, depending upon the state, do restrict to some extent such confiscation. However, the restrictions vary from state to state, and there is no federal law on the issue,[112] although that will change if the FTC's proposed regulation goes into effect and survives legal challenges.[113]

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[108] *See* sources cited *supra* note ___.
[109] 29 U.S.C. §151. *See supra* note __.
[110] *See, e.g.*, Stericycle, Inc., 357 N.L.R.B. 582, 583 (2011); Finkin, *Union Dispossession*, *supra* note ___, at 1; Schwab, *supra* note ____, at 250.
[111] *See, e.g.*, Estlund, *supra* note ___, at 388. One may characterize this differently, saying there is no waiver because the employer eliminates any expectation of privacy simply by fiat. However, I, like Estlund, regard it as a waiver. Courts are inferring applicant or employee waiver after the employer gives notice based on the applicant's accepting employment or the employee's continuing in the job.
[112] *See, e.g.*, Phillip D. Thomas, *Would California Survive the Move Act?: A Preemption Analysis of Employee Noncompetition Law*, 2017 U. CHI. LEGAL F. 823 (2017); Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. Pa. J. Bus. L. 751 (2011).
[113] *See supra* text accompanying notes ___-___.

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Professor Christopher Wonnell identifies another example of the common law disempowering employees: he argues that courts' refusal to provide effective remedies to employers for contract breaches by employees disempowers employees.[114] Employers do not bargain with applicants and employees over favorable terms and conditions in employment contracts because employers know that the contracts will not benefit them. Courts grant effective remedies to employees for breaches by the employer, but not vice versa.[115] Thus, paradoxically, the protectionist and paternalistic orientation of the courts toward employees deprives them of the power to enter into beneficial contracts. In a similar vein, the paternalistic practice of lawmakers in enacting nonwaivable rights deprives employees of what may be valuable "bargaining chips" that they could trade for terms and conditions that they value more highly[116] if problems of unequal bargaining power and information could be addressed.

Rather than empowering employees to bargain either collectively or individually[117] with their employers, the U.S. federal employment law

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[114] Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87 (1993).
[115] *Id.* at 88.
[116] *See, e.g.*, Estlund, *supra* note ___, at 389; Schwab, *supra* note ___, at 248.
[117] Professor Finkin has argued for U.S. law to develop sufficient protections for individual employees to represent themselves in negotiations with their employers. *See* Matthew W. Finkin, *Employee Self-Representation and the Law in the United States*, 50 OSGOODE HALL L.J. 937 (2013) [hereinafter Finkin, *Self- Representation*]. He describes some ways in which the existing law does this, such as anti-retaliation provisions in employment laws and the duty of reasonable accommodation under the Americans With Disabilities Act, which has been interpreted as requiring an employer to engage in an interactive process with an employee requesting an accommodation.

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regime provides protections through minimum rights laws to workers.[118] As mentioned above, this is an ersatz approach because it lacks flexibility and adaptability to create workplace conditions tailored to the needs and wishes of employers and employees.[119] Furthermore, it leaves the workers powerless and often with significant information deficits[120] and a lack of participation in workplace governance.[121]

Related to the failure of labor and employment law to empower workers is its failure to provide them with a voice and opportunities to participate in the governance of the workplace.[122] Recent events, such as the Alphabet Workers and other incidents of employee activism, suggest that employees wish to be heard and to participate in shaping their workplaces.[123]

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[118] Summers, *Labor Law*, *supra* note ___, at 10-11 (stating that "if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party").

[119] *See, e.g.*, Becker, *supra* note ___, at 175-76 (observing that unions and employers could, through bargaining, adjust legislated standards to fit particular circumstances); Guy Davidov, *Non-Waivability in Labour Law*, 40 J. LEGAL. STUD. 482, 499 (2020) (noting the potential to replace "one-size-fits all" approach with "more nuanced, tailored solutions"); Estlund, *supra* note ___, at 443 (noting potential for promoting better form of workplace governance in which employees have voice); Schwab, *supra* note __, at 258 (describing potential for win-win situation when union brokers waivable rights); Sunstein, *supra* note ___, at 206 (contending that waivable rights lack rigidity of nonwaivable rights and would ensure that employers provide employees with information).

[120] Although statutes confer rights to certain terms and conditions on employees, the employees do not play a role in obtaining those terms and conditions, and many do not know that they have the rights or appreciate certain aspects of the rights or how to enforce them. Eliasoph, *supra* note ___, at 209 (noting that all studies support conclusion that vast majority of employees overestimate their employment rights); *Cf.* Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. 1025, 1047-48 (20210) (discussing employees' lack of understanding of their rights undermining enforcement).

[121] *See, e.g.*, ESTLUND, *supra* note __, at 11 (positing that labor law has failed to deliver a mechanism that permits employees to participate in workplace governance and employment law does not even attempt it).

[122] *See generally* RICHARD B. FREEMAN & & JOEL ROGERS, WHAT WORKERS WANT (2006); ESTLUND, *supra* note ___, at 11 & Ch. 2.

[123] *See infra* Part IV.B.1.c. *See also* Angela Reddock-Wright, *Welcome to the New Age of Employee Activism*, BLOOMBERG LAW: DAILY LABOR REP. (Aug. 18, 2021); Arlene S. Hirsch, *When and How Employers Should Respond to Employee Activism*, Society for Human Resource Management (Apr. 30,

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In the U.S., unions are the only real option for collective voice and participation.[124]

A third criticism of U.S. labor and employment law is for its failure to adjust to the evolving economy, labor market, and workplaces. Beyond the inferiority of the minimum rights approach already discussed, it is failing to provide minimal protections to a large segment of the workforce. The coverage provisions have not been modernized to provide broad coverage to workers in the workplaces of today. The most general problem is that all federal employment statutes apply to "employees" of "employers" and not "independent contractors" or other classifications of workers.[125] The emergence and rapid expansion of the "gig economy"[126] leaves many workers, classified by those for whom they work, as independent contractors

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2021); Ashish Kaushal, *How The Rise Of Employee-Led Activism Is Changing Expectations Of Leadership*, FORBES (May 4, 2022). *But see* Harry G. Hutchinson, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC L. REV. 799, 837 (2008) (arguing that "the attractiveness of collective groups (unions or otherwise) varies inversely with the legal protections already available to employees in the workplace").

[124] Although concerted activity for mutual aid or protection beyond union activity is protected by Section 7 of the NLRA, some employees have found, as in the case of the Alphabet Workers Union, that they need an organization for power and protection. *See infra* note ___.

[125] *See, e.g.*, Orly Lobel, *We Are All Gig Workers Now: Online Platforms, Freelancers & The Battles Over Employment Status & Rights During the COVID-19 Pandemic*, 57 SAN DIEGO L. REV. 919, 921 (2020); C. Tippett & Bridget Schaff, *How* Concepcion *and* Italian Colors *Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U.L. REV. 459, 463 (2018).

[126] The term "gig economy" was coined by journalist and entrepreneur Tina Brown to describe the post-recession of 2008 flexible job market in which many workers provide on-demand work, service, or goods. Camille Fetter, *The Gig Economy Opportunity: Let's Get Women Back Into the Workplace Post-Pandemic*, FORBES (May 2, 2022), https://www.forbes.com/sites/forbeshumanresourcescouncil/2022/05/02/the-gig-economy-opportunity-lets-get-women-back-into-the-workplace-post-pandemic/?sh=457cf776875c.

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uncovered and unprotected.[127] The coverage issues have become more significant in recent years as the gig economy has become a substantial and rapidly expanding part of the labor force in the U.S.[128] Increasingly, businesses are classifying workers as independent contractors and claiming that they are not due the entitlements conferred by the statutes.[129] That development has prompted courts and agencies to spend substantial time and energy in developing tests and standards that expand or contract the definition of "employee."[130] Yet, the point is that the archaic coverage provisions of the individual rights laws leave a large segment of the workforce unprotected. This point became particularly salient during the COVID-19 pandemic.[131] In response, Congress expanded coverage under

[127] Laurie E. Leader, *Whose Time is It Anyway?: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. 96, 97 (2019).

[128] The size of the U.S. workforce in the gig economy is continually expanding. The Pew Research Center reported that in 2021 sixteen percent (16%) of the U.S. population had earned money from jobs in online platforms. *See* Pew Research Institute, *The State of Gig Work in 2021* (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/. Gig workers may account for as much as 35% of the U.S. workforce.

[129] Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479 (2016); Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J. L. & SOC. CHANGE 53 (2015).

[130] The California experience is particularly notable. *See* Harvey Gelb, *Defining Employee California Style*, 55 LOY. L.A. L. REV. 1 (2022); Samantha J. Prince, *The AB5 Experiment--Should States Adopt California's Worker Classification Law*, 11 AM. U. BUS. L. REV. 43 (2022). The Trump Department of Labor promulgated a business-friendly rule regarding the classification of workers, which the Biden DOL rescinded. *See* Ben Penn, *Biden Axes Trump Gig-Worker Rule, Favoring "Employee" Model*, Bloomberg Law: Daily Lab. Rep. (May 5, 2021), https://news.bloomberglaw.com/daily-labor-report/biden-axes-trump-gig-worker-rule-backs-broader-employee-model. However, that rule was revived when a federal district court on March 14, 2022, ruled that the DOL's rescission violated the Administrative Procedures Act. *Coalition for Workforce Innovation v. Walsh*, No. 1:21-cv-00130, 2022 WL 1073346 (E.D. Tex. March 14, 2022), *appeal filed*, No. 22-40316 (5th Cir. filed 5/16/22).

[131] *See* Lobel, *supra* note ___, at 921 (contending that "the COIVD-19 pandemic has exposed the vulnerabilities of gig workers and the irrationalities of rigid classification tests that have always been the Achilles heel of the field of employment and labor law").

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state unemployment programs to self-employed workers and independent contractors and permitted such workers to apply for grants under the Payroll Protection Program.[132]

A final criticism of the current labor and employment law regime merits consideration—the illusory nature of the protections/rights because of a largely feckless enforcement scheme. Skeptics of expanded use of waivable rights will likely claim that such a proposal is an evisceration of the valuable rights and protections that Congress has decided employees need.[133] However, such concern overstates the value of these rights to employees and the extent of the protection they provide. The enforcement method for many of the statutory rights is ultimately litigation in the courts.[134] If federal agencies are not able to resolve claims and do not pursue claims themselves, it is left to employees to sue.[135] If left to pursue their own claims, employees find that the Supreme Court has consistently held that waivers of class or collective claims are enforceable.[136] Moreover, many of those who wish to pursue claims and enforce their rights find that they are restricted by mandatory arbitration agreements from pursuing employment

[132] *Id.* at 923.
[133] *See* Davidov, *supra* note __, at 500 (stating that expansion of waivable rights may be opposed for this reason).
[134] *See, e.g.*, Becker, *supra* note ___, at 170-73.
[135] *See, e.g.*, ESTLUND, *supra* note __, at 10.
[136] *See* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018); AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen v. Animalfeeds Int'l Corp., 559 U.S. 662 (2010).

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claims in the courts and instead must pursue them, if at all, in arbitration.[137] Many individual employees (in the vast majority of cases *former* employees)[138] have insufficient resources to pursue litigation against employers, and many do not have access to competent legal representation.[139] Thus, the U.S. employment law regime depends largely for enforcement on individuals who may lack sufficient resources to vigorously pursue their claims and who may have been deprived of their choice of forum. Consequently, the individual minimum rights provided by Congress often practically amount to no rights at all because of inadequate enforcement.[140] This reality substantially undermines the argument that making such statutory rights waivable dilutes valuable protections. However, it also raises the question whether employers would be willing to

[137] *See, e.g.*, Viking River Cruise, Inc., v. Moriana, 142 S. Ct. 1906 (2022); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[138] FINAL REPORT, *supra* note ___, at 49-50; Becker, *supra* note ___, at 172 (citing John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991)).
[139] Stericycle, Inc., 357 N.L.R.B. 582, 583 (2011); Becker, *supra* note __, at 172 (citing Samuel Estreicher & Zev. J. Eigen, *The Forum for Adjudication of Employment Disputes* in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 410 (Cynthia L. Estlund & Michael L. Wachter eds. 2013)).
[140] Andrias, *supra* note ___, at 39-40; Estlund, *supra* note __, at 445. Professor Finkin notes that the U.S. commitment to statutory and common law employee rights and protections "depends on the happenstance of administrative intervention or individual litigation for their vindication. Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 216 (1993) [hereinafter, Finkin, *The Road*]. He argues that if the nation is serious about protecting these rights, "there would seem to be no more effective means than well informed, adequately financed, and truly independent employee organizations active in the shop or office."

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give much value in exchange for waiver of feeble protections. For reasons detailed below,[141] I think many would.

In summary, the U.S. labor and employment law regime has many shortcomings and problems, which might be ameliorated by a new approach. Our vision has not been broad enough.[142] An under-explored approach is a new coordination or articulation of the legislative rights that have been the tools of choice for over half a century with the collective bargaining and contract law approaches.[143] Lawmakers should consider adding conditionally waivable employment rights to the tool set.[144] If legislatures were to confer some conditionally waivable rights on workers, employees could be empowered to engage in bargaining with employers for terms and conditions of employment that better fit the needs and desires of both employees and employers. Workers could gain information, voice, and participation in governance of the workplace. In order to make such a tool serviceable in employment law, however, a significant question must be addressed. How can the law make rights waivable and concomitantly provide employees

[141] *See infra* text accompanying notes ___-____.
[142] Sunstein, *supra* note __, at 209 (explaining that most debates about U.S. employment law have focused narrowly on three alternatives—waivable employers' rights, collective bargaining, and nonwaivable employees' rights).
[143] Davidov, *supra* note __, at 482 (describing "lack of theorizing" in the area); Sunstein, *supra* note __, at 208 (discussing narrow framing of debate regarding allocation of legal rights).
[144] *See* Estlund, *supra* note __, at 440 n.151(suggesting conditionally waivable rights as "one building block of a post command-and-control employment law"); Davidov, *supra* note __, at 501 (suggesting that some form of conditional waivers could be part of the solution to the decline of union power); Sunstein, *supra* note ___, at 271 (characterizing waivable rights as "a distinctive, promising, and insufficiently explored approach to the law of labor relations").

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with more bargaining power and sufficient information to put them on more even footing with employers? An acceptable answer to that question is necessary to protect those rights against appropriation by employers for nothing or for far less than their value.

III. The Basic rule of Nonwaivability and Exceptions

It is a fundamental principle of labor law in the U.S. and other nations that most labor law rights conferred on employees by legislation are nonwaivable.[145] There are some exceptions. However, waivable statutory employment rights is an issue that is underexplored by scholars and commentators.[146] To the extent there has been consideration of waivable rights in the U.S., recent sentiment among many commentators and lawmakers has been understandably critical of the law regulating two generally permitted waivers of rights—mandatory arbitration agreements and covenants not to compete.[147] This section first considers the arguments in support of nonwaivability of employment rights. Then it considers some of the exceptions to nonwaivability in both other nations and the U.S. Finally, it explores some of the proposals that have been made for expanded use of waivable rights.

[145] Davidov, *supra* note ___, at 482; Schwab, *supra* note __, at 248.
[146] *See* Davidov, *supra* note __, at 482; Sunstein, *supra* note ___, at 271.
[147] *See infra* text accompanying notes ___-____.

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A. Rationales Supporting Nonwaivability

The most compelling reason for nonwaivable employment rights is the assumption that a decision by an individual employee to waive a right/protection that she possesses is not a product of free choice and freedom of contract.[148] Instead, employers with the power to confer, withhold, continue, or discontinue employment have overwhelming bargaining power to demand a waiver, and applicants and employees who need jobs have insufficient bargaining power to resist the demand.[149] This assumption seems to be borne out in the U.S. where employers routinely require applicants and current employees to sign mandatory arbitration agreements and noncompete agreements.[150] Most scholars who have examined nonwaivability cite workers' lack of both adequate bargaining power and sufficient information or knowledge[151] to engage in a bargaining process that results in a knowing and voluntary waiver based on an exchange for value that can be mutually beneficial.[152] Although some waiver decisions almost certainly are products of bargaining and are knowing and voluntary, most commentators agree with Professor Schwab's assessment that in many

[148] Davidov, *supra* note__, at 483.
[149] *See, e.g.*, Estlund, *supra* note ___, at 390 (stating that employers have little difficulty exacting waivers when it is in their interest); Finkin, *Union Dispossession*, *supra* note ___, at 1 (positing that individual job seekers are in no position other than to accept or reject terms offered).
[150] *See generally* Estlund, *supra* note ___.
[151] *See* sources cited *supra* note ___. Ian Eliasoph posits that employees lack knowledge of their rights and protections in part due to the dizzying array of law (statutes, regulations, case law) at various levels of government. Eliasoph, *supra* note ___, at 21.
[152] *See, e.g.*, Schwab, *supra* note __, at 252-53; Becker, *supra* note ___, at 171.

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cases a waivable right "may not be much of a right at all."[153] Accordingly, lawmakers enact laws conferring nonwaivable rights. A second-order argument for nonwaivability is that, even though some waivers probably are not implicitly or explicitly coerced, it is difficult for courts or other adjudicators to make that determination. Indeed, consent is not necessarily an all-or-nothing proposition; there are degrees or ranges of consent.[154] Therefore, the better position is for lawmakers to enact nonwaivable protections.[155] Thus, a major justification for nonwaivability is clearly paternalistic—protecting applicants and employees from confiscation of their rights by employers.[156]

Beyond protecting workers from confiscatory employers, there is a second and more strongly paternalistic justification for nonwaivable rights. Rights need to be nonwaivable to protect workers from themselves.[157] Several scholars have explored the behavioral tendencies and cognitive biases that may cause many workers to agree to waivers even when it is a decidedly bad deal.[158]

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[153] Schwab, *supra* note ___, at 253.
[154] Davidov, *supra* note ___, at 487.
[155] *Id.*
[156] *E.g.*, Davidov, *supra* note ___, at 483; Schwab, *supra* note __, at 251.
[157] Schwab, *supra* note ___, at 252 (referring to this rationale as "strongly paternalistic").
[158] *See*, *e.g.*, Schwab, *supra* note ___, at 252; Sunstein, *supra* note ___, at 240-44 (discussing intransigent ignorance, excessive optimism, inadequate foresight, and "editing out").

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The paternalism arguments for nonwaivability are strong. Although we often speak of paternalism pejoratively, Professor Davidov argues that, paradoxically, such paternalism is necessary to protect workers' autonomy.[159] An ardent supporter of the paternalistic justifications for nonwaivability, Davidov expands and strengthens the argument, contending that protecting human dignity is a goal of labor law.[160] Accordingly, he argues that a line must be drawn beyond which the law does not give workers the freedom to agree to limit their own capabilities and to submit to domination.[161]

Although the paternalism/autonomy arguments are a powerful justification for nonwaivability, there are other ways to protect employee autonomy.[162] We have not explored them sufficiently because we have been too narrow in our approach to the law's allocation of rights.[163]

In addition to the paternalism arguments, there are several other rationales supporting nonwaivability. One is that some rights are enacted to

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[159] Davidov, *supra* note __, at 486; *see also* Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 293 (2003) (stating that "a sensible analytical approach is to compare the gain in autonomy from the act of waiver with the loss of autonomy when the right is waived and then try to maximize the overall autonomy").

[160] Davidov, *supra* note __, at 492; *see also* Estlund, *supra* note ___, at 442 (stating that employment rights are essential to personhood and citizenship).

[161] *Id.* at 491. Davidov gives as an example antidiscrimination laws. Although the example is generally persuasive, it goes too far. *See infra* text accompanying notes ___-___.

[162] *See, e.g.*, Schwab, *supra* note __, at 253 (discussing range of approaches to achieve "libertarian paternalism"); Davidov, *supra* note __, at 496 (admitting of "room for intermediate solutions in some cases").

[163] Sunstein, *supra* note ___, at 209.

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protect someone other than the covered employee.[164] For example, the overtime requirement of the Fair Labor Standards Act can be viewed as preventing employees who are willing to work many hours for low wages from undercutting other employees who are not willing to do that.[165] So understood, it would defeat a purpose of the law for the covered employee to waive the protection. A related justification for nonwaivability is that many protections are public goods provided to all workers, and individuals who waive the right may undermine the production of that public good.[166] Each of these justifications is applicable to some, but perhaps not all, employment rights. Moreover, third parties and public goods also can be protected by constrained waivers.

Finally, nonwaivability of some employment rights may be justified on grounds of public policy. Some, and maybe most, employment laws, are enacted to recognize and further one or more public policies. However, in arguing for nonwaivability, one should not exaggerate the role of public policy, as not all employment legislation is necessarily driven primarily by "noble" public policy.[167] As Schwab points out, self-interested groups lobby

[164] Schwab, *supra* note __, at 252; Sunstein, *supra* note ___, at 259.
[165] Schwab, *supra* note ___, at 252.
[166] *Id.*
[167] *Id.* at 251.

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for legislation that supports their interests.[168] Indeed, most legislation is pushed across the finish line by institutional support.[169] Thus, the public policy rationale for nonwaivability should require a nuanced consideration of the particular statute at issue and the underlying public policies. It is plausible that making some rights waivable would frustrate achievement of important public policies. Or, as Sunstein explains, some laws are intended to change prevailing norms, and permitting waivers would impinge upon that objective, as changing norms requires collective action.[170] The federal employment discrimination laws are probably the most often-cited example,[171] although I later will challenge that proposition to some extent.[172]

In sum, there are several persuasive justifications for nonwaivability of employment rights. So, it is unsurprising that lawmakers routinely enact statutes that grant nonwaivable rights. It also is understandable that little scholarship has been devoted to exploring waivability and considering the possible benefits of creating more waivable employment rights.[173]

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[168] *Id.* Schwab gives the FLSA as an example, which was supported by organized labor in part because it set a floor below which relatively unskilled workers could not agree to work and undercut union members. I would add the Age Discrimination in Employment Act of 1967. *See* Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780 (1997) (discussing lobbying efforts to expand the reach of the ADEA).
[169] Issacharoff & Harris, *supra* note __, at 806-07.
[170] Sunstein, *supra* note ___, at 263-64.
[171] *See, e.g.*, Schwab, *supra* note __, at 265; Becker, *supra* note ___, at 187; Sunstein, *supra* note __, at 263.
[172] *See infra* text accompanying notes ___-____.
[173] *See* Davidov, *supra* note __, at 482 (noting the lack of theorizing in this area).

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B. Waivable Employee Rights

Although nonwaivability of statutory rights is the default approach in the labor law regimes of all developed nations, there also are labor rights that are waivable. This Section considers some of the exceptions with a view toward identifying some successes and failures and some characteristics of waivable rights. Additionally, it considers waiver of a nonstatutory right by employees—noncompetes or covenants not to compete.[174]

1. Waivable Rights In the Labor Law of Other Nations

In his survey of waivable labor rights under German law, Professor Finkin begins by recognizing the role of unions. Unions can, under some circumstances, negotiate variations of statutory rights. Derogations upward are permitted and commonly occur.[175] However, some laws permit downward adjustments in collective bargaining agreements.[176] In order for a union in Germany to negotiate an enforceable collective agreement, the union must have sufficient strength to engage in meaningful conflict with an employer.[177] Thus, a union that negotiates downward adjustments but obtains little of value in return cannot enter into an enforceable agreement. This principle is employed to prevent what are called in the U.S.

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[174] *See generally* Estlund, *supra* note ___, at 390 (observing that arbitration agreements and non-competes are contracts that waive employee rights).
[175] Finkin, *Union Dispossession*, *supra* note ___, at 9.
[176] *Id.*
[177] *Id.* at 12. The term is *Tariffähigkeit.*

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"sweetheart" contracts or deals.[178] Some examples of statutory protections for which German laws permit downward adjustments are notice periods for dismissals, continuation of payments for sickness and public holidays, federal holidays, and working time.[179] One of the more interesting derogable rights, considered a failure by Finkin,[180] was substantially overhauled in 2017. German law regulates the relationships and payments among a lending employer, its employee, and a borrowing employer. Generally, the law requires that the borrowed employee be paid equally with the borrowing employer's employees, and it caps the period of borrowing. However, the Temporary Employment Act permitted downward adjustments in collective agreements.[181] Finkin notes that this law was thought to be like U.S. law permitting unions to opt out from local minimum wage ordinances.[182] Some parts of that law remain in effect, but it was amended to impose caps on the downward adjustments.[183] Finkin compares the German laws with U.S. laws and notes that both regimes permit "to a small extent, so far" unions to negotiate collective agreements with employers that downward adjust statutory rights.[184]

[178] *Id.*
[179] *Id.* at 9.
[180] *Id.* at 11
[181] *Id.* at 10-11.
[182] *Id.* at 10.
[183] *Id.* at 11-12.
[184] *Id.* at 14.

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I wish to make several points about Professor Finkin's survey of German law regarding waivable rights that relate to the proposal I make later in this Article. First, both German and U.S. law permit derogations from statutory minimum terms and conditions by unions that have information and bargaining power rather than by individual employees. French law is similar in this respect.[185] Second, the terms and conditions with which legislatures have been willing to experiment with waivability are largely pay and working time. Third, the experiments with waivability, as with the German law on temporary workers, can fail because it is difficult for lawmakers to protect employees on whom they confer minimum rights from bad deals or bad waivers, even when a bargaining agent represents them.

Under German law, noncompetes are permitted and are enforceable if they comply with certain constraints. As in the U.S. generally, they must be necessary to protect a legitimate employer interest and reasonably limited in time, geography, and scope (similar business).[186] Additionally, and unlike U.S. laws, employers enforcing noncompetes must pay a portion of the former employee's wages and benefits during the duration of the

[185] *Id.* at 2 n.1 (discussing derogations at various levels, national, interprofessional, branch, regional, local, firm, etc., by different actors with different legal capacities); *see also* Christophe Vigneau, *Labor Law Between Changes and Continuity*, 25 COMP. LAB. L. & POL'Y J. 129,133-35 (2003) (discussing under French law collective bargaining agreements that adjust downward working time rights).
[186] *See* Angie Davis, Eric D. Reicin & Maris Warren, *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, 30 A.B.A. J. LAB. & EMP. L. 255, 268 (2015).

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restriction.[187] If the agreed upon compensation does not comply with the statutory minimum, the noncompete is not enforceable.[188]

Regarding employee waivers of employee expectations of privacy, both German[189] and European Union[190] law are protective of employees' privacy. Neither body of law permits employers as much latitude in coercively obtaining waivers or consents from employees[191] as is permitted under the law of the U.S.[192]

A significant minimum right conferred by European Union law that permits waiver is the EC Working Time Directive, generally establishing a maximum work week of forty-eight hours.[193] The 1993 Directive was replaced in 2003.[194] Both the 1993 and the 2003 Directives permit member states to enact laws that deviate if negotiated by collective agreement.[195] However, they also permit nations to legislate to permit individual opt-

[187] *Id.*; Thilo Mahnhold, *Choice of Law Provisions in Contractual Covenants Not to Compete: The German Approach*, 31 COMP. LAB. L. & POL'Y J. 331, 332-33 (2010).
[188] Mahnhold, *supra* note __, at 333.
[189] *See generally* Mark Dichter & Walter Aherns, *Germany* in IA INT'L LABOR & EMP. LAWS, *supra* note __, at 5-40 to -47; Lothar Determann & Robert Sprague, *Intrusive Monitoring: Employee Privacy Expectations are Reasonable in Europe, Destroyed in the United States*, 26 BERKELEY TECH. L.J. 979 (2011).
[190] Jeff Kenner, *European Union* in IA INT'L LABOR & EMPL. LAWS, *supra* note ___, at 1-148 to -159; Determann & Sprague, *supra* note ___.
[191] Determann & Sprague, *supra* note ___, at 1027-28.
[192] *See infra* text accompanying notes ___-___.
[193] Directive 93/104/EC. *See generally* Jelle Visser, *More Holes in the Bucket: Twenty Years of European Integration and Organized Labor*, 26 COMP. LAB. L. & POL'Y J. 477 (2005).
[194] Directive 2003/88/EC.
[195] Directive 93/104/EC Art. 17; Directive 2003/88/EC Art. 18.

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outs.[196] Only former E.U. member the United Kingdom exercised that provision when it enacted the Working Time Regulations 1988.[197] The individual opt out has been used extensively in the U.K.[198] Employers must have a letter signed by an employee opting out of the maximum work week.[199] There have been reports of widespread abuse of the individual opt out by employers.[200]

Consideration of the U.K. Working Time Regulations adds a couple of points about laws permitting deviations from minimum rights. First, unlike the German examples, U.K. law permits individual employees to agree to deviations in their statutory minimum right. Second, it raises concerns about how to ensure that individuals are knowingly and voluntarily agreeing rather than acceding to employer coercion and how to ensure that they are not making a bad deal—that they are receiving something of value for the waiver.

A notable failure in U.K. law regarding waivable employment rights is the Employee Shareholder Status. Under a law that went into force in September 2013, employees could agree with their employers to give up a

[196] Directive 93/104/EC Art. 18(1)(b); Directive 2003/88/EC Art. 22.1.
[197] The Working Time Regulations, SI 1999/3372.
[198] *See, e.g.*, Jeff Kenner, *Working Time, Jaeger and the Seven-Year Itch*, 11 COLUM. J. EUR. L. 53, 62 (2004/2005).
[199] https://www.gov.uk/maximum-weekly-working-hours/weekly-maximum-working-hours-and-opting-out; Working Time Regulations 1998/1833 Reg. 5 Agreement to exclude the maximum.
[200] Sandra Haurant, *Employers Abuse 48-Hour Week Opt-Out*, THE GUARDIAN (Dec. 2, 2003), https://www.theguardian.com/business/2003/dec/02/workandcareers.money.

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number of statutory rights in exchange for becoming shareholders in the business at a value of no less than £2,000.[201] In such arrangements, the employee waived rights to bring unfair dismissal claims and to receive redundancy pay, as well as other rights.[202] The law required several procedural safeguards: a detailed written statement of particulars;[203] independent advice regarding the terms and effect provided by a "relevant independent adviser," such as a qualified lawyer or certified trade union official;[204] and a seven-day cooling-off period.[205] The law also prohibited employers from retaliating against, including dismissing, current employees who rejected shareholder status, but that protection did not extend to new employees.[206] The law included certain tax exemptions for employers and employees. This innovation featuring a waiver of rights was critiqued by one commentator as "an unprecedented attack on the very core relationship of employment law, the contract of employment: divorced from employment protective norms, it loses its key public-regulatory function, the distribution of risk between workers and their employing entities."[207] The experiment

[201] Growth & Infrastructure Act 2013, c. 27, § 31 (Eng.). *See generally* Jeremias Prassl, *Employee Shareholder "Status": Dismantling the Contract of Employment*, 42 INDUS. L.J. 307 (2013).
[202] Prassl, *supra* note __, at 313.
[203] Employment Rights Act 1996 §205A(1)(c).
[204] *Id.* §205A(6)(a) & (7).
[205] Dept. of Business, Innovation & Skills Guidance n. 33.
[206] Prassl, *supra* note __, at 315.
[207] *Id.* at 307. The criticisms seem well-founded in the case of this particular law. The critique also serves as a reminder that proposals to make employment rights waivable are susceptible to the criticism that they represent a dilution of labor protections. *See* Davidov, *supra* note ___, at 500.

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ended with the tax incentives being terminated in 2016, and the government announcing its intention to abolish the Employee Shareholder Status.[208]

The U.K. experiment with the Employee Shareholder Status and its failure suggest several points about waivable employment rights. First, when individual waiver rather than collective waiver is permitted, it is necessary for government to impose procedural and/or substantive constraints on the waiver to protect the employee. The U.K. government imposed both. The procedural constraints consisted of a written statement of terms, mandatory independent advice from a knowledgeable adviser, and a cooling off period would seem to be adaptable to various work arrangements and waivable rights. Those procedural constraints are similar to those imposed by the U.S. under the Older Workers Benefit Protection Act.[209] For substantive constraints, however, how did the government know that a minimum of shares worth £2000 would be a fair exchange in all employment situations? Although employees had a bargaining chip with which they could negotiate, they were not significantly empowered to strike bargains that benefited them because the exchange was limited; the workplace term and the value they could expect in return was specified by the government. It seems likely that

[208] Chancellor of the Exchequer's Autumn Statement 2016, https://www.gov.uk/government/publications/autumn-statement-2016-documents/autumn-statement-2016; *see also* Gavin Charlton & Order Cairns, *Abolition of the Employee Shareholder Status* (Nov. 24, 2016), https://www.lexology.com/library/detail.aspx?g=aa72a9a3-f666-403d-9934-7f7e8f8dbc9e.
[209] 29 U.S.C. §626(f). See discussion *infra* text accompanying notes ___-____.

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at least some employees would have preferred to bargain for something different than shares worth £2,000. They did not have that option. The protection of voluntary waiver/freedom of contract was weak, as the law prohibited retaliation against current employees but not applicants/new employees. Moreover, the law did not create significant incentives for employers to seek the waivers. Obtaining a few individual waivers from employees would not significantly free an employer from the burdens imposed by the statutory rights. Employers need waivers that are broadly applicable both to alleviate the regulatory burdens and to make management of the workplace efficient.[210] The incentives inherent in the individual waiver approach would seem to be for employers either to forego seeking the waivers or to seek them and coerce many (or all) employees to agree to them. In light of these problems with the Employee Shareholder Status, it should not be surprising that it failed. The shortcomings are instructive, however, regarding how to design effective conditionally waivable rights with procedural and/or substantive constraints.

There is no legislation governing noncompetes in the U.K.[211] Generally, a noncompete that is overly broad and is considered an

[210] *Cf.* Schwab, *supra* note ___, at 258 (observing that with waivers by unions in collective bargaining agreements, employers "can escape certain costly restraints or conditions").
[211] Paul Callaghan, *United Kingdom* in IA INT'L LABOR & EMP. LAWS, *supra* note ___, at 8-55.

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unreasonable restraint of trade will not be enforced.[212] Noncompetes are enforceable in the U.K. if they meet requirements of employer necessity to protect a legitimate employment interest and reasonableness in geography, time, and scope.[213] Generally, U.K. courts are less likely to enforce noncompetes than U.S. courts.[214] Furthermore, the use of "garden leave" in the U.K. is a prevalent practice and is enforceable, resulting in noncompetes being less prevalent in the U.K. than in the U.S.[215]

The law of the United Kingdom is generally more protective of employee privacy than the law of the U.S.[216] Employers in the United Kingdom, in order to engage in monitoring, generally must provide more information to employees than is required in the United States.[217]

2. Waivable Rights in U.S. Labor and Employment Law

a. Waivers by Unions

Derogations from statutorily imposed minimum rights are permitted for some rights in the U.S. when the deviations are agreed to by a union in a

[212] *Id.* at 8-55.
[213] *Id.* at 8-57; Davis, et al, *supra* note ___, at 267.
[214] Davis, et al, *supra* note ___, at 267.
[215] *Cf.* Charles A. Sullivan, *Tending the Garden: Restricting Competition Via "Garden Leave,"* 37 BERKELEY J. EMP. & LAB. L. 293, 299 (20160 (stating that garden leave was developed in the U.K. largely in response to judicial hostility to noncompetes).
[216] Callaghan, *supra* note ___, at 8-47 to -51.
[217] *See generally* Employment Practices Code (Information Commissioner's Office), at https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf.

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collective bargaining agreement.[218] Unions have the most discretion to trade rights created by the NLRA. For example, unions can trade the following rights: the right to strike; the right to take unfair practice claims to the Board before grievance and arbitration; and the *Weingarten* right to representation at a hearing.[219] However, not all rights under the NLRA are waivable, and the standard distinguishing waivable from nonwaivable rights is not clear.[220]

Beyond labor rights under the NLRA, unions can waive some employment rights, but such waivers are limited to specific permissions in the particular statutes creating the rights. At the federal level, the Fair Labor Standards Act provides a specific waiver option: collective bargaining agreements can provide for special workweek arrangements that provide flexibility regarding the employer's overtime obligation for hours worked over forty per week.[221] ERISA permits a less protective vesting period for multi-employer plans established by collective bargaining agreements.[222] Furthermore, the Supreme Court held in *Livadas v. Bradshaw*[223] that state statutes creating employment rights could provide opt-outs for employees

[218] *See generally* Schwab, *supra* note ___, at 255 (noting the contrast between the law's hostility to individual waivers and receptivity to union waivers); Finkin, *Union Dispossession*, *supra* note ___.
[219] Schwab, *supra* note ___, at 256-58.
[220] *Id.* at 258. Generally, a union cannot waive rights of employees to choose their representative; that is, a union cannot waive employee rights to "lock in" the union's majority status. *Id.*
[221] 29 U.S.C. § 207(b)(1). This provision is discussed in Schwab, *supra* note __, at 263; Finkin, *Union Dispossession*, *supra* note ___, at 6-7.
[222] 29 U.S.C. §1053(a)(2)(A). *See* Schwab, *supra* note ___, at 262-63.
[223] 512 U.S. 107 (1994).

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represented by unions. There are numerous examples of state employment laws that permit unions opt outs in collective bargaining agreements.[224]

b. Waivers by Individual Workers

Generally, individual workers cannot enter into enforceable waivers of statutory employment rights. For example, individual employees cannot waive their rights under the federal employment discrimination statutes,[225] the FLSA,[226] the Family and Medical Leave Act,[227] the Employee Polygraph Protection Act,[228] etc.

There are, however, some statutory and some common law rights that individual workers can validly waive if certain procedural and/or substantive conditions are satisfied. The ADEA permits settlement of existing age discrimination claims. Additionally, state laws will enforce waivers of rights of workers to compete with their employers after separation from employment. A final example is that federal and state laws[229] will enforce waiver of both the right to bring civil actions in courts based on violations of statutory rights and the right to pursue class or collective claims for violations of statutory rights.

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[224] *See* Schwab, *supra* note __, at 261-62; Finkin, *supra* note __, at 6-8.
[225] Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974).
[226] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945); D. A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114–116; Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42 (1944); 29 CFR § 785.8 (1974).
[227] 29 C.F.R. § 825.220 (d).
[228] 29 U.S.C. § 2005 (d).
[229] Enforceability of mandatory arbitration agreements and agreements to waive the right to assert class and collective claims is determined by both state contract law and federal law.

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The ADEA permits a waiver of age discrimination claims pursuant to the Older Workers Benefit Protection Act (OWBPA).[230] While employees can settle claims under all statutes,[231] the OWBPA imposes specific constraints on the settlement or waiver of claims. Employees can execute knowing and voluntary waivers of existing age discrimination claims. For a waiver to be knowing and voluntary, there are several specific requirements that must be satisfied for a waiver to be valid, including it must be written and understandable, must refer to claims and rights under the ADEA, must advise the employee to consult an attorney before signing, must provide at least twenty-one days to consider the waiver, and must provide at least seven days after signing for the employee to revoke.[232] These waivers of ADEA rights differ from the other waivers that are discussed in this Article because they are not prospective or *ex ante* waivers; they are waivers of only existing claims.[233]

Two of the types of waivers most often used by employers in the U.S. are noncompetes and mandatory arbitration agreements. Both involve

[230] 29 U.S.C. § 626(f).
[231] Although employees may wish to settle claims and not proceed with charges or lawsuits, the government agency may pursue a claim. For example, an employee who files a discrimination charge with the EEOC may wish to withdraw the charge as part of the settlement. However, the EEOC has the authority to pursue the claim notwithstanding the wishes of the employee. *See, e.g.,* EEOC v. Watkins Motor Lines, Inc., 553 F.3d 593 (7th Cir. 2009).
[232] 29 U.S.C. § 626(f).
[233] Id. § 626(f)(1)(C) ("does not waive rights or claims that may arise after the date the waiver is executed"); Sunstein, *supra* note __, 249-50. Sunstein notes that Professor Christine Jolls has urged that prospective waivers should be permitted. *Id.* at 250 (citing Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1845 (1996)).

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contractual waivers by workers of rights they possess.[234] Although noncompetes do not entail waiver of a *statutory* right, they do involve waiver of one of the most fundamental and important rights a worker has—the right to sell her time and labor to an employer of her choice. That right emanates from property and contract law.[235] Mandatory arbitration agreements do involve waivers of statutory rights because the statutes creating employment rights also create rights to sue in courts. Many mandatory arbitration agreements not only waive the right to bring civil actions in courts, but also waive the right to bring class or collective claims. This right, too, is statutory, created by Rule 23 of the Federal Rules of Civil Procedure (class actions) and the FLSA (collective actions).[236] The rights to sue in court and assert class or collective claims are distinguishable from many other employment rights created by federal statute because they are procedural rights rather than substantive protections. The U.S. law regarding enforceability of noncompetes and arbitration agreements illustrates some of the complexity of the U.S. labor and employment regime. The law regarding

[234] Estlund, *supra* note ___, at 390.
[235] *Id.* at 386; Sunstein, *supra* note __, at 212.
[236] 29 U.S.C. § 216(b). It has been argued, unsuccessfully, that if the Federal Arbitration Act is interpreted as rendering enforceable waivers of rights to bring class and collective claims under some federal statutes, it would create a conflict between the FAA and the federal statute creating the right. *See* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) (addressing the issue under the NLRA); Gaffers v. Kelly Servs., 900 F.3d 293, 296 (6th Cir. 2018) (addressing the issue under the FLSA).

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noncompetes is state law and varies somewhat from state to state.[237] The law regarding enforceability of arbitration agreements is a mixture of state contract law and federal law involving court interpretations of the Federal Arbitration Act (FAA).[238] Even when state courts attempt to impose state contract law to determine the enforceability of arbitration agreements, the Supreme Court sometimes finds that the state law is preempted by the FAA.[239]

As Professor Estlund discusses, the law of both noncompetes and arbitration agreements renders the worker rights at issue conditionally waivable.[240] Courts will find the agreements to be enforceable only if they satisfy a number of criteria established by statute, case law, or both.

For noncompetes, each state establishes the conditions under which an agreement is enforceable.[241] Generally, noncompetes are enforceable if the employer can identify an interest it has that is entitled to protection, and the covenant restricts the worker from competing in the same or similar types of work within a reasonable geographic area for a reasonable period of time.[242] Recent years have seen efforts to restrict the enforceability of noncompetes.

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[237] *See generally* UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT (Uniform Law Comm'n 2021).
[238] 9 U.S.C. §§ 1-14.
[239] *See, e.g.*, Viking River Cruise, Inc., v. Moriana, 142 S. Ct. 1906 (2022); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011).
[240] Estlund, *supra* note ___, at 390.
[241] *Id.* at 391-97.
[242] *Id.*

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In July 2021, President Biden signed the Executive Order on Promoting Competition in the American Economy.[243] In the Order, President Biden directed the Federal Trade Commission to adopt rules banning or limiting noncompetes. On January 5, 2023, the FTC issued a proposed rule that would prohibit employers from entering into a noncompete with a worker[244] and would require rescission of existing noncompetes,[245] subject to a narrow exception for noncompetes in sales of businesses.[246] Assuming the rule becomes final after the comment period, it is certain to face significant legal challenges. Additionally, many states have been adopting more demanding standards for enforceability of noncompetes, and several states have banned their use for some workers.[247]

The law determining the enforceability of mandatory arbitration agreements comes from several sources—the Federal Arbitration Act, state law governing contracts, and the law governing the worker's underlying

[243] Executive Order No. 14036 (July 9, 2021), https://www.whitehouse.gov/bfiefing-room/presidenial-actions-2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.
[244] Notably, the proposed rule would apply to not only "employees," as almost all other U.S. employment laws do, but also independent contractors, externs, interns, volunteers, apprentices, and sole proprietors. *Id.* § 910(f).
[245] *Id.* § 910.2(b).
[246] *Id.* § 910.3.
[247] Several states have enacted laws that prohibit the use of noncompetes for low-wage workers. *See generally* Chris Marr, *Employee Noncompete Clause Limits Adopted by Three More States*, DAILY LAB. REP. (Bloomberg BNA) (June 29, 2021). In 2022, Colorado enacted a law, HB 22-1317, that voids noncompetes and customer nonsolicitation agreements for employees living or working in Colorado who do not meet certain compensation thresholds. *See Colorado's New Non-Compete Law Signed by Governor, Will Go into Effect on August 10, 2022*, XII NAT'L REV. (July 25, 2022). Months earlier Colorado had passed a criminal statute declaring violations of the state's noncompetition statute to be a Class 2 misdemeanor with jail and/or fines. *See also* UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT, *supra* note __.

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substantive claim.[248] Numerous Supreme Court decisions have upheld the enforceability of arbitration agreements,[249] with some of those decisions finding contrary state law preempted by the FAA.[250] There is, however, a large body of scholarship that is critical of the general enforceability of arbitration agreements. Moreover, Congress rendered one type of arbitration agreement generally unenforceable with the enactment of the Ending Forced Arbitration of Sexual Assault and Harassment Act of 2021.[251] That law amends the FAA to render pre-dispute mandatory arbitration agreements unenforceable if the employee wishes to sue. Parties are free to agree to arbitration after a claim has been asserted. Bills also have been introduced to limit the enforceability of arbitration agreements generally.[252] On March 17, 2022, the House passed H.R. 963,[253] which would invalidate pre-dispute arbitration agreements in employment, consumer, antitrust, and civil rights disputes.[254] It also would prohibit agreements and practices that prevent individuals from participating in class or collective actions in such matters.[255] The Senate is unlikely to pass the bill.

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[248] *See, e.g.*, Estlund, *supra* note __, at 398.
[249] *See, e.g.*, cases cited *supra* note ___.
[250] Viking River Cruise, Inc., v. Moriana, 142 S. Ct. 1906 (2022); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011).
[251] Pub. L. No. 117-90, 136 Stat. 26 (2021) (amending various sections of 9 U.S.C.).
[252] *E.g.*, Forced Arbitration Injustice Repeal (FAIR) Act of 2022, H.R. 963 & S. 505, 117th Cong. (2022).
[253] *See* Paige Smith, *U.S. House Passes Bill Banning Mandatory Arbitration Agreements*, BLOOMBERG LAW: DAILY LAB. REP. (Mar. 17, 2022).
[254] H.R. 963 §2(1).
[255] *Id.* §2(2)

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In light of the general nonwaivability of statutory employment rights, it is somewhat surprising that U.S. law permits conditional waiver by individuals of these rights. Mandatory arbitration agreements waive the right to litigate in courts and the right to assert class or collective claims over violations of nonwaivable rights.[256] Noncompetes waive the right of the worker to sell her time and work to certain employers. These two areas of the law also generate many disputes and much litigation about enforceability of the waivers.[257]

Another employee "right" for which U.S. law regularly enforces individual employee waivers is the right of privacy.[258] This is the most unusual waiver because the right is the most variable and amorphous; courts often are uncertain whether the employee has a reasonable expectation of privacy, and if so, how strong the right is. For example, in *Quon v. City of Ontario*,[259] the Supreme Court considered the Fourth Amendment privacy claims of a city police officer. The officer claimed that his supervisors violated his constitutional rights against unreasonable search and seizure by examining the text of messages he sent and received on a department-issued alphanumeric pager. Although the Court ultimately found no Fourth

[256] Estlund, *supra* note __, at 399.
[257] *Id.* at 401.
[258] *See, e.g., id.* at 388.
[259] 560 U.S. 746 (2010).

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Amendment violation, it was unwilling to decide whether the employee had a reasonable expectation of privacy in the messages.[260] Do employees have reasonable expectations of privacy in their lockers,[261] their file cabinets,[262] their bodily fluids[263] or their online accounts[264]? Depending on whether they are public or private, employers often are sued for violating privacy under the Fourth Amendment, various federal and state statutes, and the tort of invasion of privacy. To preserve employers' ability to probe into physical or virtual areas in which employees may claim a right of privacy and to avoid liability, attorneys and other advisers counsel employers to have applicants and employees sign computer use policies, social media policies, and other policies and agreements stating that the employees understand the employer has rights of surveillance, monitoring, etc.[265] However, most courts require employers to do no more than give employees notice that they will monitor;

[260] *Id.* at 759-60.
[261] *See, e.g.*, K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. 1984).
[262] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987).
[263] *See, e.g.*, Luedtke v. Nabors Alaska Drilling, 768 P.2d 1123 (Alaska 1989).
[264] *See, e.g.*, Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369 (D.N.J. 2012).
[265] *See, e.g.*, Estlund, *supra* note ___, at 388 (stating that employees waive privacy rights by agreeing to searches that otherwise would violate privacy rights); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671 (1996); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 154-55 (2003).

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courts do not require employee assent.[266] Thus, employers ask/require applicants and employees to waive to some degree their privacy rights.[267]

Perhaps it is because the right to privacy is so variable and amorphous that courts recognize and enforce waivers that are not likely knowing and voluntary.[268] Additionally, U.S. law treats employees' privacy rights as being based on expectations of privacy, and those expectations can be undermined by employers.[269] Employers often condition initial employment or continued employment on the applicant's or employee's waiver[270] and in many cases they simply state their rights to monitor and surveil without asking for assent.[271] It is questionable whether express or implied consent obtained on threat of nonhire or termination should be considered effective consent.[272] However, this argument might apply equally to mandatory arbitration agreements and noncompetes, as employers are not merely requesting that applicants and current employees agree to them; rather, they are requiring it as a condition of employment or continued employment.

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[266] *See, e.g.*, Steven L. Willborn, *Notice, Consent, and Nonconsent: Employee Privacy in the Restatement*, 100 CORNELL L. REV. 1423 (2015).
[267] This may be viewed as not being a waiver because employers can eliminate an expectation of privacy with notice in many cases. However, I see it as courts finding at least an implied waiver when notice is given and the applicant accepts the job or the employee continues to work.
[268] Estlund, *supra* note ___, at 388 n.22.
[269] *See, e.g.*, Willborn, *supra* note ___, at 1433-34; Determann & Sprague, *supra* note ___, at 992.
[270] Kim, *supra* note ___, at 718-19. *See* Finkin, *Employee Self-Representation*, *supra* note __, at 953 (stating that for at-will employees, the law treats them as players in a series of contractual transactions in which "[a]t every instant" the employer offers employment on a take-it-or-leave-it basis).
[271] *See, e.g.*, Willborn, *supra* note __, at 1430 (stating that notice is a "particularly powerful tool because it is one-sided").
[272] *Id.*; Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 511-25 (2001).

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3. Some Thoughts About the Current State of Waivability of Employee Rights

Having considered the law of the U.S. and other nations regarding waivable employee rights, I offer some thoughts that should be relevant to any expansion of waivable rights. The basic rule under the law of the United States and other nations is that employees' statutory employment rights are nonwaivable. However, there are exceptions. The law is much more likely to enforce a waiver negotiated by a union or some organization representing the employees collectively. The representation and process of collective bargaining by an organization with collective power is likely to assuage several concerns about waivers by individual employees: lack of freedom of contract; imbalance of power; coercion; imbalance of knowledge, information, and understanding; and poor decision-making by individuals. Therein lies one of the most significant differences between many other countries and the United States. Union density and coverage by collective agreements is much higher in most other developed countries. Although the law of the U.S. permits the waiver of some of the workers' statutory rights by unions, a relatively small percentage of employees have such representation.[273] Furthermore, U.S. law to a large extend limits collective representation of employees and collective bargaining to unions recognized

[273] *See supra* note___.

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by a majority of an appropriate bargaining unit serving as the exclusive representative of those employees. Thus, conditional waiver of rights is not an option available to most employees in the U.S.

Generally, legal systems do not permit valid waivers of statutory rights by individual employees unless the statute at issue expressly provides for such waiver. Examples of such permitted individual waivers are the Employee Shareholder Status in U.K law and age discrimination claim waivers under the OWBPA in U.S. law. In each case, the statute providing for waiver by individuals specifies the conditions or constraints that must be satisfied for a waiver to be enforceable. Such specification is necessary, in the absence of negotiation between an employer and a collective bargaining representative, to address the deficiencies of the individual employee vis-à-vis the employer. Such constraints are necessary to ensure that the agreement is both a product of freedom of contract and a fair deal in which the employer provides something of value for the right that is waived.[274] It is difficult for legislators to specify in a statute the constraints necessary to achieve those ends.[275] Indeed, drafting statutes with sufficient specificity to achieve the desired objectives but sufficient flexibility to address the needs of diverse workplaces is one of the great weaknesses of statutory minimum

[274] *See, e.g.*, Berg, *supra* note __, at 344.
[275] *Id.*

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rights standards; they tend to be very specific and rigid, and they lack flexibility and adaptability.[276] The Employee Shareholder Status is a clear failure. The OWBPA continues to exist, but it is not widely considered to be a significant success.[277]

U.S. law recognizes valid and enforceable waivers by individuals of both their statutory rights to pursue clams in courts against employers for violations of their substantive employment rights and their statutory rights to assert class or collective claims. This a very controversial aspect of U.S. law, and it also is a product, in part, of a federal statute that favors arbitration—the Federal Arbitration Act. Thus, the presumption in favor of the permissibility/validity of the waiver of statutory rights is itself ensconced in a federal statute.

U.S. law, like that of other nations, permits individual waivers of two fundamental employee rights that are not established by statute. Noncompetes are waivers by employees of part of their freedom to sell their labor and time to employers or to start their own businesses. Once again, enforceable waivers are conditional or constrained, and nations and states, as well as legislatures and courts, struggle with determination and specification

[276] PAUL C. WEILER, GOVERNING THE WORKPLACE 26-29 (1990); Becker, *supra* note ___, at 175 (discussing the anachronistic "one-size-fits-all system); *Cf.* Sunstein, *supra* note __, at 209 (noting the flexibility of the common law that is its great advantage).
[277] *See generally* Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271 (1993).

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of the appropriate constraints. The labor law of various nations also permits the waiver of some part or degree of employee privacy rights. Privacy rights is such a broad category that it is difficult to state many generalizations about the governing law. Additionally, legislative bodies and courts are attempting to sort through privacy rights in a rapidly changing world of electronic communication.[278]

Why does U.S. law permit waivers of such fundamental rights by individual employees? For mandatory arbitration/class claim waivers,[279] noncompetes,[280] and privacy waivers, [281] there are significant countervailing interests of employers that legislators or courts consider worthy of legal protection. However, strict legal regulation is required to prevent employers from going well beyond what is needed to protect their reasonable interests,[282] and such regulation has been lacking for all three of these permitted waivers. In very recent times, the federal government and some states have taken actions to limit abusive conduct by employers regarding noncompetes.[283] However, mandatory arbitration agreements/class

[278] *See, e.g., supra* text accompanying notes ___-____ (discussing *Quon v. City of Ontario*).
[279] *See, e.g.*, Stephen A. Plass, *Mandatory Arbitration as an Employer's Contractual Prerogative: The Efficiency Challenge to Equal Employment Opportunity*, 33 CARDOZO L. REV. 195 (2011) (discussing employers' interest in reducing or eliminating dispute resolution costs).
[280] Estlund, *supra* note ___, at 391-395 (discussing employers' interests relevant to noncompetes).
[281] *See, e.g.*, Wilborn, *supra* note ___, at 837-38 (discussing employers' legitimate interests in monitoring).
[282] *See* Estlund, *supra* note __, at 420.
[283] *See supra* note ___.

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waivers[284] have been limited only in the context of claims of sexual harassment or sexual assault, and coercive confiscations of privacy rights have not been subjected to such regulation.

The volume of litigation generated by noncompetes,[285] mandatory arbitration agreements/waivers of class/collective claims,[286] and invasions of privacy indicates several concerns with conditionally waivable rights that would need to be addressed in any viable proposal to expand such rights. The litigation indicates that many employees think that employers are illegally and unfairly confiscating their rights. The volume of litigation also suggests the difficulty of achieving compliance or self-enforcement with clear standards that constrain the waivers. The standards vary from state to state, and either it is difficult for employers and employees to understand and comply with them, or employers are deliberately not complying. An expanded system of conditionally waivable rights should not replicate this problem. Rather, administration of such a system should be reasonably administrable and not too costly.[287]

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[284] The U.S. Supreme Court repeatedly has found such provisions enforceable, giving the Federal Arbitration Act preference over other federal and state laws. *See, e.g.*, Viking River Cruise, Inc., v. Moriana, 142 S. Ct. 1906 (2022); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).
[285] *See* Estlund, *supra* note __, at 401 & n.69.
[286] *See id.*
[287] *See* Estlund, *supra* note __, at 439 & 444.

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IV. Expanding Conditionally Waivable Employment Rights

The body of scholarship devoted to expanding conditionally waivable employment rights is small. This Part considers some of that work and some of the justifications for such an expansion in the U.S. labor and employment law regime. Finally, it sketches some options for expansion and offers a proposal.

A. Considering Expansion of Conditionally Waivable Rights

The existing state of conditionally[288] waivable employment rights and the case for possible expansion has been underexplored and undertheorized.[289] This likely is because it is difficult to develop a proposal that corrects for the disparities in power and information between employers and employees,[290] thus ensuring freedom of contract/knowing and voluntary waiver by employees and protecting employees from making bad exchanges for inadequate value. Indeed, the challenges of crafting such a proposal are daunting, but not insuperable.

Expansion of waivable rights will be more challenging in the U.S. than in other nations. Most other nations have more pervasive and diverse

[288] I, like others supporting exploration of this idea, take it as a given that waivers must be conditional or constrained.
[289] *See* Davidov, *supra* note __, at 482 (noting the lack of theorizing in this area); *see also* Sunstein, *supra* note ___, at 208 (stating that most debates about American employment law have been limited to waivable employers' rights, collective bargaining, and nonwaivable employees' rights).
[290] *See, e.g.*, Estlund, *supra* note __, at 444 (stating that "[a] major challenge in crafting any new conditionally waivable rights will be making them reasonably administrable" and noting that the constraints require effective oversight).

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collective representation and bargaining by which expanded waivable rights could be effectively administered without adding substantial cost to the systems. Moreover, the labor law regimes of other nations do not create the dichotomy of labor law/labor rights and employment law/employment rights that exists in the U.S. In the U.S., where collective bargaining and collective contracts are available to only a small percentage of the workforce,[291] an expansion of waivable rights would require creation of some means of oversight and constraint. It also could, and should, include a reconceptualization of U.S. labor law that breaks the unnecessary and problematic labor/employment dichotomy.

A couple of scholars have considered the possible benefits of expanded waivable rights in collective bargaining by unions.[292] A couple more have proposed that it is worthwhile to consider expansion of the rights than can be waived by individual employees.[293] Even Professor Davidov, who largely subscribes to the paternalism justifications for nonwaivability, concedes that there is room for intermediate solutions.[294]

What, then are the most persuasive arguments for a larger body of waivable rights in U.S. labor law? First, the regime we have has many

[291] *See* supra note __; *see also* Sunstein, *supra* note ___, at 259.
[292] Schwab, *supra* note __, at 266; Becker, *supra* note__, at 175-76.
[293] Sunstein, *supra* note ___, at 251-52: Estlund, *supra* note __, at 439-45.
[294] Davidov, *supra* note ___, at 496.

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problems, and it does not fit well with the modern labor market and fissured workplaces.[295] The individual minimum rights statutes that have become the most prominent regulatory device in the regime are rigid, poorly enforced, and subject to being avoided by business interests that have mobile assets.[296] Many of the deficiencies and problems of the statutory minimum rights approach might be ameliorated by expansion of conditionally waivable rights.[297] Furthermore, statutory individual rights are conferred on a decreasing segment of the workforce because of the narrow coverage provisions in the statutes and our antiquated dichotomy of covered "employees" and "employers" and uncovered "independent contractors."

Although Congress and state legislatures certainly can amend statutes to attempt to keep pace with the rapidly evolving economy, labor market and workplace, they have not done so. Although some state legislatures are active in amending existing employment laws and enacting new ones, Congress has done neither, other than with emergency legislation during the COVID-19 pandemic.[298] Thus, the existing federal employment laws provide narrower coverage than is needed, and Congress does not enact new

[295] *See supra* Part II.
[296] Estlund, *supra* note __, at 445.
[297] *Id.* at 439 (touting the potential of conditionally waivable rights "in light of growing doubts about the ability of the uniform mandates and command-and-control regulatory structures to protect employees' interests"); Sunstein, *supra* note __, at 271 (stating that "waivable workers' rights represent a distinctive, promising, and insufficiently explored approach to the law of labor relations").
[298] *See supra* notes ___-___ and accompanying text.

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laws to protect worker rights. Would Congress and state legislatures be willing to enact more laws and confer more rights on a broader swath of workers if the rights were conditionally waivable, permitting employers to escape their requirements by contract? It is plausible that they would be willing because they could be less concerned with the obligations imposed on employers. Waivability could mitigate a disadvantage of minimum rights legislation: determining the appropriate outcome for all workers and employers covered by the law.[299] Employers and workers who would not be well served by the law could reach a different agreement. Equipped with such a tool, legislators might be willing both to expand coverage and to create new rights. Indeed, as Professor Davidov suggests, even those who view creation of waivable rights as a dilution of labor law protections may have a more charitable view of such a regime if it were accompanied by an expansion of coverage.[300]

A second argument in favor of an expanded system of waivable rights is that it could break down, to some extent, the labor law/employment law dichotomy that has been detrimental to U.S. law regulating the workplace.[301] Under this fractured regime, employees represented by unions have been able to bargain through representatives, trade rights, and receive in exchange

[299] Schwab, *supra* note __, at 253.
[300] Davidov, *supra* note ___, at 500.
[301] *See supra* note ___.

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terms and conditions more precisely tailored to their workplaces, while unrepresented employees have received terms and conditions that Congress has been willing to bestow on covered employees and impose on covered employers.[302] Some measure of this bifurcation could be reduced. If waivable rights were expanded to include labor rights and employment rights, and the rights could be waived/traded only by unions, more employers may see mutual benefit in collective bargaining and become more supportive of, or at least less resistant to, union organizing efforts.[303] Given the low union density in the U.S., however, I prefer a system in which unions would be the first option for collective representation, bargaining, and waiver, but not the sole option. Any system of expanded waivable rights, whether limited to union-represented employees or expanded to other options, could increase employee representation, voice, and participation in workplace governance.[304] It also could break down barriers and create a more unified and coherent body of law. Such a system could integrate to some extent the labor law of representation and collective bargaining and the employment law consisting of the common law of individual contracts and statutory minimum rights. The next argument is related.

[302] *See* Schwab, *supra* note ___, at 248.
[303] Finkin, *supra* note __, at 5; Becker, *supra* note __, at 173-80; Davidov, *supra* note __, at 500.
[304] *See* Estlund, *supra* note __, at 443 (positing that waivable rights could be "potential leverage for the promotion of better forms of workplace governance in which employees have a real voice").

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I think the most compelling argument for developing an expanded system of waivable rights is to empower workers in the U.S. There is general agreement that most workers are poorly informed regarding the law and their rights, they have little to no voice and participation in governance of their workplaces, and they do not have sufficient leverage to bargain for the terms and conditions of employment that they need and/or want. They get the rights/protections that lawmakers confer on them, and they cannot trade those rights no matter how poorly or well- suited the rights are to their particular workplaces and no matter what they may be able to get from their employers in an exchange.[305] This is not the best way to meet the needs of employers and employees.[306] Moreover, most workers do not know of many of the protections/rights they have.[307] Even when they know of their rights, the enforcement mechanisms associated with the minimum rights law do not result in robust enforcement.[308] If a system could be devised that overcame workers' deficits in information and bargaining power, waivable rights could become valuable bargaining chips that empower workers.[309] It is hard to imagine more worthwhile objectives for labor law than to empower workers,

[305] *See* Schwab, *supra* note __, at 248 (stating that "the law forces its protections only on nonunionized workers").
[306] *Cf.* Sunstein, *supra* note ___, at 237 (arguing that "[a] nonwaivable workers' right to job security—and here is a general lesson for employment law—is an unreliable method of redistributing resources to workers")
[307] *See supra* notes ___-___ and accompanying text.
[308] *See* Andrias, *supra* note __, at 39; Estlund, *supra* note __, at 445; Becker, *supra* note __, at 172.
[309] Estlund, *supra* note __, at 389.

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to inform them of their rights, and to give them participation and voice in workplace governance.

For such a system to accomplish those objectives to any appreciable extent, it is necessary to craft a proposal that includes constraints/conditions on waiver that can be administered efficiently and fairly at reasonable cost, depending, in large part, on self-compliance/enforcement.[310] Such a system would be unlike the approach applied under current U.S. law to noncompetes and mandatory arbitration/waivers of class and collective claims.[311]

B. Sketching a Proposal

This section considers some of the options that are available for implementation of a scheme of expanded conditionally waivable employment rights. Like my predecessors who argued for consideration of expanded use of waivable rights,[312] I have tried to present the case for why this approach is needed in U.S. labor and employment law. Indeed, because

[310] Professor Estlund expresses this idea well:

> [C]onditional waivability tends to be complex and costly to administer—not more costly than mandatory rights, perhaps, but certainly more costly than ordinary contract terms, which come with a strong presumption of validity. So whether it makes sense to move toward conditional waivability in any particular case depends partly on solving that problem: can conditions be made reasonably clear and predictable, and can the law effectively induce employers to police themselves in the formation of contracts.

Estlund, *supra* note ___, at 439.
[311] *See supra* text accompanying notes ___-___.
[312] Estlund, *supra* note __, at 439-45; Davidov, *supra* note __, at 482; Sunstein, *supra* note ___, at 208.

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of developments such as the gig economy, it is needed even more and more urgently than when they wrote.[313] I do not attempt to develop granular details of a proposal, as I think it unlikely that Congress will embrace and leap to implement any concrete, detailed proposal that I could offer.[314] This is a controversial matter[315] and an under-examined area of employment law.[316] Arguing for expansion of conditionally waivable rights can be seen as fundamentally changing and weakening labor law in two ways. First, it can be seen as weaking workers' hard-won protections because some rights that the legislature confers become alienable.[317] Second, some of the options for representation and trading of rights, as a means of constraining the waivers, can be seen as anti-union. I think a proposal that achieves to a substantial degree the objectives for which I have argued should do neither of those things. There are options, and the best proposal is not necessarily what is theoretically ideal, but rather what is politically palatable. Therefore, I prefer to consider options and express preferences rather than advocate for a single best approach. My goal is to advance discussion of an approach to labor law that I think is desperately needed—in some form.

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[313] In 2001 (Sunstein), 2006 (Estlund), and 2012 (Schwab).
[314] *Cf.* Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L. REV. 89, (2008) (after setting forth an impressive case for a federal termination law, Professor Hirsch concluded his article by noting that "it is unlikely that a proposal this ambitious would ever be fully adopted").
[315] *See* Estlund, *supra* note __, at
[316] Davidov, *supra* note __, at 482; Sunstein, *supra* note ___, at 208.
[317] *See* Davidov, *supra* note__, at 500 (referring to those who "would see this as an unjustified weakening of labour law").

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1. Setting Conditions or Constraints on Waivers

a. Procedural, Substantive, and Hybrid Constraints

All advocates of expanded waiver agree that there must be some constraints on the waivers to ensure freedom of contract and to provide workers with more equal footing in terms of information. Additionally, depending on the type of constraints chosen, the constraints may provide the workers with greater bargaining power vis-à-vis their employers and greater voice and participation in workplace governance. The types of constraints may be divided broadly into procedural constraints, substantive constraints, and combinations of those two.[318] Substantive constraints generally involve specifications of specific terms or conditions which are the minimum terms below which an exchange cannot be made (such as the specification of minimum value of shares in Employee Shareholder Status) [319] or standards that must be satisfied (such as reasonable time, geography, and scope restrictions for noncompetes)[320] or a combination (such as the waivers under the OWBPA).[321] Procedural constraints usually involve advice and assistance by a knowledgeable and perhaps experienced or savvy person or group, such as expert advice, union negotiation and approval, government

[318] Davidov, *supra* note ___, at 497; Sunstein, *supra* note __, at 207.
[319] *See supra* text accompanying notes ___-___.
[320] *See supra* text accompanying notes ___-___.
[321] *See supra* text accompanying notes ___-___.

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agency approval, or some combination of the foregoing.[322] In the U.S., union waivers of some labor rights in collective bargaining agreements are enforceable.[323] The unions are subject to a duty of fair representation and can be sued by the employees they represent for breach of that duty.[324] There are examples of combined procedural and substantive protections. In the U.S., the OWBPA permits waiver of existing age discrimination claims if the waiver is, among other conditions, knowing and voluntary and the employee is advised in writing to consult with an attorney and is given at lest twenty-one days to consider the agreement and at least seven days following execution of the waiver to revoke it.[325] An example of combined substantive and procedural constraints from the law of the United Kingdom is that employees could accept Employee Shareholder Status and waive specified statutory rights in exchange for shares of the business worth at least £2,000 if certain procedural safeguards were followed.[326] To prevent employer coercion, the Employee Shareholder statute provided limited protections against retaliation for refusal to agree to the status.[327]

All three of these types of constraints or conditions should be considered in developing a system of expanded waivable rights. Indeed, it

[322] *See* Davidov, *supra* note __, at 499.
[323] *See generally* Schwab, *supra* note ___; Finkin, *Union Dispossession*, *supra* note ___, at 5-8.
[324] Finkin, *Union Dispossession*, *supra* note ___, at 13; Schwab, *supra* note __, at 264.
[325] 29 U.S.C. § 626(f)(1); *see supra* text accompanying notes ___-___.
[326] *See supra* text accompanying notes __-__.
[327] *Id.*

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seems likely that some rights may be well suited to either required minimum terms of exchange or standards for evaluating voluntariness and fairness. Generally, however, I think procedural constraints are preferable for several reasons.

First, substantive constraints that impose minimum terms or conditions of exchange pose the same problem that is one of the principal criticisms of minimum rights legislation: lawmakers must decide in advance what are appropriate terms across a wide range of situations, and there is no flexibility. For most rights, it is difficult for lawmakers to determine what is the best minimum term for all workplace situations. Under the Fair Labor Standards Act, what should be required as a term in exchange for the overtime rate for hours over forty? One possibility is what the FLSA already permits for public employees—compensatory time at a rate of one-and-a-half in lieu of overtime pay.[328] However, employers have many pay arrangements and benefits that they may offer in exchange for employees waiving the federal overtime rate.[329] Given the many exceptions developed under the FLSA,[330] lawmakers have demonstrated that specification of a

[328] 29 U.S.C. §207(o).
[329] *See, e.g.*, Dunlop v. Gray-Goto, Inc., 528 F.2d 792 (10th Cir. 1976) (employer, seemingly not understanding nonwaivable rights, argued that it did not violate the FLSA by not paying overtime because it provided numerous benefits, including paid vacations and holidays and biannual bonuses, which exceeded the value of overtime compensation owed).
[330] The FLSA is replete with statutory exceptions. *See, e.g.*, 29 U.S.C. § 213(a) (exemptions from minimum wage and overtime); *id.* §213(b) (exemptions from overtime).

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generally applicable minimum term is difficult. Why was shares worth £2,000 the proper term of exchange for the statutory rights employees who waived statutory rights under the U.K.'s Employee Shareholder Status? Apparently, it was not, given the failure of that conditional waiver statute.[331]

The second reason that I think procedural constraints are preferable is that substantive constraints of the other kind--standards for evaluating knowledge, voluntariness and fairness--present different problems from minimum-term constraints. Most such standards will be somewhat amorphous and flexible, such as reasonable time, proximity, and scope for noncompetes, in order to adjust to different situations. To be sure, such flexibility is needed, and it is one of the principal arguments in favor of expanding waivable rights. However, the flexibility also introduces uncertainty and unpredictability. Thus, self-compliance and self-enforcement often fail, disputes arise, and enforcement costs are generated in the form of claim assertion and adjudication. Consider, for example, the volume of disputes and litigation in the U.S. regarding noncompetes and mandatory arbitration agreements.[332] Lack of predictability, lack of self-enforcement, and high costs and other difficulties of administration are not

[331] *See supra* text accompanying notes ___-___.
[332] *See generally* Estlund, *supra* note__, at 399.

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the results that we should want with an approach to regulating the workplace.[333]

I think procedural constraints are preferable as the predominant approach to conditional waivers. They offer the advantages of both not requiring determination of either minimum terms of exchange or evaluative standards in advance and providing flexibility for the many different work situations. Additionally, some procedural constraints offer the possibility of a less paternalistic approach to workplace regulation: empowering employees to bargain for what they value and need rather than what lawmakers are willing to mandate; providing them with information; and giving them a voice in workplace governance. In the rapidly changing and evolving work arrangements of the twenty-first century,[334] empowering employees to take care of themselves in their own workplaces is a virtue that our employment law should be designed to achieve.

b. Collective Waivers

Reliance on procedural protections as the principal method to condition waivers militates against individual waiver and in favor of collective waiver. To engage in mutually beneficial exchanges and avoid employer confiscation of waivable rights, employees need representation

[333] Estlund, *supra* note ___, at 439 (urging that system not be too complex and costly to administer).
[334] *See*, *e.g.*, Davidov, *supra* note __, at 499 (noting that one-size-fits-all regulation is not well-suited to the proliferation of new work arrangements).

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and negotiation by an organization.[335] Most examples of waivable rights in the U.S. and other nations entail union representation and bargaining in order to ameliorate the deficiencies of individual employees in information, knowledge, and bargaining power.[336] Additionally, union brokering may reduce concern with employees making bad bargains because of their cognitive biases.[337] Finally, unions are better positioned than legislators to know, evaluate, and be responsive to the conditions of the local workplace.[338]

In addition to correcting for employee deficits, collective waivers have more value to employers and are more likely to be sought by employers than are individual waivers. Employers are much less likely to be incentivized to negotiate with tens or hundreds of individuals for waivers of rights in exchanges that could set a multitude of different terms and conditions particular to the many individuals in the same workplace. Such negotiations could be difficult, time-consuming, and divisive. Furthermore, individual waivers of that type would free employers of the various burdens associated with the right but give them in exchange the difficulties of managing a workplace of diverse terms and conditions. Individual

[335] *See, e.g.*, Schwab, *supra* note ___, at 255 (stating that unions have a broader perspective than individuals and are in a better position to broker rights).
[336] Finkin, *Union Dispossession*, *supra* note ___, at 4; Schwab, *supra* note ___, at 254; Sunstein, *supra* note ___, at 264-66.
[337] Schwab, *supra* note __, at 254; Sunstein, supra note ___, at 240-43.
[338] *See* Finkin, *Union Dispossession*, *supra* note ___, at 4.

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employees negotiating with employers also could engage in detrimental competition with their fellow workers.[339] Such a work environment could become quite toxic, as employees learn of the better exchanges negotiated by coworkers. As Professor Finkin suggests, dispossession of public goods in exchange for something of perceived greater value is best handled through collective action.[340]

Finally, collective waiver is preferable to individual waivers because that approach would best achieve a unification of the disparate elements of labor law and employment law in the U.S.[341] It could weave together the collective bargaining and group action approach of the NLRA, the contract foundation of the common law, and the statutory minimum rights approach that ascended to dominance in the 1960s. In addition to achieving a more integrated and coordinated body of law, this approach may provide the types of tools needed for regulation in the modern economy and labor market.[342]

c. Who Would be the Brokers of Conditionally Waivable Rights?

If procedural constraints is generally the better approach, what procedural protection involving collective representation and action is best suited to expanded conditional waivability in the United States? Prior

[339] Consider, for example, the problem of the "rat race" or undercutting. *See, e.g.,* Schwab, *supra* note ___, at 254.
[340] Finkin, *Union Dispossession*, *supra* note ___, at 4-5.
[341] *See* Becker, *supra* note ___, at 58 (stating that "[a] politically feasible . . . economically rational, and effective reform proposal would seek to unify our labor and employment laws").
[342] *See, e.g.,* Estlund, *supra* note __, at 383; Sunstein, *supra* note ___, at 209-12.

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proposals and suggestions have provided that answer--unions.[343] Indeed, that is how the U.S. and most other nations have managed much of their existing law of conditionally waivable rights.[344] Expanding waivable rights and entrusting the brokering role to only unions also could do much toward breaking the U.S. dichotomy of labor law and employment law and achieving a more unified and coherent body of law.[345]

Now, as to the issue of political feasibility, would organized labor support such a proposal? Would unions want this role? Professor Schwab has argued that it ultimately is a question of bargaining power—if a particular union has sufficient bargaining power, it would be able to decline to waive or trade waivable rights but also able to make exchanges in the best interest of its members.[346] He recognizes that some unions may encounter significant difficulties. Unions with much less bargaining power than the employer may find their inferior bargaining power further degraded by the employer's ability to demand waivers. Some unions may find it difficult to justify to their membership the exchanges they make.[347] Thus, some unions may be in a stronger bargaining position when statutory rights are

[343] Schwab, *supra* note ___ *passim*; Becker, *supra* note __, at 174-80.
[344] Schwab, *supra* note __; Finkin, *Union Dispossession*, *supra* note ___.
[345] Becker, *supra* note ___, at 173-80.
[346] Schwab, *supra* note __, at 264.
[347] *Id.*

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nonwaivable.[348] On the other hand, the problems of imbalance in bargaining power and difficulty of explaining the merits of the overall contract to the membership exist under the current collective bargaining model; they would not be new problems under an expanded waivable rights regime. Bargaining, brokering, and negotiating deals for their bargaining units is what unions do. Making some employment rights waivable gives unions more bargaining chips. Furthermore, I am not proposing, and it is inconceivable, that Congress would declare all statutory employment rights waivable.[349] Some rights should be waivable and some should not, and this is what unions should want.[350]

I favor giving the role of broker of waivable rights to unions when a majority union represents a collective bargaining unit. However, I do not favor limiting the brokering role to unions. When there is no union representative, I think there should be another option for the role of broker regarding waivable rights.[351]

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[348] *Id.*

[349] *See* Becker, *supra* note ___, at 187 (stating that some minimum standards should remain "just that").

[350] Schwab, *supra* note __, at 264.

[351] Professor Summers, in arguing for alternative forms of worker representation authorized by legislation, stated that collective bargaining between unions and management likely provides the better model for employees to have meaningful participation. Alas, the U.S. does not sufficient union density for to provide such participation to the vast majority of employees. Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 148 (1993) [hereinafter Summers, *Employee Voice*]; *see also* Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 170 (1997) (arguing that Congress should recognize that collective bargaining is not going to further the interests of the vast majority of Americans and should create alternative methods of employee participation).

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The principal reason for not limiting the role to unions is that, compared with most other nations, the U.S. has weaker organized labor, lower union density, and a much lower percentage of the workforce covered by collective bargaining agreements.[352] Under Section 9(c) of the NLRA, a union that achieves majority status in an appropriate bargaining unit is the exclusive representative of the unit, and an employer is obligated to bargain with that union and no other organization or individual.[353] Furthermore, it is assumed that employers do not have an obligation to bargain with a nonmajority union.[354] Some scholars posit that low union density in the U.S. is partially attributable to adherence to exclusivity and majority rule.[355] If the role of bargaining regarding an expanded set of waivable rights were limited to majority-status unions, most employees in the U.S. will not benefit.[356]

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[352] *See supra* notes __ & ___.

[353] 29 U.S.C. §159(c). *See generally* Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1556-60 (1999); Clyde W. Summers, *Unions Without a Majority—A Black Hole*, 66 CHI.-KENT L. REV. 531 (1990) [hereinafter Summers, *Unions Without*].

[354] Summers, *Unions Without*, *supra* note __, at 538; Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain With Minority Unions*, 27 ABA J. LAB. & EMP. L. 1 (2011). Professors Summers notes that there is little support for this proposition in the text of the NLRA or court or Board decisions. He also says, however, that "it may be much too late to open this question," *Id.* He also notes that the idea that an employer has no duty to bargain with a union until it achieves majority status is "unknown and unthinkable in most other countries." *Id.* at 540. However, he admits that recognition of an employer duty to bargain with a nonmajority union probably would require a statutory amendment at this time. *Id.*

[355] Crain & Matheny, *supra* note ___, at 1615.

[356] Sunstein, *supra* note __, at 259 (stating that "the truth is that . . . unions are not a likely option for many workers").

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The U.S. also does not have several different types of employee representation bodies, as many other nations do.[357] Not only do U.S. statutes not recognize the existence of alternative forms of employee representation, the NLRB's interpretation of the NLRA is an impediment to the formation of other representative bodies or structures. In its decision in *Electromation, Inc.*,[358] the Board interpreted Section 8(a)(2) of the Act[359] as prohibiting many forms of employee representation as constituting domination of or interference with a labor organization.[360] Despite legislative efforts to overturn *Electromation*, it remains the law and is applied by the Board.[361] Thus, under current U.S. law, it seems likely that the only collective option for brokers of waivable rights is unions.

There is a countervailing point to declining union presence and strength, and one that is urged as a reason to expand conditionally waivable rights in the U.S. If unions were the only agent authorized to negotiate

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[357] *See supra* notes ___-___ and accompanying text.
[358] 309 N.L.R.B. 990 (1992), enf'd, 35 F.3d 1148 (7th Cir. 1994).
[359] It shall be an unfair labor practice for an employer—

* * *

> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . .

[360] There is a large body of scholarship examining *Electromation*. *See, e.g.*, Rafael Gely, *Where Are We Now? Life After Electromation*, 15 HOFSTRA LAB. & EMP. L.J. 45 (1997).
[361] Lindsey K. Self, *We Didn't Mean It: Rethinking Electromation and the Presumption of Anti-Union Animus in NLRA Section 8(A)(2) Violations*, 53 U. TOLEDO L REV. 91, 96 (2021).

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waivers of an expanded body of employee rights, it might reduce employer opposition to unionization and lead to greater union growth and strength.[362] Perhaps that is so. The relevant inquiry is whether employers would perceive greater value in bargaining with unions to obtain waivers of worker rights than they perceive in maintaining control of the terms and conditions of their workplaces without the obligation to bargain with a union.[363] The answer to that inquiry is unknowable in advance of an expansion of conditionally waivable rights.

Is there sufficient interest in employee organization and representation for it to be feasible to implement an expansion of waivable rights and entrust the waiver authority to unions and perhaps representatives other than unions? It is a significant question that involves one, and perhaps two, fundamental changes in the U.S. approach to labor law. Some recent events should be considered which may suggest renewed interest in collective action and bargaining that provides employees with bargaining power, voice, and participation in governance. First, unions have enjoyed some surprising successes in recent times with election wins[364] and an increase in

[362] *See, e.g.*, Finkin, *Union Dispossession*, *supra* note __, at 5; Davidov, *supra* note __, at 500.
[363] Craig Becker explains that, although employers may be content with labor law becoming obsolete, they are dissatisfied with a minimum rights regime that is rigid and expensive. Becker, *supra* note __, at 173.
[364] Consider, for example, union victories in 2022 in New York at Starbucks coffee shops and at one Amazon warehouse. *See* Noam Scheiber, *A Union Blitzed Starbucks. At Amazon, It's a Slog*, NY TIMES (May 12, 2022), at https://www.nytimes.com/2022/05/12/business/economy/amazon-starbucks-union.html.

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representation petitions being filed.[365] There appears to be new interest among U.S. workers in union representation.[366] It is possible that unions will experience a strong resurgence,[367] gaining NLRB recognition in many workplaces and union density may increase significantly, but that result is far from certain.[368]

A second recent event of note suggests the potential for employee organization, representation, and collective action beyond the model of the majority union: the emergence and development of the Alphabet Workers Union at Google.[369] Alphabet Workers is a minority (or nonmajority) union affiliated with the Communications Workers of America.[370] Perhaps that

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[365] N.L.R.B., *Union Election Petitions Increase 57% in First Half of Fiscal Year 2022* (Apr. 6, 2022), at https://www.nlrb.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022.

[366] *See* Jennifer Elias & Amelia Lucas, *Employees Everywhere are Organizing. Here's Why it's Happening Now*, CNBC (May 7, 2022), at https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html.

[367] *See, e.g.*, Liz Shuler, AFL-CIO, *Labor's Great Resurgence* (Apr. 28, 2022), https://aflcio.org/2022/4/28/labors-great-resurgence

[368] *See* Christina Pazzanese, *Will the message sent by Amazon workers turn into a movement?* (Q&A with Lawrence Katz), HARV. GAZETTE 9Apr. 7, 2022), at https://news.harvard.edu/gazette/story/2022/04/the-future-of-labor-unions-according-to-harvard-economist/; Michael Saltsman, *Big Labor's Resurgence That Wasn't*, WALL ST. J. (Jan. 23, 2022).

[369] *See* Kate Conger, *Hundreds of Google Employees Unionize, Culminating Years of Activism*, NY TIMES (Jan. 4, 2021), at https://www.nytimes.com/2021/01/04/technology/google-employees-union.html. Communications Workers of America is affiliated with some other groups of employees who engage in collective action without securing collective bargaining rights. *See* Josh Eidelson, *Google Employees Unionize, Escalating Tension with Management*, FORTUNE (Jan. 4, 2021), https://fortune.com/2021/01/04/google-union-alphabet-workers-unionize-organized-labor-silicon-valley/. The Alphabet Workers Union at Google was not the CWA's first work with a nonmajority union. *See* Nissen, *supra* note __.

[370] *See* Alphabet Workers Union, https://alphabetworkersunion.org/. Alphabet Workers initially organized and developed through worker initiative without organizing by an established independent union. However, over time, according to its website, the company became recalcitrant and retaliatory, and Alphabet Workers realized it needed help:

> Alphabet workers had to adapt to the changing circumstances. We realized that in order to keep this fight going and start winning, we needed to get organized. We needed a structure with elected and accountable leadership. We needed to pool our resources to

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minority union is indicative of a growing interest among employees in self organizing for specialized purposes with the assistance and advice of established unions.[371] Indeed, some have argued that work with or as nonmajority unions should be one of the principal ways that unions organize workers.[372] As one commentator stated, "[u]nions could certainly experiment further with employing many aspects and strategies inherent in minority unions, even if most have no interest in pursuing a radical departure from their present union structure and practice."[373]

Other recent developments may signal the rise of new forms of representation, activism, and engagement in collective activity.[374] Professor Andrias sees such a nascent movement in the engagement of workers, unions, and governments in "social bargaining" in efforts to secure better terms and conditions of employment at the sectoral and regional levels rather than the local level.[375] One prominent example of this movement is the

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> support one another when volunteer labor wasn't enough. We needed to start thinking ahead and strategizing, being proactive with a plan to build power in the workplace. We needed a union.

Id., Meet CWA.

[371] *See* Nitasha Tiku, *Google workers launch unconventional union with help of Communications Workers of America*, WASH. POST (Jan. 4, 2021), at https://www.washingtonpost.com/technology/2021/01/04/google-union-cwa/.

[372] *See* Nissen, *supra* note ___, at 38-39.

[373] *Id.* at 55.

[374] *See* ESTLUND, *supra* note __, at 116-28 (discussing several examples of what she terms "experiments in self-regulation by contract").

[375] *See* Andrias, *supra* note___. Professor Andrias offers this as one example of "a new, more inclusive, and more political form of unionism." *Id.* at 100.

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work of Service Employees International Union with low-wage workers in the "Fight for $15."[376]

Perhaps recent developments are harbingers of a resurgence of worker interest in the old, established model of employee representation and collective bargaining by a union that has majority status and is recognized as the exclusive collective bargaining representative. Even if the resurgence proves to be minimal or ephemeral, there is evidence of renewed worker interest in collective activity and participation in workplace governance. U.S. law already permits alternative forms of employee representation that can be used to trade waivable rights, and it can be amended to strengthen recognition of such alternatives. Furthermore, conferring such power on other organizations could benefit unions if they expanded their services and considered the other forms of representation as potential gateways to union representation.[377]

Expanding waivable rights and entrusting the brokering role to no representative other than majority unions is an option, and, I think, it is a good one for the U.S. It is a change that organized labor might support. If

[376] *Id.* at 7.

[377] Professors Richard Freeman and Joel Rodgers proposed a similar idea, which they call "open-source unionism." *See* Richard B. Freeman & Joel Rogers, *Open-Source Unionism: Beyond Exclusive Collective Bargaining*, WORKINGUSA, Spring 2002, at 8 (discussed in ESTLUND, *supra* note ___, at 169). Professor Estlund suggests that even if unions were to take the gamble and support alternative forms of representation as a gateway to union organizing, employers would be likely to see it the same way and oppose it. ESTLUND, *supra* note __, at 172.

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that is all that could be accomplished regarding expansion of waivable rights, I think it would be worthwhile. However, I do not think it is the best option available.

Given the paucity of union representation in the private sector, there should be alternatives to make conditionally-waivable-rights bargaining available to a substantial segment of the workforce. As Professor Finkin notes, two broad ideas for legislative reform that have been discussed in the literature are nonmajority unions or "members only representation" and the creation of works councils, either by voluntary employer action or by legislative mandate.[378] I think both of these options should be considered to have a "backup" broker if a majority status union does not represent employees.

Some may view proposing alternatives to a majority union as the brokers of waivable rights as anti-union, but it is nothing of the kind. As already discussed, many nations recognize or mandate forms of employee representation other than unions.[379] Rather than presenting a challenge to unions, such additional representative bodies provide a fertile field of opportunity for unions to gain access to employees, to offer them services, and to reshape and expand the role of unions in U.S. labor and employment

[378] *See* Finkin, *The Road*, *supra* note __, at 196.
[379] *See supra* note ___.

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law. In that way, as the expansion of waivable employment rights could strengthen majority union's bargaining power, the recognition of other employee representatives could give both majority and nonmajority unions roles in many U.S. workplaces. Professor Summers and others have suggested the ways in which nonmajority unions might offer services to nonunionized employees.[380] Permitting the formation of these representative bodies for a limited purpose is not tantamount to replacing majority unions, which have a larger role with more functions and services.[381] Having such access to employees and providing such service to them may educate and persuade employees about the value of union representation.[382] Unions potentially could increase their membership as a result of this new type of representation. France, Germany, and other nations have long demonstrated that unions can co-exist and function with other representative bodies.

[380] Summers, *Unions Without*, *supra* note ___ (proposing that nonmajority unions provide representation of employees and their interests through in-plant committees); Madelyn Carol Squire, *Reality or Myth: Participatory Programs and Workplace Democracy—A Proposal for a Different Role for Unions*, 23 STETSON L. REV. 139 (1993) (making a similar proposal).

[381] Admittedly, in some situations, the bargaining could affect many terms and conditions of employment because of what is traded for the waivable rights, and the agreements could approximate full collective bargaining agreements.

[382] *See* Summers, *Unions Without*, *supra* note __, at 548 (stating that a "union's demonstration of its continued concern for the rights of employees and its ability to provide some protection of those rights can be the most persuasive path to achieving majority status"); Sachs, *supra* note ___, at 2690 & 2734-43 (arguing that collective activity by workers in support of employment rights increases the probability that workers will engage in, and be successful at, stronger forms of collective action); Squire, *supra* note __, at 178.

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One option is for Congress to confer the role of bargaining about waivable rights in the absence of a majority union on nonmajority unions.[383] Although employers have no statutory duty to bargain with nonmajority unions and enter into collective agreements if agreement is reached,[384] they may choose to do so.[385] Just as Professor Summers argued that nonmajority unions could represent employees for protection of individual employment rights,[386] they also could represent employees for bargaining and trading such rights. Employers might be incentivized to engage in such bargaining if they wanted to bargain about waivable rights and nonmajority unions had authority to bargain and reach agreements. This option has the disadvantage, however, that the bargaining and agreement would apply to only the employees who chose to be represented by the union.[387]

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[383] Also called minority unions, these terms apply to organizations or associations that do not have majority status under the NLRA as collective bargaining representative, and the employer has no statutory duty to bargain. However, the members of the organization can engage in protected concerted activity to attempt to pressure management regarding policies and terms and conditions of employment. *See* Nissen, *supra* note ___, at 35.

[384] *See supra* note ___ and accompanying text.

[385] *See* Summers, *Unions Without*, *supra* note __, at 536-37; Finkin, *The Road*, *supra* note __, at 198 (stating that "[i]n the absence of an exclusive representative, concerted activity by work groups for better working conditions is statutorily protected, and nothing prohibits an employer from contracting with a union for terms applicable only to its members"). The Supreme Court held that "members only" contracts can be enforced under Section 301(a) of the NLRA, 29 U.S.C. §185(a). Retail Clerks Int'l Ass'n, Local Unions Nos. 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962). For their part, employees can engage in concerted activity such as picketing and work stoppages to pressure employers to bargain. Summers, *Unions Without*, *supra* note __, at 541; Finkin, *The Road*, *supra* note __, at 198-99 (positing that he ability of a nonmajority group to compel an employer to deal with it depends on its "strategic situation in the workplace").

[386] Summers, *Unions Without*, *supra* note __, at 545.

[387] Professor Finkin explores many of the issues posed by multiple nonmajority unions. *See* Finkin, *The Road*, *supra* note __. For one, consider that different terms and conditions of employment could result from several different representations of similarly situated workers within the same workplace. *Id.* at 213-14. While this could be a problem, it would not necessarily be so. First, the function of nonmajority unions

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Of course nonmajority unions do not, by definition, represent a majority of the employees. This aspect of nonmajority unions could present some problems regarding collective waivers. In most situations, employers would not derive sufficient benefit from bargaining for waivers with two or three employees. Under current law, employers could simply refuse to bargain with nonmajority unions. Another aspect of the nonmajority status is that employers could be confronted with a proliferation of nonmajority unions that want to bargain over waivable rights. Again, in the absence of a duty to bargain, an employer could simply refuse to bargain unless and until a nonmajority union represented a critical mass of employees that made bargaining for waivers worthwhile. If Congress imposed a duty to bargain with nonmajority unions, or even if it did not, it could provide for a threshold level of representation that must be met for the union to have status as a broker of waivable rights.[388]

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that I propose is bargaining over waivable rights. It does not seem at all likely that a multitude of groups would seek to represent similarly situated employees for that purpose or that employees would seek a multitude of different representations. *Id.* at 212-13. Second, employers would continue to have bargaining power to negotiate regarding the waivable terms and to agree to only terms that are sufficiently similar as to render the workplace manageable. *Id.* at 214-15.

[388] In discussing minority unions, Finkin gives the example of Executive Order No. 10,998, 3 C.F.R. 521 (1959-1963), which provided for formal recognition in the federal sector of a non-exclusive representative of the employees if the organization had a membership of at least ten percent of the employees in an appropriate bargaining unit. Finkin, *The Road*, *supra* note ___, at 204 &n.39. Another example under current law is the Board's requirement that a union petitioning for a representation election must support its petition with at least a 30% showing of interest in the bargaining unit. NLRB Representation Case Handling Manual §11023.1 (2007).

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I think Congress should impose a requirement on a nonmajority union for it to have the power to represent employees regarding waivable rights—that it either be an independent union or that it be affiliated with such a union. Most nonmajority unions satisfy this criterion because they are established independent unions that simply have not been able to attain majority status. That does not describe all, however. The Alphabet Workers Union started through employee organization. It sought affiliation with an established union when the employer became resistant and retaliatory.[389] There are a few reasons that I favor imposing this requirement. First, I think it would improve the position of the broker in terms of knowledge, experience, and bargaining savvy. Second, I think it would provide a better check on the employer and discourage the commission of unfair labor practices. Third, such a requirement would provide unions with access to employees and an opportunity to offer services that may persuade employees of the value of representation by a majority union. In turn, organized labor might find a reason to support, or at least not vehemently oppose, the law reform.

Three objectives of recognizing conditionally waivable rights could also be advanced by the expansion of nonmajority union representation.

[389] *See supra* note ___.

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First, conditionally waivable rights would be adjustable to the needs and desires of workers in many diverse workplaces. Professor Finkin observes that nonmajority representation also offers flexibility that is "better attuned to the contemporary workplace."[390] Second, this form of expanded representation holds the promise of better enforcement than the current enforcement model. Finkin argues that, if the nation takes seriously the statutory and common law protections of workers, "there would seem to be no more effective means than well informed, adequately financed, and truly independent employee organizations active in the shop or office."[391] Third, nonmajority unions, like waivable rights, can be more responsive to the needs of the many classifications of atypical workers, many of whom are not covered by current laws. Finkin posits that nonmajority representation has the potential to the be more responsive to the various "contingent" or "atypical" workers.[392] Finally, authorizing waiver by nonmajority unions as backup brokers will more fully empower workers and provide them with a voice in workplace governance.[393]

An alternative for the role of backup broker is for Congress statutorily to provide for the creation of worker representative committees, works

[390] Finkin, *The Road*, *supra* note __, at 216.
[391] *Id.*
[392] *Id.* at 217-18.
[393] *See*, *e.g.*, Andrias, *supra* note ___, at 97-99 (discussing nascent experiments with alternative forms of representation that enhance worker voice); Finkin, *The Road*, *supra* note __, at 208.

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councils, or whatever one wishes to call them.[394] I will not develop a detailed proposal for such a representative body because doing so is a substantial project that merits meticulous consideration of U.S. labor law history, comparative labor law, and politics. Furthermore, there have been excellent scholarly treatments,[395] although none that have been tailored to the role of broker of waivable rights. Furthermore, statutory recognition of such organizations is a peripheral issue to my principal proposal—expansion of conditionally waivable rights in U.S. employment law. I think the law would be improved by such expansion even if the role of broker were limited to majority unions.

In broad outline, such representation committees could be elected by the employees if requested by the employees or the employer. Employee request raises the issue, as with nonmajority unions, of critical mass. The statute could specify that a committee would be formed only if a certain percentage of the workers requested it.[396] There are many other issues and details, but, again, there have been very good proposals that would merit

[394] *See* ESTLUND, *supra* note ___, at 171 (stating that "[i]n principle, works councils would seem to be the next-best alternative to union representation in giving employees a voice in the workplace").
[395] *See, e.g.*, WEILER, *supra* note __; Summers, *Employee Voice*, *supra* note ___; Craver, *supra* note __; Befort, *supra* note __.
[396] On this issue, the trigger for formation under the law of other nations may not provide much guidance, as their representative bodies perform different functions. For example, under German law a meeting can be called to establish a works council by any union with jurisdiction or any three employees entitled to vote. Betriebsverfassungsgesetz 1972 [Works Council Act] §17; Dichter & Ahrens, Germany, *supra* note __, at 5-83.

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consideration. Those proposals probably would need to be adjusted to the role that I have described. As with nonmajority unions, and for the same reasons, Congress should impose a requirement of an affiliation with an established independent union.

Returning to the issue of political feasibility, would organized labor support legal recognition of a "backup" organization for the role of rights broker? It seems unlikely.[397] Generally speaking, organized labor has not supported alternatives to majority status exclusive representation by unions. For example, the AFL-CIO opposed[398] the TEAM Act,[399] which would have amended Section 8(a)(2) of the NLRA to displace the Board's decision in *Electromation*,[400] declaring it not to be an unfair labor practice for employee organizations to interact with management for some purposes. The 1995 TEAM Act did not legalize such employee organizations if they sought to become the exclusive collective bargaining representative or if they sought to negotiate, enter into, or amend collective bargaining agreements.[401] Although the TEAM Act was passed by Congress, it was vetoed by President Clinton. Republican senators introduced a modified version of the

[397] *See*, *e.g.*, ESTLUND, *supra* note ___, at 171.
[398] *See* AFL-CIO, *Company Unions* (Feb. 22, 1995), https://aflcio.org/about/leadership/statements/company-unions. *See also* LeRoy, *supra* note ___, at 1658 & n.27.
[399] Teamwork for Employees and Management Act of 1995, S. 295 & H.R. 473, 104th Cong. 1995-96, https://www.congress.gov/bill/104th-congress/house-bill/743/text.
[400] 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994).
[401] *See* TEAM Act, *supra* note ___.

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Act in 2022.[402] Predictably, organized labor did not react favorably.[403] The role regarding conditionally waivable right for nonmajority unions and employee representation committees that I have limned as an option to only union waiver goes beyond the employee participation committees provided for in the various iterations of the TEAM Act because it involves bargaining and reaching agreements with employers. However, the times are changing. Some unions have some experience working as or with nonmajority unions, as in the case of CWA with the Alphabet Workers Union. Perhaps organized labor could appreciate the opportunities of access and provision of new services to workers as worthwhile and as providing entrées to traditional majority status exclusive representation.

And what of employers? Would a critical mass support, or at least not strongly oppose, federal legislation to create conditionally waivable rights via collective representation? If they see it as providing unions organizing opportunities[404] or empowering employees with new alternative forms of collective representation, they are likely to oppose it. On the other hand, they

[402] Teamwork for Employees and Managers Act of 2022. S. __, 117th Cong. (2002). *See, e.g.*, Daniel Johns, *The TEAM Act Brings Us Back To The Future Again*, LAW360 (Apr. 26, 2022), *https://www.law360.com/articles/1487429/the-team-act-brings-us-back-to-the-future-again e.g*https://www.peoplespolicyproject.org/2022/02/07/whats-the-point-of-the-rubio-company-union-bill/.
[403] *See, e.g.*, Matt Bruening, *What's the Point of the Rubio Company Union Bill?*, People's Policy Project (Feb. 7, 2022), https://www.peoplespolicyproject.org/2022/02/07/whats-the-point-of-the-rubio-company-union-bill/
[404] *See* ESTLUND, *supra* note ___, at 172.

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may see it that way but also accept that as a condition for offloading some of the burdens of the statutory protections/rights.[405]

2. Which Rights Would Be Conditionally Waivable?

No commentator who has urged consideration of expanding waivable rights has suggested that all statutory rights should be made waivable.[406] One approach would be for Congress to experiment with this device prospectively and apply it to only newly created rights. However, if this regulatory device were added to Congress's repertoire, it should not be so limited. There are good reasons to consider conversion of existing nonwaivable rights. First, if Congress had considered the possibility of waivable rights at the time it enacted some laws, it might have chosen that approach for some. Second, there are some existing statutory rights that seem particularly appropriate for a flexible approach that permits adjustments for particular workplaces.[407] Finally, making more rights waivable should generate greater bargaining power for worker representatives and concomitantly more interest on the part of employers in

[405] *Cf. id.* at 172 (suggesting that works councils perhaps not be mandated by legislation but be required as a condition for participating in a system of co-regulation).
[406] *See, e.g.*, Becker, *supra* note __, at 187 (stating that "some minimum standards should remain just that"); Estlund, *supra* note __, at 443 (observing that many employee rights are nonwaivable because they are essential to human freedom and citizenship); Sunstein, *supra* note __, at 259-64 (discussing justifications for nonwaivable rights).
[407] Professor Sunstein gives as an example the leave rights under the Family and Medical Leave Act. Sunstein, *supra* note __, at 252-54.

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bargaining for waivers. What then should be the guidelines or standards for determining which rights are made waivable?

Commentators have offered several factors for consideration. Perhaps the most overarching is whether making the right waivable is consistent with the rationale for enacting the law in the first place.[408] This seems appropriate as a general and overarching standard, but it should be supplemented with some more specific considerations. One such consideration should be that some employment rights are conferred to ensure human dignity[409] and "personhood and citizenship in a free society,"[410] and this characteristic militates against conditional waivability. A second consideration, in many cases related to the first, is that some rights are designed, at least in part, to change prevailing norms, and permitting waiver might impede that societal mission.[411] Third, legislators should be hesitant to permit waiver of rights that are conferred, at least in part, to protect third parties.[412] A fourth consideration, and perhaps one of the most important, is that for some rights/protections, society and lawmakers should be concerned with the majority having the power to trade the right away to the detriment of a

[408] *See* Schwab, *supra* note __, at 252.
[409] Davidov, *supra* note ___, at 492.
[410] Estlund, *supra* note __, at 442.
[411] Sunstein, *supra* note __, at 263.
[412] Schwab, *supra* note __, at 252 (giving as examples overtime rights under the FLSA and OSHA).

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minority.[413] Two arguments that support creating some conditionally waivable rights also could provide guidance on which rights are appropriate for such treatment: rights about which lawmakers are uncertain what the right should be; and rights that lawmakers have difficulty tailoring to diverse workplace settings.[414] Legislators should take all of these considerations into account when considering whether a statutory employment protection should be made waivable as well as the general standard of consistency with the rationale for enacting the law.

Most commentators who have discussed waivable rights and possible expansion have stated that federal antidiscrimination laws should remain nonwaivable.[415] So, let us consider federal antidiscrimination rights as the ostensibly strongest candidate among existing rights to remain nonwaivable. Many of the considerations mentioned above seem to support this conclusion, particularly the concern with a majority trading away a protection needed by a minority.

Although realizing that antidiscrimination rights are fundamental and perhaps should remain unwaivable, some scholars have been unwilling to categorically declare that *all* the rights protected under the antidiscrimination statutes should be beyond consideration for waivability. While stating that

[413] Becker, *supra* note __, at 187; Schwab, *supra* note __, at 250.
[414] *Id.* at 253.
[415] Schwab, *supra* note __, at 265; Becker, *supra* note __, at 187.

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the "core" of antidiscrimination law is a primary candidate for continued nonwaivability, Professor Estlund notes that there are some tradeoffs already permitted within the existing law.[416] Consider, for example the OWBPA waivers available under the ADEA.[417] Professor Sunstein seems to favor nonwaivability of core antidiscrimination rights because of both the third-party effects that waivers could have and the need for collective action to change societal norms and preferences.[418] However, he also recognizes that employers may be willing or eager to obtain waivers of these rights, not because they wish to discriminate, but because they wish to be free of frivolous lawsuits.[419] But more to the point, whether frivolous or meritorious claims, antidiscrimination laws generate a large volume of charges of discrimination[420] and lawsuits.[421] Additionally, there are other burdens, risks, and costs that the antidiscrimination laws impose on employers beyond lawsuits. To obtain relief from those burdens, employers may be willing to exchange terms and conditions of considerable value. On the other hand, it

[416] Estlund, *supra* note __, at 443.
[417] *See supra* text accompanying notes ___-___.
[418] Sunstein, *supra* note __, at 261-64.
[419] *Id.*
[420] *See, e.g.*, Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021.
[421] In the year ending March 31, 2021, in the federal courts, civil rights filings grew 2 percent (up 703 cases). Cases involving claims under the Americans with Disabilities Act rose 5 percent (up 594). Federal Judicial Caseload Statistics 2020, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020. Civil rights filings declined in the federal courts for the year ending March 31, 2021. https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021; *see also* Deborah M. Weiss, *The Impossibility of Agnostic Discrimination Law*, 2011 UTAH L. REV. 1677, 1731 (2011) (stating that in 2006 employment discrimination cases accounted for "a staggering 22% of trials" in federal courts).

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may impede the objectives of the antidiscrimination laws to permit employers to be relieved of some of those burdens, such as having HR departments develop strategies to prevent discrimination and train employees.

Even if an employer obtained waivers regarding discrimination, I think most employers would be reluctant to engage in discrimination and suffer the opprobrium and reputational damage among employees, potential applicants, customers, and perhaps shareholders.[422] The societal norm may have shifted sufficiently to guard against such discrimination. Nonetheless, waivers may enable employers to become less vigilant about eradicating invidious discrimination in the workplace.

For antidiscrimination rights, I think it is facile to generalize regarding the case for nonwaivability. Rather, it is important to recognize that there are numerous rights and several protected characteristics included within federal antidiscrimination law. The Supreme Court has made clear, for example, that age discrimination differs in significant ways from race and sex discrimination and should be treated differently by law,[423] and Congress has permitted waivers of existing age discrimination claims.[424] Thus, a more

[422] Sunstein, *supra* note ___, at 261.
[423] *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).
[424] *See supra* text accompanying notes ___-___.

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nuanced approach should be employed to determining whether some antidiscrimination rights should be waivable.

The OWBPA waiver provision in the ADEA suggests another factor that should be considered—rights for which Congress already has provided for some form of waiver. Another is the overtime pay requirement in the FLSA for which Congress recognizes a waiver for public employees who freely agree to compensatory time lieu of overtime[425] and a waiver by unions under some circumstances.[426] It seems that for statutory rights for which Congress already has provided for a limited waiver, it would be reasonable to consider permitting a negotiated broader waiver.

In my introductory hypothetical, I gave an example of two different types of privacy rights that Congress could enact as waivable rights. I think various privacy rights are good candidates for such treatment. Congress has fallen far behind in protecting privacy rights. The federal statutory claims that employees assert for electronic privacy invasions are under laws enacted in 1986.[427] Information technology and electronic communication have outpaced the law. This is understandable. The bundle of privacy rights is diverse and complex. Employers and employees have significant

[425] 29 U.S.C. § 207(o).
[426] 29 U.S.C. § 207(b)(1).
[427] Electronic Communications Privacy Act/Stored Communications Act, 18 U.S.C. §§ 2510-2521 & 2701-2711; Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 et seq.

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countervailing interests and these vary greatly among different workplace settings. It is difficult for Congress to confer statutory minimum rights regarding privacy that are appropriate for all situations. The possibility of creating waivable rights might prompt Congress to pass laws that it would not with only nonwaivable rights.

Finally, legislators considering which statutory rights should be made waivable should consider the value of the bargaining chip. Congress should consider the trade value that any particular right would add. Some rights might be made waivable because they would confer significant bargaining power on the worker representative and would create a strong incentive for employers to engage in such bargaining. I realize that skeptics may object that the most valuable rights conferred by Congress should remain nonwaivable. Some probably should. Nonetheless, it is important to remember that this proposal envisions a less paternalistic labor law in which workers are empowered to take care of themselves as they see fit.

I have not attempted to determine all rights that should be made conditionally waivable. Rather, I have set forth some of the considerations that should be taken into account. No one factor should be dispositive. It does seem that legislators should begin this project cautiously, but I do not

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think that means applying it to only new rights. As discussed, there are some good candidates for conversion among existing rights.

3. Not Necessarily All or Nothing

Flexibility is one of the chief positive attributes of conditionally waivable rights, just as rigidity is one of the principal weaknesses of the nonwaivable rights approach. Even greater flexibility can be created in such a system by avoiding the all-or-nothing dichotomy. Professor Sunstein recommends a two-tier approach in which Congress could specify a first tier of nonwaivable minimum rights and a second tier of waivable rights.[428] In other words, Congress could create hybrid rights. This indeed might be the best approach for some rights. It is a logical extension of a regime in which there are both nonwaivable rights and conditionally waivable rights.

4. Federal/State

I have proposed this approach to statutory rights at the federal level because I have been concerned with reconceiving the federal labor and employment law of the U.S. Unions currently have the power to bargain and trade some federal and state statutory rights.[429] States could also create statutory rights that are waivable under the system I propose. One candidate is noncompetes. Given the volume of litigation and the concern with

[428] Sunstein, *supra* note __, at 251-52.
[429] *See* Finkin, *Union Dispossession*, *supra* note __, at 6-8; Schwab, *supra* note__ at 259-60.

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employer overreach regarding noncompetes, state legislatures could commit noncompetes to this system. Thus, state lawmakers could end their quest for the appropriate substantive constraints for enforceability of noncompetes and instead submit them to the procedural constraints outlined in this proposal. The controversy, disputes, and lack of predictability regarding noncompetes might be avoided with a system permitting negotiated collective waiver. Employers agreeing in bargaining to give something of value in exchange for noncompetes would be more akin to garden leave in the United Kingdom than to the current array of standards in the U.S., which have generated much dissatisfaction and political activity.[430]

V. CONCLUSION

The labor and employment law regime of the U.S. is rife with problems and deficiencies. The most overarching is the lack of coordination among the common law, the collective bargaining law, and the individual minimum rights law and the dichotomy of labor law and employment law. An underexplored approach to labor and employment law that would better coordinate these parts is conditionally waivable rights. It is established in U.S. law for waiver of some federal labor rights under the NLRA and some state statutory rights. The law could be greatly improved by expanding the

[430] *See supra* note ___.

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use of waivable rights and developing a new model of constraints. Employees can be protected against employer confiscation of rights by procedural or substantive constraints. Procedural protections in the form of representation and bargaining could achieve the laudable goals of empowering workers to trade for the terms and conditions that they want and need, providing them with knowledge and understanding of their rights, and giving them greater voice and participation in workplace governance. The structures for employee representation and bargaining over waivable rights are feasible under U.S. law with some amendments of current law. Unions would have a significant role under any version of the proposal articulated in this Article. Although paternalism has a significant role to play in employment law, empowerment does as well, and that role is becoming more significant in the economy and job markets of the twenty-first century. The paternalistic approach of imposing/conferring defined and inalienable protections on large groups of workers and inflexible burdens on employers is no longer providing either adequate protection or appropriate terms and conditions of employment to many workers. It is time to wave goodbye to some nonwaivable rights of employees.

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