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A Theory of Minimum Contract Terms, with Implications for Labor Law

Keith N. Hylton*

I. Introduction

This Paper deals with a topic at the core of labor, property, and contract law: to what extent should individuals be free to enter into agreements of their choice? In many instances, the state intervenes to tell parties that they may not execute or enforce certain agreements, or that they must incorporate certain "minimum terms." A broad view of property rights would support the position that individuals are free to enter into whatever agreements suit them. A narrow view, on the other hand, is consistent with the claim that the state may require contracting parties to comply with a set of minimum terms.

This Paper aims to provide a theory of minimum terms in the employment context. I first examine the tension between minimum terms and the employment-at-will doctrine.[1] I argue that the common intuitive notion that the at-will rule is inconsistent with minimum terms is false, and sketch a theory of common-law minimum terms. I then consider "new labor law minimum terms," the most important of which is the right under section 7 of the National Labor Relations Act to form and to join labor unions.[2]

I am more concerned with providing a theoretical foundation for section 7 rights. In spite of the legal significance of the New Deal labor

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1. The employment-at-will doctrine provides that when the term of the employment contract is indefinite, the employer and the employee are free to terminate the contract without liability at any time. For a discussion of the rule and the controversy surrounding it, see Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 683-96 (1994).

2. Section 7 provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

29 U.S.C. § 157 (1994).

legislation, there is surprisingly little in the way of rigorous justification for it.[3] One typically finds references to coercion in the early attempts to justify protection of organizational rights, particularly in passages discussing the yellow dog contract.[4] However, the precise sense in which a yellow dog agreement is coercive has never been made clear.[5] The argument that a yellow dog contract is a derivative of slavery is difficult

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3. For articles discussing the social desirability of unions, see, for example, Kim B. Clark, *The Impact of Unionization on Productivity: A Case Study*, 33 INDUS. & LAB. REL. REV. 451, 458-61 (1980) (presenting empirical evidence to suggest that unions enhance productivity); Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism*, 57 PUB. INTEREST 69, 73-74 (1979) (presenting a defense of unions as solutions to collective action problems in the workplace); Henry C. Simons, *Some Reflections on Syndicalism*, 52 J. POL. ECON. 1, 9 (1944) (treating unions as monopolistic cartels that lead to the misallocation of resources). For articles discussing the social desirability of certain labor law doctrines, see, for example, Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 468-78 (1992) (critiquing the traditional monopoly model of unions from an economic perspective); Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 508-20 (1993) (arguing that labor law doctrines reflected in successorship, partial closing, and relocation law might be understood on efficiency grounds); Keith N. Hylton & Maria O'Brien Hylton, *Rent Appropriation and the Labor Law Doctrine of Successorship*, 70 B.U. L. REV. 821, 822-23 (1990) (offering an economic justification for the successorship doctrine based on a model of unions as rent-protecting organizations); Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1185-92 (1980) (examining the economics of labor unions in the context of a union's tactical objectives, such as monopolizing the labor supply and attacking the competitors of unionized firms); Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 286-87 (1987) (discussing the implications of applying the "mimic the market" approach when transaction costs prevent labor and management from reaching an efficient collective bargaining agreement); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1352-53 (1988) (arguing that "significant elements of labor law can be viewed as attempting to remedy market failures in internal labor markets").

My point here is rather narrow. The novel feature of the New Deal legislation was the prohibition of yellow dog and other agreements restricting employee organizational rights. "Yellow dog contract" refers to an agreement in which an employee promises, as a condition of employment, never to join a union while remaining with his present employer. The term also refers to "agreements not to go on strike, or not to do anything which will interfere with the employer's conduct of a non-union or open shop." Edwin E. Witte, *"Yellow Dog" Contracts*, 6 WIS. L. REV. 21, 21 (1930). Unions existed long before the New Deal. Why organizational rights should be protected by legislation outlawing agreements inconsistent with those rights has not been addressed in the literature on the social desirability of unions or labor law.

4. In discussing the limitations upon an abstract right to contract, Frankfurter and Greene provided the classic description, observing that

> [t]he legal conception of "duress" at common law is much narrower than the range of economic coercion. But that conception of duress grew out of a very different state of society . . . . The compulsions upon men's free choice in action vary from time to time, and living law must make its accommodations to shifts in compulsion. Certainly, if a legislature, having due regard to . . . the inequitable provisions of [yellow dog] contracts, should conclude that a wise public policy does not justify their judicial enforcement, the Supreme Court ought not to neglect the truth of such industrial facts . . . .

FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 214 (1930).

5. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1370-75 (1983) (refuting the economic duress argument as a justification for abolishing yellow dog contracts).

to accept; for if such a pledge strips a worker of fundamental rights, why is this not also true of a promise not to reveal trade secrets or not to sell one's services to a competing employer?[6]

Although I find it hard to justify a legislative prohibition of the yellow dog agreement, the theory I present does reveal in a precise sense how such a contract might be coercive. I show that under some fairly routine conditions, the anti-union promise may be procured by the employer at a price that fails to compensate employees for the rights traded away. This failure is the result of a sort of "strategic coercion" that is a fixed feature of the bargaining setting. It is possible, to be sure, for employees to adopt strategies that would enable them to avoid or lessen the potential for strategic coercion, but there is no guarantee that employees will do so. In light of this, fundamental section 7 protections may be justified on coercion grounds, but this is a kind of coercion that has nothing to do with traditional notions of duress.

I use the theory of strategic coercion to provide a positive theory of the fuudamental labor law decisions on the scope of section 7 rights. I find that there is a common thread explaining several key and seemingly unrelated decisions, such as *Republic Aviation Corp. v. NLRB*,[7] *J. I. Case Co. v. NLRB*,[8] and *NLRB v. Wooster Division of Borg Warner*.[9] That

6. Public sector employers, unlike their private sector counterparts, cannot force employees to give up their associational rights. The problem is that all contracts restrain the freedom of the contracting party. If an anti-union promise is a form of slavery because it restrains employees from exercising "basic" freedoms, then what principle restricts the set of basic freedoms? Because this question cannot be answered, I will not rely on a theory of inherent rights to provide a rationale for the prohibition of yellow dog contracts.

I will also not rely on paternalistic arguments. *See generally* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 563 (1982) (asserting that "paternalist motives play a central role in explaining the rules of the contract and tort systems with respect to agreements" and denying that "paternalist intervention can be justified only by the 'incapacity' of the person the decision maker is trying to protect"); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 765 (1983) (describing three different forms of paternalistic restriction in contract law, one form justified by economic efficiency and distributive considerations, another by the idea of personal integrity, and the third by "the familiar, though poorly understood, notion of sound judgment"). The sophisticated economic version of paternalism relies on a theory of "time-inconsistent preferences." *See* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 84 (1979) (arguing that paternalistic laws are unobjectionable to the extent that they stem from citizens' desire to protect themselves against their own impulsive behavior in the future); Robert H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUD. 165, 171, 168-72 (1956) (introducing a microeconomic model to demonstrate that an individual's optimal consumption plan may change over time and commenting that "there is nothing patently irrational about the individual who finds that he is in an intertemporal tussle with himself—except that rational behavior requires that he take the prospect of such a tussle into account"). Paternalism, however, offers no limit to the amount of state intervention that the theory supports.

7. 324 U.S. 793 (1945).

8. 321 U.S. 332 (1944).

9. 356 U.S. 342 (1958).

common thread is simple: section 7 doctrine aims to prevent inequitable transfers of organizational rights that may result from the strategic incentives of employees. Put another way, section 7 shields employees from strategically coercive transfers of organizational rights.

This theory of section 7 reconciles *Republic Aviation* with the rule of *NLRB v. Babcock & Wilcox*[10] and, more recently, *Lechmere, Inc. v. NLRB*.[11] *Republic Aviation* holds that broad rules prohibiting solicitation of union support at the workplace generally violate the NLRA.[12] The decision can be understood as preventing employees from trading away their right to engage in such solicitation. In *Lechmere*, the Supreme Court asserted a broad right on the part of the employer to prohibit nonemployee organizers from soliciting support or distributing information on company property.[13] Commentators have argued that the *Babcock & Wilcox/Lechmere* doctrine is inconsistent with the theory of section 7.[14] But it is one thing to prohibit potentially coercive transfers of rights and quite another to reassign property rights. The rules of *Republic Aviation* and *Lechmere* are consistent with the theory that section 7 aims to prohibit strategically coercive transfers without reassigning property rights.

Although my focus is labor law, this Paper has implications for contract theory as well. It is a commonplace axiom now that even though parties bargain in order to enhance their wealth, the resulting contracts may fail to maximize the wealth of the parties.[15] Two reasons for this failure have received a great deal of attention in the literature. One is that the costs of bargaining make it economically irrational for the parties to

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10. 351 U.S. 105 (1956).

11. 502 U.S. 527 (1992).

12. Specifically, the Court relied on § 8(a)(1) of the statute, 29 U.S.C. § 158(a)(1) (1994). For the exceptions to the general rule, see *infra* text accompanying notes 105-111.

13. *Lechmere*, 502 U.S. at 538.

14. For recent critiques, see Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305 (1994) (arguing *Lechmere*'s interpretation of the right to exclude is overly broad and not justified by the NLRA or state property law); Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of* Lechmere, Inc. v. NLRB, 9 HOFSTRA LAB. L.J. 1, 10-11, 10-21 (1991) (chastising the *Lechmere* decision for, among other things, "trivializ[ing] the core § 7 right of workers to learn about the merits of a union"). On the apparent inconsistency between property and § 7 rights, see William B. Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964) and William B. Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505 (1965).

15. The general theory is that contractual failure may result because of "transaction costs." *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (observing that such operations as finding a transaction partner and negotiating the terms of a deal may be "sufficiently costly . . . to prevent many transactions that would be carried out in a world in which the pricing system worked without cost"). Coase's paper is generally cited for introducing the Coase Theorem, which states, roughly, that in the absence of transaction costs, parties will reach agreements that maximize wealth. But if the costs of transacting are high, the parties may not have incentives to enter into wealth-enhancing contracts.

include provisions covering remote contingencies.[16] The other is that informational asymmetries may lead parties to avoid making certain proposals for strategic reasons.[17] This Paper illustrates a third process that generates wealth-reducing contracts: strategic incentives that arise when one of the bargaining parties is a group, such as a group of employees. Bargaining costs and informational asymmetry play no role in this analysis.

This Paper is organized as follows. Part II presents a catalogue of different types of minimum terms with some discussion of their economic implications. Part III examines the tension between minimum terms and the employment-at-will rule. The tension exists only on a superficial level. The at-will rule existed simultaneously with a rich set of common-law minimum terms. In Part IV, I provide a theory of new labor law minimum terms, with special emphasis on the right to form unions. In Part V, I use the theory developed in Part IV to explain a number of fundamental labor law doctrines.

II. Minimum Terms: Definitions, Types

The standard example of a minimum term in an employment contract is a minimum wage law, such as the minimum of $4.25 per hour required by the Fair Labor Standards Act (FLSA).[18] But what about section 8(a)(3) of the National Labor Relations Act (NLRA), which prohibits anti-

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16. *See, e.g.*, GORDON TULLOCK, THE LOGIC OF THE LAW 35-55 (2d ed. 1987) (relying on bargaining costs to explain basic features of contract law); Coase, *supra* note 15; Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 972 (1983) (observing that parties are not likely to "work out definitively the optimal responses to all future contingencies").

In addition to explaining the degree of detail observed in a typical contract, the bargaining cost theory suggests that parties will sometimes fail to make a contract, and in other cases bargaining costs will explain the nature of the contract. Bargaining costs play an important role in Coase's theory of the firm. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (positing that firms integrate vertically because the costs of contracting make a system of specific, spot-market transactions infeasible).

17. This idea is implicit in Coase's theory of transaction costs and bargaining. *See* Coase, *supra* note 15, at 15. *See, e.g.*, Joseph Farrell, *Information and the Coase Theorem*, J. ECON. PERSP., Fall 1987, at 113, 115 (concluding that "we cannot assume that all mutually beneficial contracts are signed, unless we assume that everyone knows everything about everyone, which they do not"). A number of recent articles, however, have further articulated this argument. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (recommending that default rules for filling gaps in incomplete contracts be based on the concept of "penalty default"—terms which parties would not want—to encourage the parties to reveal information); Kathryn E. Spier, *Incomplete Contracts and Signalling*, 23 RAND J. ECON. 432, 434-35 (1992) (presenting a principal-agent model in which asymmetric information leads to contractual incompleteness).

18. 29 U.S.C. §§ 201-219 (1994).

union agreements?[19] Is this also a minimum term, and if so, how does it differ from the minimum wage?

The prohibition of anti-union agreements and the minimum wage statute are alike in that they both prohibit certain types of agreements, or limit the set of agreements into which parties may enter. The minimum wage prohibits agreements in which the employer promises to pay—and the employee accepts—a wage less than the statutory minimum. Section 8(a)(3) prohibits agreements in which the employee promises never to join a union while working for the employer. Thus, "minimum term" will be used in this Paper to refer to restraints on the set of contracts which the parties may execute and enforce.

Minimum terms may be grouped into three classes: contractual, statutory, and common law. "Contractual" refers to the set of terms determined by agreement, such as an agreement between a union and an employer to maintain the hourly wage above ten dollars over the term of their agreement. By "statutory," I mean those minimum terms imposed by statute, such as the minimum wage required by the FLSA. Finally, by "common law" I mean those minimum terms imposed by judge-made law. A common-law rule requiring courts to read ambiguous employment contracts in a manner that favors employees could, under certain conditions, be equivalent to a statutory minimum term.

Of the three classes, contractual minimum terms are the least worrisome in terms of their effects on the welfare of the parties.[20] If the parties are well-informed and conditions suggesting a voluntary exchange are present, the parties will agree to a contractual minimum term when and only when it enhances welfare for both sides.[21]

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19. Section 8(a)(3) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1994). This section is generally understood to declare that anti-union agreements are unfair labor practices. *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 39-40 (1954).

20. By "welfare" here and throughout the text, I refer to the net benefits each party gains through contracting. Thus, if the employer is willing to pay $50 for an hour of the worker's time, and actually pays $20, the employer's net benefit (or welfare) from the employment contract is $30. If the employee is willing to work for the employer for as little as $10 per hour, the employee's net benefit from the employment contract is $10. The total welfare is then $10 + $30 = $40. Welfare is equivalent in this usage to the concept of "consumer surplus." *See* JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 204-06 (4th ed. 1988) (explaining consumer surplus as the net advantage to consumers of buying at the equilibrium price even though they would have been willing to pay a higher price). While the consumer surplus approach has been criticized for not capturing income effects, those effects are likely to be small. *See* Robert D. Willig, *Consumer's Surplus Without Apology*, 66 AM. ECON. REV. 589, 589 (1976) (providing empirical data to demonstrate the validity of consumer surplus as a measure of welfare).

21. This is an implication of the Coase Theorem. *See* Coase, *supra* note 15, at 15 (arguing that parties to a transaction will exhaust all opportunities for a mutually advantageous exchange if transaction costs are zero).

Consider, for example, a work-preservation clause in a collective bargaining agreement. The clause guarantees some measure of job security to employees, and thus is as valuable to employees as a wage enhancement. To the extent that it constrains the employer from subcontracting out work in order to reduce costs, however, the clause makes production more costly. Suppose the work preservation clause is worth $500 to the employees (*i.e.*, they are willing to offer a concession worth $500 in exchange for it) and the expected cost of the clause to the employer is $400. The parties then have an incentive to agree to the clause and will be better off as a result.

On the other extreme in terms of worrisomeness is the statutory minimum term. The legislature may impose such a term in instances where it fails to place both parties in a better position. Indeed, the standard analysis of the minimum wage concludes that it fails to improve the welfare of all the parties.[22] Employers who rely on low-skilled, low-wage labor are forced by such a statute to exit the industry, or to alter the production process so that low-wage workers are not employed. Since the

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22. For a survey of the literature, see Charles Brown et al., *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. ECON. LITERATURE 487, 487 (1982). Briefly, the reason the minimum wage fails to improve the welfare of all parties is as follows. Low-skill employees are hurt by the minimum wage because an employer is unlikely to have an incentive to hire them, precisely because the value of an hour of such an employee's time is likely to fall below the wage floor. Employers who rely on low-skill employees are forced by such a statute to exit the industry; although, if the capital used in production can be transferred to some other use, these employers can sell their assets without incurring a substantial loss. The employees are made redundant by a minimum wage that causes them to suffer in the short- and probably long-term.

There is recent research suggesting that the minimum wage may not have the negative employment effects typically predicted in economic analyses. *See* David Card, *Using Regional Variation in Wages to Measure the Effects of the Federal Minimum Wage*, 46 INDUS. & LAB. REL. REV. 6, 14-16 (1992) (demonstrating that the 1990 increase in the federal minimum wage increased teenage employment); David Card, *Do Minimum Wages Reduce Employment? A Case Study of California, 1987-89*, 46 INDUS. & LAB. REL. REV. 38, 38 (1992) (offering data indicating that after a 1988 increase in the California minimum wage there was no correlative decline in employment of young and less-skilled workers); Lawrence F. Katz & Alan B. Krueger, *The Effect of the Minimum Wage on the Fast-Food Industry*, 46 INDUS. & LAB. REL. REV. 6, 15, 14-16 (1992) (demonstrating through a study of the Texas fast-food industry that, contrary to conventional economic models, "employment growth was positively related to the size of wage increases mandated by the minimum wage"); Stephen Machin & Alan Manning, *The Effects of Minimum Wages on Wage Dispersion and Employment: Evidence from the U.K. Wages Council*, 47 INDUS. & LAB. REL. REV. 319, 319 (1994) (finding either a positive effect or no effect on employment as a result of minimum wages). *But see* David Neumark & William Wascher, *Employment Effects of Minimum and Subminimum Wages: Panel Data on State Minimum Wage Laws*, 46 INDUS. & LAB. REL. REV. 55, 55 (1992) (providing data in support of the argument that increases in the minimum wage cause declining employment); Nicholas Williams, *Regional Effects of the Minimum Wage on Teenage Employment*, 25 APPLIED ECON. 1517, 1526 (1993) (demonstrating employment reductions in the teenage labor force resulting from the minimum wage). The new "pro-minimum wage" results, however, do not contradict the prediction that low-skilled employees are disadvantaged in the labor market as a result of such legislation. For a review of the recent debate among empirical economists, see Louis Uchitelle, *A Pay Raise's Impact: A Higher Minimum Wage Does Not Lead to Big Losses in Jobs, Research Indicates*, N.Y. TIMES, Jan. 12, 1995, at D1, D19.

latter option is available to the parties even in the absence of the statute, it is unlikely the statute makes them better off, for the parties would have had incentives to adopt that alternative well before the passage of the statute.[23]

Common-law minimum terms fall somewhere in between the statutory and contractual categories in terms of their implications for the welfare of the contracting parties. When the common-law minimum term acts as a default rule that mimics what the parties would have chosen on their own, then it saves transaction costs and enhances the parties' welfare.[24] Thus,

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23. Obviously, there are reasons that parties might not adopt welfare-enhancing changes. The Coase Theorem implies that if the costs of bargaining over such a modification are very high, the modification will not be adopted. *See* Coase, *supra* note 15, at 15. In some cases, a certain welfare-enhancing change may be simple, yet require a high degree of inventiveness to see it. *See* Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 919-20 (1986) (arguing that although an economic theory may be brilliant, it may nevertheless fail to impact individual lives because most people are not brilliant enough to see it). In other cases, a party may be reluctant to propose a welfare-enhancing modification because the proposal itself may signal the existence of some undesirable trait or tendency in the proposer. *See* Spier, *supra* note 17, at 433 (providing the example of a professional athlete unwilling to ask for an injury clause in his contract for fear that the team manager will believe he is more likely to be injured than another player). Neither of these arguments seems to apply very well, however, to the setting where both employer and employees are made better off by an increase in the proportion of highly paid employees.

I have not exhausted all of the reasons that a statutory minimum term may be undesirable. The statutory minimum term is also worrisome in its welfare effects because it reduces competition in the labor market in a manner that benefits high-skilled employees. The reduction in competition leads to an increase in production costs, and thus an increase in prices, which works to impoverish all consumers. In addition, the process gives the highly skilled an incentive to seek further restrictions in order to maintain their positions, and generates a provider-client relationship between high-skilled workers and their legislative advocates. Thus, statutory minimum terms tend to generate "rent-seeking" legislative action. *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (explaining how industries and occupations with significant political power seek state regulations in an attempt to control entry into the industry or occupation).

24. When the parties are fully informed and the direct costs of bargaining pose the only obstacle to making a contract that covers all of the possible contingencies, then a default rule that reflects the bargain they would have reached if the bargaining costs had been zero enhances welfare by providing a clear rule at no cost to the parties. *See* ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 4 (1979) (positing that one of the functions of background rules of law is "to reduce the costs of the exchange process by supplying a standard set of risk-allocation terms for use by contracting parties").

What happens when the parties are not fully informed? Suppose one of the parties has an informational advantage? In this case, the "reasonable" rule is likely to be one that constrains the informationally advantaged party's power to exploit his advantage. A rule that gives the advantaged party an incentive to disclose information would be appropriate. *See* Ayres & Gertner, *supra* note 17, at 98-100; Farrell, *supra* note 17, at 117-20.

Would a rule that encourages information disclosure be one that mimics what the parties would have chosen, or would it be one that they would not have chosen? The answer depends on your perspective. If both parties were told to choose a rule without knowing which one of them would have the advantage, they would choose the one that encourages disclosure. *Ex post*, however, when the advantaged party knows that he has an advantage, he would clearly choose a rule that maximizes his advantage. When I say that an appropriate default rule reflects what the parties would have chosen on their own, I refer to the case where they are not aware of their advantages.

to the extent common-law minimum terms reflect implicit terms that typically govern private agreements, they are welfare-enhancing.

A second set of distinctions among minimum terms concerns the scope of the restriction on private agreements. Some statutory or common-law minimum terms prohibit certain agreements while others merely deny parties the option of having their agreement judicially enforced. For example, section 3 of the Norris-LaGuardia Act prohibits federal courts from enforcing anti-union agreements.[25] Section 8(a)(3) of the National Labor Relations Act is understood as making anti-union agreements unlawful.[26]

I include both prohibitions of agreements and restrictions on enforceability under the heading "minimum term." Although a restriction on enforceability places fewer constraints on the parties than does the prohibition of a certain type of agreement, it still has a big impact on the parties' ability to design a contract of their choice. If one party breaches a promise that is unenforceable, the other cannot collect damages for the injury that results. Realizing this, the party who is likely to be injured has an incentive to alter the terms of the contract in a manner that offsets the risk of breach; and if the expected injury from breach is sufficiently high, the prospective victim will not have an incentive to enter into the contract at all. So, a restriction on enforceability can have an impact as significant as a prohibition on the type of agreement.

III. Minimum Terms and the Common Law

Coppage v. Kansas[27] contains an apparently logical argument, elevated to the level of constitutional doctrine, to the effect that minimum terms are inconsistent with the employment-at-will doctrine.[28] The argument runs as follows: because the employer may lawfully fire an employee for any reason whatsoever in an at-will regime, it should be

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Note that I am rejecting the dichotomy between ordinary and penalty defaults proposed in Ayres & Gertner, *supra* note 17, at 87-95. I reject their dichotomy because it carries the implication that informational asymmetry requires something more than the transaction cost analysis originally suggested by Coase. The problem of informational asymmetry, however, has been recognized from the very start as a source of transaction costs in Coase's framework. *See* Farrell, *supra* note 17, at 115 ("[W]hen people don't know one another's tastes or opportunities, then experience, theory and experimental evidence all confirm that negotiations may be protracted, costly and unsuccessful.").

25. 29 U.S.C. § 103 (1994).

26. *See, e.g.*, Radio Officers' Union v. NLRB, 347 U.S. 17, 42 (1954) (explaining that the clear purpose of § 8(a)(3) is to prevent an employer from encouraging or discouraging the union membership of its employees by discriminatory means).

27. 236 U.S. 1 (1915), *overruled by* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

28. *Id.* at 13 ("Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will.").

within an employer's rights to condition employment on any requirement. The argument is persuasive, on a superficial level, because it boils down to a claim that a certain greater power includes a lesser power.[29]

A. Fundamental Common-Law Minimum Terms

Though persuasive at first glance, the greater-includes-lesser power doctrine is unreliable as a theory of common-law rules. There were fundamental common-law minimum terms that restricted (and, where applicable, continue to restrict) the set of enforceable agreements.

Blackstone's discussions of the employment relationship[30] and of fundamental common-law rights (personal security, liberty, and property)[31] suggest the existence of such terms. The best known term is the prohibition of a contract for total slavery. Such an agreement would not be enforced because "[e]very sale implies a price, a *quid pro quo*, but what equivalent can be given for life, and liberty, an equivalent given to the seller in lieu of what he transfers to the buyer: both of which (in absolute slavery) are held to be in the master's disposal?"[32]

Similarly, the fundamental right of personal security, which includes protection of bodily integrity and autonomy, seems to have provided minimum terms in the employment contract. On this right, Blackstone asserted that

> the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se*

29. One ancient form of the greater-includes-lesser power doctrine attempts to provide a justification for the enslavement of prisoners of war. In this context the attempted justification runs as follows: if it is morally unobjectionable for the victors to kill the opposing forces, then it is surely not morally objectionable for the victors to merely enslave them. As Blackstone noted in his brief discussion of justifications offered in defense of slavery, this argument relies on the false premise that war provides a moral basis for killing one's enemy, whether he resists or not. 1 WILLIAM BLACKSTONE, COMMENTARIES *411.

In the property context, the greater-includes-lesser power doctrine generates the argument that because an owner can exclude another from his property for any reason, good or bad, he can condition entry on any requirement that pleases him. As testimony to the persuasiveness of this argument, note that Holmes adhered to it throughout his career and applied it in a number of cases. *See, e.g.*, Motion Picture Patents v. Universal Film Mfg. Co., 243 U.S. 502, 519 (1917) (Holmes, J., dissenting) ("Generally speaking, the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event."); *see also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 18 (1990) ("The second example is Holmes's rejection of the doctrine of unconstitutional conditions: he thought that since a person has no right to be a police officer (or any other type of public employee), an officer cannot complain if the police department has a rule denying its employees free speech. The greater power—the power not to hire—includes the lesser power to condition employment on the employee's agreeing to surrender his constitutional rights.").

30. 1 WILLIAM BLACKSTONE, COMMENTARIES *410-20.

31. *Id.* at *125-36.

32. *Id.* at *412.

> *defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other requisite solemnities, are totally void in law, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. And the same is also a sufficient excuse for the commission of many misdemeanors . . . .[33]

And in a later passage we learn that "[t]he statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity."[34]

However, the part that comes closest to the question at hand is a discussion of the limits of the duress excuse:

> A fear of battery or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burnt, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement ean be made for the loss of life, or limb.[35]

While none of these passages deals squarely with the case in which an employer conditions employment on the surrender of claims to bodily integrity, they clearly suggest such a condition would not have been enforced.

Personal liberty, the second fundamental right, receives similar treatment in Blackstone.[36] A related source of fundamental minimum terms stems from the right to apply to courts for redress of injuries,[37] so it follows that an employer could not enforce a condition requiring the employee to forfeit all legal claims.

B. Minimum Terms, Employment at Will, and Fundamental Rights

The simultaneous existence of minimum terms and the at-will rule forces us to ask whether there are deeper sources for these seemingly inconsistent doctrines. The difficulty in squaring employment at will with the existence of common-law minimum terms is not merely the result of a clash between two opposing doctrines. It illustrates one of many points of

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33. *Id.* at *126.
34. *Id.* at *129.
35. *Id.* at *127.
36. *See id.* at *130-34.
37. *See id.* at *137.

conflict among fundamental common-law rights.[38] The at-will doctrine recognizes the employer's ownership of a job slot as a form of private property: just as the owner of a parcel of land could exclude others from that parcel for any reason whatsoever, so too could an employer exclude a worker from a job slot.[39]

The right to exclude, under common-law trespass doctrine, has traditionally been broad in scope. In *Gilbert v. Stone*[40] the defendant was found guilty of trespass even though he fled in "fear of his life."[41] Thus, a knowing, intelligent decision to invade the property of another was, at least at one time, sufficient to support a trespass claim, even though the crossing was spurred by a well-grounded fear of bodily harm.[42] On the other hand, it has never been trespass where the invasion itself is not voluntary, as in the case of a person thrown off of his horse onto the land of another. The region of legal uncertainty has involved intentional invasions that might also be said to be involuntary, such as the famous squib case, *Scott v. Shepherd*,[43] where the court rejected the argument that each individual who threw the squib in order to escape the blast was guilty of an independent trespass.[44] The reasoning was not made clear, but the majority probably felt that the intermediate squib handlers were motivated by an involuntary desire to preserve themselves.

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38. These fundamental rights (personal security, liberty, and property) can be thought of as large (tectonic) plates under the surface of legal doctrine. Difficult legal conflicts arise (like earthquakes) where these plates meet and occasionally rub together. Because the law is most uncertain at these points of friction, one should expect a large number of litigated disputes in these areas, and also expect their outcomes to be most uncertain. For the argument that legal uncertainty is greatest at the point of conflict between two established legal doctrines, see OLIVER W. HOLMES, THE COMMON LAW 101 (Little, Brown & Co. reprint) (Mark D. Howe ed., Harvard Univ. Press 1963) (1st ed. 1881).

39. *But see* Estlund, *supra* note 14, at 336-39 (arguing that recent decisions recognizing expansions in the doctrine of private necessity render invalid the doctrine that a property owner can exclude for any reason, good or bad). Although Estlund's argument is fairly persuasive, I think it is fair to say that trespass doctrine has not been replaced by a general balancing test that seeks to determine whether the intrusion onto another's property was "reasonable" (perhaps because the benefits outweighed the costs).

40. 82 Eng. Rep. 539 (K.B. 1647).

41. *Id.*

42. The law today is not as harsh as the rule suggested by *Gilbert v. Stone*. The general question is the extent to which necessity will provide a privilege to intrude on another's land. The leading case on this is Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910) (holding a ship owner liable for dock damage caused by his vessel during a storm, even though prudent seamanship required the ship's master to leave the ship moored to the dock). The privilege is narrow: the actor will not be liable for the entry itself, but will be liable for any actual harm caused by the intrusion. *See* FOWLER V. HARPER ET AL., 1 THE LAW OF TORTS § 1.22, at 85-87 (3d ed. 1996).

43. 96 Eng. Rep. 525 (K.B. 1773). A brief description of the case is this: Shepherd throws a big firecracker into a market in which several sellers are working at their stalls. The first to grab the firecracker (Willis) throws it and it lands near another stall, where another seller (Ryal) grabs it and throws it and it explodes, putting out the eye of Scott.

44. HOLMES, *supra* note 38, at 104.

If one extends the reasoning of these cases to the employment context, the conclusion emerges that the employer's right to fire an employee in an at-will regime is quite broad and could be exercised without fear of legal repercussion, even when the termination foreseeably results in a large loss to the employee. A property rights theory of employment at will therefore yields the prediction that an employer who foresees that termination would lead to the employee's eviction from his apartment would not be held responsible for the injury.[45] The employee who refused to leave the employer's premises (after the license to remain had been revoked) would be guilty of trespass, unless the premises were a ship out at sea, and survival required the employee to remain.

If I am right in suggesting that the employment-at-will doctrine is an application of established tort and property law doctrines to the employment context, then it follows that the clash between the at-will rule and common-law minimum terms is in part a clash among competing fundamental common-law rights. Further, the argument provides a simple explanation for the conflict between minimum terms and the at-will rule, which has long been a source of controversy.

That one can exclude another from one's property because that person refuses to waive all claims to bodily integrity and yet cannot enforce a contract in which entrance is conditioned on such a waiver illustrates a conflict between rights of property and of personal security. Although it seems a little odd that a property owner can exclude a person on any basis and yet cannot enforce every conceivable condition on entry, this is probably the only simple solution that would not require a substantial diminution in either property or personal security rights. For if an owner could enforce any agreement, then courts could be used to aid private efforts to strip others of personal security. On the other hand, if an owner's right to exclude were limited by the liberty rights of others, the right to exclude would be virtually worthless.

An example may be useful. Suppose the Tasmanian Devil (Taz) wants to work on property owned by Bugs Bunny (Bugs). Bugs knows that Taz causes enormous damage wherever he goes. Bugs is willing to have Taz work on his land as long as Taz is willing to confine himself to a cage. We have a conflict between Bugs's right to exclude and Taz's liberty. If Bugs's property right consistently trumped Taz's liberty, then if Taz were to leave his cage, he would become a trespasser because he would have exceeded the scope of Bugs's invitation.[46] If Taz's right trumps, Taz

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45. For a fairly recent discussion of the at-will rule consistent with this view, see Redick v. Kraft, Inc., 745 F. Supp. 296, 303-04 (E.D. Pa. 1990).

46. Bugs could bring a trespass claim, use certain self-help measures to exclude Taz, and, given the assumption that Bugs's rights are more important, seek an injunction (requiring Taz to either stay off the property or to remain in the cage while on the property). On self-help, note that if Taz were

could sue on the ground that he could not lawfully be excluded because of his refusal to stay in a cage.

Under the common-law solution, Bugs cannot enforce the condition, nor does he have an action for trespass; and the law does not permit Taz to sue for damages on the ground that he was excluded unlawfully. Because liberty is regarded as a fundamental right, a promise to surrender that right cannot be enforced.[47] Similarly, Taz cannot sue Bugs for damages because Bugs's right to exclude is not conditioned on the rights of others. The parties are both restricted to self-help measures: Taz can leave the property rather than comply with the condition, and Bugs can remove Taz if he refuses to comply.

Of the solutions considered, the common-law solution is the only one realistically capable of resolving the dispute between Bugs and Taz while preserving the rights of each. If Taz's liberty were given priority, Bugs's property right would be limited in precisely those instances in which he has the greatest desire to assert it. And if we admit the possibility that courts make mistakes,[48] a system in which Taz's right is given priority would generate a flurry of complaints from people who would claim to have been excluded because they refused to give up their liberty. Similarly, Taz's liberty would not be worth much in a regime in which Bugs could enlist the power of an occasionally erroneous or biased state in enforcing an alleged agreement to surrender it.

C. *The General Bases for Common-Law Minimum Terms*

Fundamental common-law rights provide one set of minimum terms in employment contracts, but any attempt to provide a theory of common-law minimum terms will have to look toward other sources as well. The other broad common-law basis for finding a minimum term in a contract

violently destroying Bugs's property, Bugs could use force to get Taz off his property. Deadly force, however, would not be permitted unless Taz assaulted Bugs. *See, e.g.*, M'Ilvoy v. Cockran, 9 Ky. (2 A.K. Marsh.) 271, 276 (1820) (finding that personal assault would justify a "wounding," while defense of possession would not); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 21, at 132-33 (5th ed. 1984) ("[T]here is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety." (footnotes omitted)).

47. However, Bugs can bring an action based on some extra-contractual theory, such as negligence. Moreover, Taz enjoys something equivalent to a privilege for the pure invasion. If Taz did unnecessary damage to Bugs's land in the course of leaving it, then he would remain liable for actual damage, as suggested by the necessity cases. *See* Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910) (holding the owner of a cargo ship liable for the actual damages sustained by a dock to which the ship was moored when the ship, in the course of a severe storm, repeatedly struck against the dock, even though prudence required the captain to refrain from setting sail).

48. The Court might make a mistake such as finding that Bugs unlawfully excluded Taz when in fact he did not. On the incentive effects of courtroom error, see Keith N. Hylton, *Costly Litigation and Legal Error Under Negligence*, 6 J.L. ECON. & ORGANIZATION 433, 446-50 (1990).

is public policy.[49] Restraints on alienation and restraints of trade make up two large public policy exceptions to the general rule that a promise is enforceable.

In the employment context, restraint-of-trade doctrine has provided an important source of minimum contract terms. *Mitchel v. Reynolds*[50] stated the "rule of reason" that applies in trade restraint cases: general agreements, not limited in time or space, are presumptively unenforceable; while agreements that are particular and, consequently, limited in time or space, may be enforced.[51] Thus, an employer who conditioned employment on the employee's agreement never to work in the same line of trade anywhere in the world for the rest of his life, after leaving the employer's shop, could not count on such an agreement being judicially enforced.[52] Such agreements smack of slavery, in the employment context, but courts have held them unenforceable because they restrain trade, creating monopoly power.[53] Put another way, courts refused to enforce the agreements because of the third party, or external, costs of monopolization.

Although the list of common-law minimum terms provided here is not exhaustive—for example, it should include the right to vote—we have come far enough to state general theoretical sources of common-law minimum terms. Restraint-of-trade doctrine is concerned with the external harms generated by certain agreements. The "fundamental" common-law minimum terms (*i.e.*, those connected to fundamental rights) are based either on the theory that each agreement must exhibit some sort of mutuality or consideration,[54] or on the notion that special protection should be provided to aspects of bodily integrity and personal autonomy because there are no generally accepted substitutes to these entitlements, and they are incommensurable with money.[55] The mutuality theory is implicit in Blackstone's argument against the enforceability of a contract for slavery. Blackstone suggests the incommensurability theory in his description of the duress doctrine.

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49. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 893-94 (3d ed. 1987) (discussing the ability to enforce otherwise illegal bargains by means of severance or by a process of interpretation and reformation).

50. 24 Eng. Rep. 347 (K.B. 1711).

51. *Id.* at 349.

52. *Id.*

53. *Id.*

54. That is, the contract cannot be so one-sided that it is difficult to believe that a rational individual would accept it. As Blackstone noted, a contract for total slavery is the classic example of a violation of the mutuality principle. 1 BLACKSTONE, *supra* note 29, at *411-12.

55. This theory is also the source of "inalienability rules" identified by Calabresi and Melamed. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972) (positing that moralisms—external costs that cannot be objectively measured, and paternalism, which is the judgment that an individual cannot always make the best choices for himself, result in inalienability rules).

I will label the three sources: (1) externality, (2) mutuality, and (3) incommensurability. As suggested, each of the three sources includes or implies several minimum terms as special cases or applications. For example, under the externality theory, which recognizes that certain contracts may be desirable as between two parties but undesirable from a social standpoint,[56] we see as special cases the common law of trade restraints, restraints on alienation, and more generally the refusal of courts to enforce agreements to commit a crime. Moreover, under the mutuality theory we see as special cases the doctrine of consideration and the various rules connected to it.[57]

It would take us too far beyond the scope of this Paper to explore these areas in more detail. What I have said so far, however, should be sufficient to serve as a sketch of the theoretical sources of limitations on the employment-at-will doctrine. The at-will rule, before legislative incursions, existed alongside a complex and large set of minimum terms imposed by common law. These minimum terms were not merely imposed in ad hoc fashion, but either resulted from conflicts among fundamental rights respected by common law or were a reflection of the externality concerns embodied in the established public policy grounds for refusing to enforce contracts.

IV. A New Theory of Minimum Terms

I have argued that the greater-includes-lesser power theory of *Coppage v. Kansas*[58] is invalid as a general rule of contract law; the employment-at-will rule existed simultaneously with a large number of common-law minimum terms.[59] I now confront the more difficult problem of providing a rationale for the minimum terms imposed by federal labor law. The most important federally prescribed minimum term is the prohibition of yellow dog and other agreements prohibiting or restricting the right of employees to form and to join unions.

The literature has failed so far to provide a coherent theoretical justification for the prohibition of yellow dog contracts and, equivalently, the legal protection extended in section 7 of the NLRA to efforts to form

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56. *See* KRONMAN & POSNER, *supra* note 24, at 258 (noting that interests of third parties, if sufficiently important, may justify invalidation of a contract); Kronman, *supra* note 6, at 797-98 (concluding that principles of "distributive fairness, self-respect, and the value of judgment or moral imagination" justify paternalistic limitations on contracts).

57. *See* Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 532-52 (1981) (arguing that opportunistic behavior is successfully deterred by the modern common law's requirement that to uphold a contract modification there be either new consideration or some other objectively demonstrable reason for the modification, such as unanticipated circumstances).

58. 236 U.S. 1 (1915), *overruled by* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

59. *See supra* subpart III(A).

unions. The labor law literature on this subject is replete with conclusory statements on the social harmfulness of the yellow dog contract, but little analysis. For example, in their highly influential attack on the labor injunction, Felix Frankfurter and Nathan Greene repeatedly asserted that the industrial facts contradicted freedom-of-contract theories embedded in the labor jurisprudence of the *Lochner* era.[60] But precisely how and why the facts invalidated the theory that parties are best left to structure their own arrangements without government interference was never explained.[61] Frankfurter and Greene, building on the work of Roscoe Pound,[62] set a standard for legal realist criticism that influenced several generations of labor law scholars.[63]

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60. I refer to the period from roughly the late 1800s to the beginning of the New Deal, in which federal courts viewed the freedom to enter into contracts as a property right protected by the Constitution. The era is named after Lochner v. New York, 198 U.S. 45 (1905), a decision typifying the doctrines of the period.

61. In a fairly typical passage discussing the yellow dog contract and *Coppage v. Kansas*, Frankfurter and Greene asserted that

> if a legislature, having due regard to the actual practice of industrial hire and fire and specifically to the inequitable provisions of these contracts, should conclude that a wise public policy does not justify their judicial enforcement, the Supreme Court ought not to neglect the truth of such industrial facts, even if this may involve a re-examination of some assumptions in the *Coppage* opinion.

FRANKFURTER & GREENE, *supra* note 4, at 214. Assertions such as this are offered throughout the text, as a substitute for rigorous theoretical or empirical research, which the authors presumably thought unnecessary.

Although Frankfurter and Greene were targeting the labor injunction, their more general aim was to provide a sustained "realist" critique of pre-Wagner Act labor jurisprudence. Perhaps the passage that best illustrates the larger contribution of the Frankfurter and Greene analysis is the following. Referring to the court decisions invalidating laws prohibiting yellow dog contracts, Frankfurter and Greene explain that the legislation

> ran counter to judicial conceptions of "Liberty of Contract" which the Supreme Court discovered within "the vague contours" of the due process clause. Though actually intervening in the push and tussle of the industrial conflict, the Court seems not to move outside the logical framework of an abstract syllogism: freedom of contract and the right of private property are protected by the Constitution . . . . Such reasoning presupposes a perfectly balanced symmetry of rights: the employer and employee are on an equality, and legislation which disturbs that equality is "an arbitrary interference with the liberty of contract. . . ."

FRANKFURTER & GREENE, *supra* note 4, at 147-48 (footnote omitted).

62. Perhaps the starting point for the legal realist critique of liberty contract doctrines is Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1908). Pound's general argument is that the liberty-of-contract theories adopted by the Supreme Court were inconsistent with the empirical evidence regarding industrial relations.

63. The central plank of the realist platform is that legal doctrine is based on assumptions and theories that often bear no relationship to reality. For an example of recent labor law analysis in the style of Frankfurter and Greene, see JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 171-80 (1983) (arguing that the Supreme Court's labor law jurisprudence reflects values and assumptions rooted in pre-Wagner Act law). Though never established with any degree of scientific rigor, the claim that pre-Wagner Act labor doctrine was based on theories that were inconsistent with reality seems to be an established post-Wagner Act maxim of federal law. *See, e.g.*, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 715, 715-16

The recent writing in law and economics has also failed to provide a theory of these rights. The more common treatment is hostile, taking as a starting point the doctrine that freedom of contract is the best rule. It follows from this premise that the only sound basis for refusing to enforce a yellow dog contract is the lack of a voluntary acceptance, as when the agreement is procured through force or fraud.[64] Because employees are presumably compensated for agreeing to forfeit the right to form or to join a union, such contracts should be permissible because they serve to improve the welfare of both sides.[65] The implication of this argument is that the minimum terms provided by federal labor law could only serve one purpose: to redistribute wealth from employers and non-union employees to unionized employees.[66]

In this Part, I present a theory of the minimum terms established by the New Deal labor legislation, particularly those terms protecting efforts to form and to join unions.[67] I will use several game theory examples to examine the welfare of employees before and after they agree to an employer's proposed contract modification.[68] Under the liberty-of-contract doctrine, any agreement that is not procured through force or fraud should be welfare-enhancing for all parties. I will demonstrate that under fairly general conditions, however, voluntary employment agreements signed by fully informed parties may not be welfare-enhancing for the employees. While I cannot prove, and do not wish to prove, that the freedom-of-contract doctrine is always wrong, the examples do suggest that it may not be the best rule in every setting.

(1982) ("Apart from the procedural unfairness of many labor injunctions, one of the greatest evils associated with them was the use of tort-law doctrines, which often made the lawfulness of a strike depend upon judicial views of social and economic policy.").

64. *E.g.*, Epstein, *supra* note 5, at 1370.

65. *E.g.*, Epstein, *supra* note 5, at 1382 ("Any worker who accepts a yellow dog contract will demand some compensation for giving up the possibility of the gains of union membership."). The Coase Theorem goes further by implying that yellow dog provisions will be observed *only* when both sides of the transaction gain. According to the theorem, where transaction costs are negligible, parties will exploit all opportunities for mutually beneficial improvements in a contract. If the zero-transaction cost conditions are satisfied in the employment setting, then yellow dog provisions will be observed when and only when they are welfare-enhancing for the employer and the employees.

66. For a similar argument, see Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1064 (1984) (arguing that because parties already have incentives to enter into mutually advantageous contracts, the only function of a duty to bargain must be to coerce employers to meet the demands of unions).

67. The most important statutory provisions are § 3 of the Norris-LaGuardia Act, 29 U.S.C. § 103 (1994), and § 7 of the NLRA, 29 U.S.C. § 157 (1994).

68. The examples discussed in this Part are simple, and I have stressed the intuitive explanations. In a separate set of notes I have demonstrated some of the points in this Part in a mathematical model. *See* Keith N. Hylton, Coercion and Employment Contracts (1995) (unpublished manuscript, on file with the *Texas Law Review*) (using a mathematical model to analyze yellow dog contracts in terms of voluntariness).

A. *Contract Modification and Employee Welfare*

The framework I consider is one in which the employer proposes a modification to the employment contract or collective bargaining agreement. The modification is either one that will reduce the welfare of all of the employees, or will reduce the welfare of a subset of employees. I assume that the employer offers some payment in exchange for the modification.[69]

To simplify matters further, I will assume that the modification is a yellow dog agreement. However, the examples discussed below can be generalized to apply other types of contract modification.

I will start by considering two examples in which employees have the same preferences with respect to the yellow dog contract. The alternative assumption is that employees differ with respect to their willingness to sign a yellow dog agreement, which I consider later.

1. *Employees Have Same Tastes*.—Suppose there are three employees, and they all hate the yellow dog contract. Specifically, each of them assigns the value one dollar to the current contract and zero dollars to the modified contract (*i.e.*, the yellow dog), so their preferences are summarized as follows:

	Status Quo	Yellow Dog
Employee 1	\$1	\$0
Employee 2	\$1	\$0
Employee 3	\$1	\$0

One's initial intuition is that the employer will have to compensate all of the employees in order to induce them to sign the yellow dog. The level of compensation will, one might guess, more than fully offset the losses in employee welfare experienced by the change in the contract. Thus, if the employees lose a total of three dollars by the contract modification, the employer will have to raise the payroll by at least three dollars in order to induce them to sign the agreement. This reasoning suggests that the yellow dog provision will be accepted only under conditions in which all parties gain in welfare, consistent with the liberty-of-contract doctrine.[70]

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69. Alternatively, I could assume that the employer threatens some punishment, such as dismissal, for refusing to accept the new contract provision. The analysis is the same under either assumption. Seidman reports that some employers actually paid workers to sign yellow dog agreements, but those instances seem to be relatively few. JOEL I. SEIDMAN, THE YELLOW DOG CONTRACT 69 (Johns Hopkins University Studies in Historical and Political Science Series L, No. 4, 1932). Probably in the vast majority of cases, workers signed out of fear that their refusal might lead to retaliation by the employer.

70. This assumes that the employees must receive at least \$1 each to sign the contract. The employer will presumably pay the compensation only if the value of such a provision, from the

Although persuasive at first glance, this reasoning is wrong because it ignores strategic considerations. The employer can induce acceptance without having to offer full compensation to the employees. To demonstrate this claim, and its limitations, I will work through two examples.

Example 1: Suppose acceptance of the yellow dog, for the employer's purposes, requires unanimity. In order for the employer to induce signature by all employees, he will have to compensate each employee for the loss in welfare caused by the yellow dog provision. Put in more formal terms, if the employer fails to fully compensate each employee for the welfare loss, then there will not be an equilibrium in which all employees sign the agreement. Thus, under a unanimity requirement, the yellow dog is accepted only when it leads to a welfare improvement for all parties.

This example shows that the liberty-of-contract doctrine—that any agreement between parties necessarily enhances the welfare of all—is perfectly valid when unanimity is required for acceptance of the employer's contract modification.

Example 2: Suppose only a majority is necessary to have acceptance of the employer's contract modification. That is, if only two employees sign on, all three employees are, in effect, bound by the yellow dog agreement. This is a plausible assumption in this context because it is impossible to form a union where a majority of employees have signed and considered themselves bound by a yellow dog contract.

Suppose the employer offers only $0.50 as compensation for signing the agreement. This is too little to compensate employees for the loss in welfare resulting from the contract modification. I will show that in spite of this, however, it is possible for the employer to induce all of the employees to sign. To state it more formally, the outcome in which all employees sign the agreement is an equilibrium of the game under consideration.

Consider the incentives of Employee 1. Suppose he assumes that Employees 2 and 3 will not sign the yellow dog agreement, and hence the agreement is not accepted. If he signs the agreement, his expected net reward is $0.50 (the payment from the employer). If he refuses to sign the agreement, his net reward is zero (because he assumes the contract is rejected). Because he prefers $0.50 to zero, he will sign the agreement. This shows that in equilibrium at least one of the employees will sign the yellow dog agreement.

Now suppose Employees 2 and 3 have signed the agreement, and the agreement has therefore been accepted. What is the incentive of Employee 1? By assumption, Employee 1's signature will have no impact on his

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employer's perspective, exceeds $3. If the employees receive $4 in compensation and the provision is worth $5 to the employer, then both sides gain.

valuation of the contract; it will only determine whether he gets a payment from the employer. Clearly then, he will sign the agreement. Thus, the outcome in which all employees sign is an equilibrium.

The only case in which the employee will demand full compensation is when his vote is pivotal (*i.e.*, he will determine whether the modification is accepted or not). To see this, suppose Employee 2 has signed and Employee 3 has refused to sign. If Employee 1 signs, his net reward is -$0.50 (the difference between the payment of $0.50 and the $1 loss in welfare), and if he does not sign, his net reward is zero (the yellow dog is rejected and he gets no payment). To induce this employee's signature, the employer will have to provide full compensation.

Thus, if an employee thinks that the yellow dog provision will not be signed by a majority, signing the provision is a smart move: he loses nothing and gains the side payment, even though trivial. On the other hand, if the employee believes that the provision will be accepted by a majority, signing the provision is, again, a smart move: it is better to get something than nothing out of this undesirable modification. The only employee who will not have an incentive to sign the provision (unless full compensation is provided) is the one who thinks that his vote is pivotal. Of course, it is the rare employee who will view his vote as pivotal.

The likely result of the contract proposal process is that all employees sign the yellow dog even though the provision reduces employee welfare and even though the employer's concessions fail to compensate employees for the loss in welfare caused by the contract modification. I will refer to this phenomenon as *strategic coercion*.

2. *Employees Have Different Tastes.—Example 3*: Suppose employee preferences are as follows:

	Status Quo	Yellow Dog
Employee 1	$1	$0
Employee 2	$0	$0.25
Employee 3	$1	$0

Suppose the employer sets aside a sum of $1.50 that will be shared among the employees who sign the yellow dog agreement. I will show that the agreement may be signed by two employees, and therefore accepted, even though the concessions fail to compensate for the employees' loss in welfare.

In this case the employees' incentives can be illustrated as shown in Figure 1.

Figure 1

		Employee 3	
		Don't Sign	Sign
Employee 1	Don't Sign	($0, $0)	(-$1, $0.50)
	Sign	($0.50, -$1)	(-$0.25, -$0.25)

Suppose Employee 3 signs. Then his payoffs are either $0.50 or -$0.25. The reason is as follows. Employee 2 prefers the yellow dog contract and will sign anyway. Thus, if Employee 3 refuses to sign and Employee 1 also refuses, the contract modification is rejected and both Employees 1 and 3 remain in the same position in terms of welfare. If Employee 3 signs and Employee 1 does not, then the modification is accepted, and Employee 3 loses $1 in welfare and gains $1.50 in a side payment, for a net of $0.50. If Employee 3 signs and Employee 1 also signs, they both lose $1 and gain $0.75 in return as compensation, for a net loss of $0.25 each. Suppose Employee 3 does not sign. Then his payoffs are either $0 or -$1. To see this, suppose Employee 1 and Employee 3 refuse to sign. Then they remain in the same position in terms of welfare (because the modification is rejected), receiving payoffs of zero. If Employee 3 does not sign and Employee 1 signs, then the modification is accepted, and Employee 3 loses $1 in welfare.

In this example, the "Sign" strategy is dominant[71] in the sense that Employee 3 is better off signing the agreement no matter what Employee 1 does. However, the net result of signing is a reduction in the welfare of employees as a group. In this example, Employees 1 and 3 suffer a net loss of $0.25 each, and Employee 2 gains $0.25. The net change in position of the employees is -$0.25. Again, the liberty-of-contract doctrine is violated.

B. *Distributional Concerns*

Distributional concerns have been ignored in the preceding examples. Although there is no generally accepted theory of a proper income distribution,[72] consideration of distributional effects may either strengthen

71. On dominance of strategies generally, see R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS 79-80 (1957).

72. Such a theory would require specification of a social welfare function, as Abram Bergson and Paul Samuelson once proposed as a method for solving resource allocation problems arising when markets failed. *See* PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 252-53 (1947) (ad-

or weaken the welfare conclusions reached in the examples. Assume that a redistribution from less wealthy to more wealthy is undesirable.[73] Consider first the case in which employees have different tastes regarding the yellow dog. The acceptance by employees of a yellow dog provision—where the employer does not provide concessions that compensate the employees who suffer a loss in welfare—results in a transfer of wealth from the employees who hate the yellow dog to those who prefer the yellow dog. If the latter group is more well-off than the former, then the result is undesirable on distributional grounds.

Consider the case in which all of the employees hate the yellow dog. When the employer can induce employees to sign without fully compensating them for the loss in welfare, a transfer of wealth from the employees to the employer has occurred. Because the employer will generally be the wealthier party, this is an undesirable result on distributional grounds.

C. *General Implications*

Although I have considered simple examples, a few general statements can be extracted. One is that if the contract modification sought by the employer must be accepted by each employee, then the freedom-of-contract view that yellow dog contracts, and contract modifications generally, will be observed only when they result in an enhancement of welfare for all sides is valid. In short, where unanimity is required, the employer cannot set up conditions that induce employees to agree to a contract modification which results in a reduction in employee welfare.[74]

The unanimity requirement includes several types of contract modifications as special cases. Any contract modification that deals with

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vocating a system of welfare economics where "[a] given divergence in a subset of the optimum conditions necessitates alterations in the remaining ones"). Kenneth Arrow, however, demonstrated in 1951 that such a welfare function could not be constructed in a manner that meets certain rationality properties and that is also consistent with individual preferences. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 72 (1951) (concluding that it would be impossible to construct a social welfare function that satisfied stated value judgments and conditions, and that also yielded "a true social ordering for every set of individual tastes").

73. This is consistent with a social welfare program that seeks to maximize the welfare of the least well-off individual in society. *See* JOHN RAWLS, A THEORY OF JUSTICE 100-01 (1971) (discussing the "difference principle" of justice, which dictates that society must give more attention to those in "less favorable social positions" in order to create equality).

74. At least employers cannot do so under the assumptions of this analysis—that there is no force or fraud and that the parties are adequately informed. If the employees were not adequately informed, then obviously they might agree to a contract provision that makes them worse off ex post. Of course, if evaluated in terms of their own beliefs, ex ante, the contract provision would have made them better off. For a rigorous demonstration of these claims in the consumer context, see Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561, 561-62 (1977).

individual entitlements probably will satisfy the requirement. For example, a proposal that an employee accept a reduction in pension contributions in exchange for an increase in his wage generally deals with an individual entitlement because that action is (ignoring tax and pension regnlations) not affected by the decisions of other employees. The yellow dog agreement is outside of this set because acceptance, for the employer's purposes, of a yellow dog provision is effectively achieved when fifty percent of the employees sign. Thus, in the case of a yellow dog provision, one employee's valuation of the provision is very much dependent on the actions of other employees.

In the case of a yellow dog or some other provision that requires a majority (or even a supermajority) for acceptance, the examples suggest that it is quite likely that conditions will exist in which employees will sign the contracts even though the concessions they receive in exchange fail to compensate them for the rights they have traded away. The conditions that generate this phenomenon are: (1) a lack of communication among employees concerning their planned actions, (2) the presence of some concession or threatened punishment designed to encourage the employee to sign the contract provision, and (3) a perception on the part of each employee that his vote is unlikely to be pivotal. In the presence of these conditions, a type of strategic coercion may occur: each employee, fearing that a majority of employees will waive their rights, waives his rights in order to receive whatever meager compensation the employer offers or to avoid the employer's retaliatory actions.[75]

This is not the end of the story, however. It may be possible for employees to communicate among themselves and to organize in order to defeat a yellow dog provision. If all of the employees hate the provision, the best response is for all of them to agree never to sign such a provision. Because these agreements are always possible, there is no reason to believe that the sort of strategic coercion observed in the examples discussed above will always occur. Indeed, the examples suggest that the primary function served by a union organizer may be to prevent such outcomes from occurring.

Some other types of contract modifications share features of the yellow dog but also seem to deal with individual entitlements. Consider a contract proposal in which the employee agrees to have his personal effects searched every day by the employer, presumably for items stolen from the worksite. If all of the other employees sign such a provision, the value of refusing becomes worthless to the remaining employee. Any report of a

75. This type of coercion could not occur if unanimity were required for acceptance of the employer's contract modification. In the case of a yellow dog, however, acceptance is achieved for the employer's purposes when 50% of the employees agree to the provision.

stolen item would immediately lead the employer to suspect the employee who refused to sign a waiver. Alternatively, consider a contract in which the employee agrees never to speak in favor of unionization at the worksite. Because the value of discussing the benefits of organization is to a large extent dependent on the freedom of other employees to also discuss such matters, individual waivers will be influenced by the decisions of other employees. Where individual rights decline in value as coworkers trade them away, the kind of strategic coercion observed in the preceding examples is possible.[76]

V. Implications for Labor Law

A central aim of this Paper is to develop a theory that makes sense of modern labor law minimum terms. I turn to that task now. First, I use the theory to explain the effects of the yellow dog contract and its influence on the development of labor law. Second, I use the arguments to provide a positive theory of labor law minimum terms.

A. *The Yellow Dog Contract: Its Effects, the Case for Prohibition, and Its Influence on Labor Law*

In spite of its importance to the development of labor law, there are few historical accounts of the effects of the yellow dog contract. The best available is Joel Seidman's,[77] which I rely on below.

1. Effects of the Yellow Dog.—According to Seidman, the yellow dog contract made its appearance in this country on a large scale during the 1870s, and the contract was used by an increasing number of employers over the 1880s. Over the 1890s the contract continued to spread, but declined in influence, as employees "no longer felt themselves morally bound" to honor it.[78]

Viewed in strictly economic terms, employees never had strong incentives to comply with the agreement. The employer had little incentive to sue an individual employee for breach of the yellow dog agreement.[79] The cost of suit would be substantial and the likely award trivial.[80] Even if the employer could show a substantial injury, most employees would have been judgment proof with respect to the employer's damages.[81] The

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76. For further development, see Hylton, *supra* note 68, at 8-10.
77. SEIDMAN, *supra* note 69.
78. *Id.* at 16-18.
79. *Id.* at 79; Witte, *supra* note 3, at 22.
80. SEIDMAN, *supra* note 69, at 79.
81. *Id.*

more important hurdle, however, was proof of damages.[82] The employer could not mount a strong claim for damages in the case of a single employee who had violated a yellow dog agreement. The employer's loss would be small and largely speculative. Further, if the employer sought injunctive relief he could not expect success, for no court would have required the employee to quit a union and remain in the service of the employer. The employer's only practical retaliatory response to the breach of a yellow dog contract was to dismiss the offending employee. But under the at-will rule, the employer could have dismissed the employee for joining a union even if there had been no yellow dog agreement. Thus, the agreement itself was irrelevant insofar as it affected the economic incentives of an individual employee.[83]

Because the employer seldom if ever brought suit against an individual employee, the yellow dog was used largely for its "psychological effect" on employees,[84] and as a threat against unions. But the unions generally disregarded the contracts during the 1890s.[85]

The influence of the yellow dog was enhanced dramatically by the Supreme Court's decision in *Hitchman Coal & Coke v. Mitchell*,[86] which held that an employer could enjoin union organization efforts on the theory that it was a tortious interference with the yellow dog agreements signed by the employees.[87] Several lower courts issued injunctions against entirely peaceful organization efforts on the basis of *Hitchman*.[88]

The strategic considerations introduced in this Paper provide some insight into the workings of the yellow dog and the desirability of the Supreme Court's *Hitchman* decision. Seidman's historical account—which suggests that the yellow dog was effective initially and then declined in influence until the *Hitchman* decision—is consistent with a story in which unions, over time, developed strategies that enabled them to neutralize the

82. *Id.*

83. *Id.*

84. *Id.* After signing the contract, some employees apparently found it hard to break their word by joining a union, even though the likelihood of retaliation by the employer was small. *Id.*

85. *Id.* at 18.

86. 245 U.S. 229 (1917).

87. *Id.* at 259-60.

88. *See, e.g.*, Charleston Dry Dock & Mach. Co. v. O'Rourke, 274 F. 811 (E.D.S.C. 1921) (granting an injunction to a business against certain union activities including interfering with the business's employees for the purposes of inducing them to stop performing their work); Vonnegut Mach. Co. v. Toledo Mach. & Tool Co., 263 F. 192 (N.D. Ohio 1920) (granting an injunction to a business against union picketing based on the *Hitchman* ruling against interference with employment contracts); *see also* Osmond K. Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts*, 30 ILL. L. REV. 854, 870 n.94 (1936) (listing cases which banned all peaceful picketing within a state); Witte, *supra* note 3, at 24-25 (noting that the majority of cases since *Hitchman* have broadly applied *Hitchman*'s holding and have issued injunctions prohibiting all picketing based upon yellow dog contracts).

effects of the yellow dog. The obvious counterstrategy for the union is to advise employees to sign the yellow dog, and then to violate it with impunity. Such a strategy would be consistent with data suggesting a simultaneous increase in the number of contracts and decline in their influence.

My argument suggests that by the middle of the 1890s, yellow dog contracts probably had little influence where union organizers could reach workers. If the union organizer arrived before the employer presented the yellow dog, he could persuade employees not to sign, or he could persuade them to sign and violate it. In either case the organizer's primary role would be as a coordinator of the employees' actions. The sort of strategic coercion demonstrated in the preceding analysis of this Paper would be much less likely to occur in the presence of a union organizer. Indeed, if I am right in suggesting that the yellow dog was largely neutralized as a result of the unions' counterstrategies by the early 1890s, it follows that it may have had a beneficial impact over the middle and late 1890s. The agreement may have served largely as a sorting device in the labor market, enabling those employers and employees who preferred union shops to find and select each other.

2. *Case for Prohibition of the Yellow Dog*.—In light of this analysis it is interesting that the yellow dog contract has received so much criticism.[89] The real source of the "evil," to the extent that there was any, was the Supreme Court's decision in *Hitchman*, not the contract. The *Hitchman* decision transformed the yellow dog from a largely unenforceable promise to a powerful weapon against organization.

Both the analysis of this Paper and the historical account suggest that the yellow dog, when matched against the unions' counterstrategies, had

89. *See, e.g.*, FRANKFURTER & GREENE, *supra* note 4, at 212 (claiming that inequitable conditions surround the formation of yellow dog contracts and that the obligations under them are unfairly divided); SEIDMAN, *supra* note 69, at 34, 34-36 (detailing "reaction against the yellow dog contract" by legislators and the general public, leading to efforts to enact prohibitions of the contract); Epstein, *supra* note 5, at 1370 (reporting criticisms of yellow dog contracts by labor scholars).

The following passage conveys the extent to which the yellow dog had become, by 1930, the central focus of pro-union legislative pressure groups:

> The reaction against the contract culminated in the spring of 1930 in the rejection by the Senate of the nomination of Judge Parker to the United States Supreme Court. Up to that time, indeed, the yellow dog contract had figured little in the daily press, and the general public was as yet largely unacquainted with the term. The storm of protest that swept over the country when the author of [an opinion enforcing the contract] was named to the highest judicial body in the land showed public opinion almost unanimously opposed to the yellow dog contract. Senator after senator attacked Parker for having enforced the contract, and . . . [w]hen the Senate . . . finally voted to reject Parker, it was in reality passing judgment, not upon him, but upon the yellow dog contract.

SEIDMAN, *supra* note 69, at 36.

ambiguous welfare implications. Under certain conditions, it would be easy for the employer to induce employees to sign, even though they had not received concessions that compensated them for the value of the rights traded away. The employees, however, could prevent this from happening by communicating among themselves on organizational matters. In addition, the evidence presented in the Seidman study suggests that the contracts were not very effective as obstacles to union organization, especially after the 1880s, when organizers and many employees were familiar with their implications and the difficulty of enforcing them. Had the Supreme Court refused to uphold the injunction issued in *Hitchman*, no broad legislative movement to ban the yellow dog contract would have occurred, and there probably would have been no broad movement to enact federal laws protecting the right to organize unions.

So does this analysis suggest that *Hitchman* was wrong on economic grounds, as Archibald Cox asserts?[90] If, as some of the evidence suggests, the yellow dog contract had been neutralized by union counterstrategies, then the *Hitchman* decision should be criticized on economic grounds, though for reasons far different from those expressed by Frankfurter and Greene, Cox, and other labor law scholars. The *Hitchman* decision's primary economic effect was to raise the costs of union organizing—probably to a prohibitive level in some areas. This, in turn, made it almost impossible in some instances for the union organizer to play the role of coordinator among the employees, and the strategic coercion phenomenon became more likely.

One can argue that there should be some limits on the things union organizers are permitted to do in the course of an organization drive, and that the *Hitchman* decision merely prohibited unions from coercing employees.[91] If union pickets threatened bodily harm to employees who refused to join the union, then they clearly were guilty of committing a tortious interference with the employees' anti-union promise. The problem with *Hitchman*, however, was the implication that an injunction could be used against peaceful organization efforts. Peaceful efforts to persuade employees to join a union are no closer to tortious interference than is an advertisement that asks a consumer to switch to another product,[92] and the

90. Cox attacks the opinion on the ground that the Court took away the employees' only effective form of self-help, but did nothing to solve the underlying economic problems—successive wage cuts and high rents in the company's villages. ARCHIBALD COX, LAW AND NATIONAL LABOR POLICY 7 (1960).

91. For a recent argument suggesting that union organization efforts are often coercive, see Epstein, *supra* note 5, at 1377.

92. *See* Francis B. Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 699-701 (1923) (dismissing any enticement arguments as applicable to employees at will and arguing that there can be no tort remedy when there are no contract rights to be protected). For the opposite position, see Epstein, *supra* note 5, at 1373-74. Epstein argues that union efforts to persuade employees to breach

mere risk of intimidation through threats of physical harm does not justify a prohibition of peaceful efforts to persuade.

The foregoing suggests that the case for prohibiting the yellow dog contract was weak before *Hitchman*, but became considerably stronger after it. It was weak before *Hitchman* because there are good reasons, on theoretical and empirical grounds, for concluding that the yellow dog contract was ineffective as a deterrent to union organization after roughly 1890. The case for prohibition became strong after *Hitchman* because the decision, as interpreted by some courts, made the contract *too effective* as a deterrent. A better response would have been legislation targeted directly at overruling *Hitchman*, or for Congress to simply do nothing and wait for the courts to narrow the holding in *Hitchman* to the point that it no longer constrained peaceful organizational efforts.[93] But it is too much to ask for perfect decisions from Congress. The final outcome, the Norris-LaGuardia Act followed by the Wagner Act, can surely be defended as second-best.

B. Modern Labor Law Minimum Terms

The new law of minimum terms is embodied in several doctrines and statutory provisions of federal labor law. The statutory provisions are section 3 of the Norris-LaGuardia Act[94] and section 8(a)(3) of the NLRA.[95] Section 3 of the Norris-LaGuardia Act prohibits federal courts from issuing injunctions in labor disputes. Section 8(a)(3) declares it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,"[96] which is generally understood as prohibiting yellow dog contracts.[97]

I now turn to several areas of labor law in which federal common-law doctrine has supplied additional detailed minimum terms. My aim is to provide a positive theory of these rules. The first general area, "direct yellow dogs," includes several types of agreement indistinguishable from the traditional yellow dog. The second general area, "indirect yellow

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their yellow dog contracts are tortious under the doctrine of Lumley v. Gye, 118 Eng. Rep. 749 (1853), because those efforts invade an important interest of the employer. But *Lumley* held that the inducement had to be "malicious," *id.* at 749, and that is not easy to say in the case of peaceful union organization efforts. Unless courts are of the opinion that union organization could serve no useful purpose, or lead to no desirable outcome, a finding that such efforts are malicious could not easily be based on the doctrine of *Lumley*.

93. For evidence that courts had started to narrow the holding in *Hitchman*, see Witte, *supra* note 3, at 24-28.

94. 29 U.S.C. § 103 (1994).

95. 29 U.S.C. § 158(a)(3) (1994).

96. *Id.*

97. *See, e.g.*, Epstein, *supra* note 5, at 1370 (observing that yellow dog contracts "are today forbidden by explicit statutory command" in § 8(a)(3) of the NLRA).

dogs," includes agreements similar in effect to, or sharing some important feature of, the yellow dog.

1. Direct Yellow Dogs.

a. Solicitation by Employees.—One of the key employee entitlements under the National Labor Relations Act is the right to engage in pro-union solicitation and distribution of literature on company property. The entitlement was established in *Republic Aviation Corp. v. NLRB*.[98]

In *Republic Aviation* the employer dismissed four employees: one for engaging in pro-union solicitation in violation of a rule prohibiting solicitation of any type in the factories or offices, the other three for wearing pro-union buttons.[99] The Supreme Court, affirming the National Labor Relations Board, held that the promulgation and enforcement of the no-solicitation rule violated section 8(a)(1)[100] and discriminated against the discharged employee in violation of section 8(a)(3).[101] The employer also violated section 8(a)(1) by discharging the button-wearing employees.[102] In response to the employer's argument that the Board should be required to prove that enforcement of the no-solicitation rule *actually interfered* with the section 7 right to organize, the Court held that the Board was authorized to balance section 7 rights of employees against employer property rights,[103] and that the Board could rely on its own judgment in finding that the interference with section 7 rights in a given context could not be justified by the employer's property interests.[104]

Subsequent decisions have distinguished the right to engage in pro-union solicitation on company property from the right to distribute pro-union literature. In general, the right to solicit is somewhat broader than

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98. 324 U.S. 793 (1945).

99. *Id.* at 795.

100. 29 U.S.C. § 158(a)(1) (1994) prohibits interference by an employer with the organizational rights of employees.

101. 324 U.S. at 805.

102. *Id.* at 802. In a footnote the Supreme Court quoted with approval the Board's holding with respect to the wearing of buttons. *Id.* at 802 n.7. The Board had held that the "right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the [employer's] curtailment of that right is clearly violative of the Act." Republic Aviation, 51 N.L.R.B. 1187, 1188 (1943).

103. 324 U.S. at 799.

104. The Court stated,

> An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidenrial facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.

Id. at 800.

the right to distribute literature, because it is less likely to result in interference with the production process or in littering on company property.[105] One can think of four areas of concern: (1) working time, working area, (2) working time, non-working area, (3) non-working time, working area, and (4) non-working time, non-working area. In the first category, the employees' rights are severely limited: the employer may prohibit pro-union solicitation and distribution of literature on company time in work areas.[106] The second category is similarly restricted; the Board has consistently held that "working time is for work."[107] In the third, the employer may prohibit the distribution of union literature, while the prohibition of pro-union solicitation must be justified by special circumstances.[108] Finally, in the fourth category the employer is generally prohibited from enforcing a broad no-distribution, no-solicitation rule.[109] Special circumstances, however, may still justify prohibitions in this category, such as in the case of a hotel lobby where employees are prohibited from distribution and solicitation in the presence of customers.[110]

The justification for the holding in *Republic Aviation* can be based on this Paper's analysis of yellow dog contracts, though the analysis is somewhat more complicated in this setting. One could argue that a provision waiving the right to speak about union matters on company property effectively binds all employees after a majority has signed the provision. After all, what use is the right to speak on a certain subject if two of the three employees you work around are prohibited from carrying on the conversation? Under this view, the prohibition on speech is indistinguishable from the yellow dog contract: acceptance by a majority or supermajority binds all employees. It then follows that a ban on solicitation could result from the sort of strategic coercion analyzed earlier in

105. *See, e.g.*, JULIUS G. GETMAN & BERTRAND B. PROGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 40, 38-40 (1988) (explaining that the NLRB distinguishes between oral solicitation, which can usually be prohibited during work time in working areas, and the distribution of literature, which may be prohibited in working areas during non-work time as well because "literature presents more of a legitimate problem in working areas").

106. Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943).

107. *E.g.*, Our Way, Inc., 268 N.L.R.B. 394, 394 (1983); *Peyton Packing Co.*, 49 N.L.R.B. at 843.

108. *E.g.*, Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 621 (1962). Two members of the Board dissented in favor of allowing distribution of literature on non-working time, working area. *Id.* at 625-31.

109. *E.g.*, G.C. Murphy Co., 171 N.L.R.B. 370 (1968), *enforced*, 422 F.2d 685 (D.C. Cir. 1969).

110. *See, e.g.*, *id.* at 370 (holding that a sign prohibiting solicitors was directed to the public, not employees, and thus did not inhibit union solicitation); May Dep't Stores Co., 59 N.L.R.B. 976, 981 (1944) (allowing a prohibition at all times of union solicitation on the selling floor of a department store in order not to disrupt business), *enforced*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946).

this paper[111]—that is, because of strategic incentives, the employees may have traded away their right of pro-union solicitation for a price that failed to compensate them for its value.

Does it matter that in the case of the yellow dog, the waiver of organizational rights is bargained for, while in this case, the employer merely announces a prohibition as a condition of entry onto the employer's premises? Under the theory presented here it should not, for otherwise the employer could evade a prohibition on certain contractual provisions merely by making them conditions attached to the license to remain on the employer's premises. Further, the strategic coercion problem is a serious concern under either scenario.[112]

Of course, one might argue that a ban on speech is not quite the same thing as a ban on organization. While a ban on organization pretty clearly binds all employees once a majority has accepted it, a ban on speech will not necessarily have the same effect. In other words, even if a majority of employees waive their right to speak on union matters, the minority may find that they can still communicate on unionization matters and that their right to communicate among themselves is still valuable. Does this change the result? Not in a substantial way. Even if the minority can carry on effective communication among themselves, it cannot be doubted that the value of their right to communicate has been diminished by the fact that a majority of employees have waived their right to communicate. Speech is different from certain other elements of the employment bargain because its value is heavily dependent on the freedom of other employees to speak. In this setting, strategic incentives can still operate in a way that generates an inequitable trade.[113]

This analysis suggests that the doctrine of *Republic Aviation* (and related rules) can be understood as shielding employees from inequitable, or "strategically coercive," transfers of the right to organize or communicate about organizational matters.

The strategic coercion theory also provides a justification for the Court's holding that the Board did not have to demonstrate that the employer's ban actually interfered with the right to organize. The employer argued that the Board should be required to demonstrate that unusual conditions made solicitation away from the employer's premises extremely difficult.[114] The essence of the employer's position was that

111. *See supra* subpart IV(A).

112. Why? If the employees try to offer a concession in order to change the condition, they will run into the very same incentive problems that generate inequitable transfers in the contract-making process.

113. This is fairly easy to show in the examples discussed earlier in the text. *See supra* Part IV. For a formal demonstration, see Hylton, *supra* note 68, at 8-10.

114. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798-99 (1945).

because the right to exclude an employee from its property was absolute, it could also require, as a condition of employment, that the employee accept a prohibition on pro-union solicitation. For the Board to strip the employer of that property right would at least require, under the employer's theory, some showing that the employer's exercise of its property right actually interfered with rights that the Board was authorized to protect.[115]

The employer's argument, based on the greater-includes-lesser-power theory that the right to exclude implies an unlimited power to enforce conditions on entrance, had to be rejected. First, the very power the employer claimed (to prohibit solicitation) was at issue in *Republic Aviation*, so it would have been strange indeed for the Court to reject that power and then set up procedural barriers protecting the employer's use of it. Second, in addition to being difficult to prove, an actual interference requirement fails entirely to come to grips with the strategic coercion problem. The potential for strategic coercion exists independently of the ban's tendency to "actually interfere" with organizational rights.

Even if it were not extremely difficult to solicit employees away from the employer's premises, a ban on solicitation would be troubling for two reasons. First, it undoubtedly restricts organizational rights by raising the cost of an organizational drive. Second, because of the incentive problems identified earlier,[116] the employer can purchase organizational rights at a price that fails to fully compensate employees. The Court's rejection of an actual interference test is therefore consistent with a view of *Republic Aviation* as a prophylactic rule against inequitable transfers resulting from strategic incentives.

In *NLRB v. Magnavox Co.*[117] the Court extended its holding in *Republic Aviation* to make it an unfair labor practice for the employer to adopt an overly broad ban on workplace solicitation even if the bargaining representative accepts the ban.[118] The general rule is that the right to communicate on organizational matters cannot be waived by the employee's bargaining representative.[119]

Magnavox is consistent with the view that the aim of the law is to prevent coercive transfers of organizational rights. After the union has

115. The employer's argument was based on the theory of procedural due process articulated in Matthews v. Eldridge, 424 U.S. 319 (1976), which generally requires examination of three factors: the private interest affected, the risk of an erroneous deprivation, and the state's interest. Here the state's interest is in enforcing the § 7 rights of employees.

116. *See supra* subpart IV(A).

117. 415 U.S. 322 (1974).

118. *See id.* at 325 (holding that a collective bargaining representative cannot waive employees' substantive rights to join or assist a labor organization).

119. *See id.* (noting that waivers are frequently upheld in the economic area, but are not upheld to bar employees from striking against unfair labor practices).

been certified, its incentives are in many respects similar to those of an employer who wishes to avoid union organization efforts. In the case of an incumbent union, the fear is that the employees will lend their support to a rival union.[120] The bargaining representative could reduce the probability of a rival union's organizational campaign by waiving certain rights of employees, such as the right to communicate about organizational issues on the employer's premises. In order to induce employees to support such a waiver, the incumbent union could offer some side payment to supporters or signal the possibility of retaliation against those who refuse to go along. The situation is indistinguishable from that of an employer who proposes a yellow dog contract.

b. Solicitation by Nonemployees.—The *Republic Aviation* and *Magnavox* decisions can be justified as implications of the argument for banning the yellow dog contract. The case for permitting pro-union solicitation by nonemployees on the employer's property, however, is more difficult. The Court held in *NLRB v. Babcock & Wilcox Co.*[121] that the employer may "validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution."[122] The Court's recent decision in *Lechmere* made clear that the Board is not generally authorized to balance section 7 rights against the employer's property rights in deciding whether access to the employer's property should be granted to a nonemployee organizer.[123] Such balancing is appropriate only where unusual

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120. Of course, there are several hurdles that might stand in the way of a rival union. One is the election year bar of § 9(c)(3) of the NLRA, 29 U.S.C. § 159(c)(3), which prohibits the direction of an election within one year after a board-conducted election. Another, and more important hurdle, is the contract bar doctrine, which bars the filing of an election petition by a lawfully recognized union during the term of a collective bargaining agreement of reasonable duration, not exceeding three years. *See generally* BERNARD D. MELTZER & STANLEY D. HENDERSON, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 352-56 (3d ed. 1985).

121. 351 U.S. 105 (1956).

122. *Id.* at 112.

123. *Babcock & Wilcox* created confusion. After stating that the employer may "validly post his property against nonemployee distribution," *id.*, the Court, referring to the problem of balancing property rights and § 7 rights, said that "accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.*

The two statements generated confusion as to the proper standard governing the rights of employees to hear the organizational message of nonemployees. The holding in *Babcock & Wilcox* suggested that the employer could generally prohibit nonemployees from engaging in pro-union solicitation and distribution of union literature on company property. The Court's reference to balancing rights, however, suggested that the Board and lower courts were authorized to balance § 7 rights against property, just as in the case of solicitation by employees. Before the *Lechmere* decision, the Board had settled on the following standard:

conditions make communication away from the employer's worksite extremely difficult, as in the case of a remote mining or logging camp.[124]

The theory of this Paper fails to provide a justification for granting nonemployee organizers access to an employer's property. The yellow dog contract is a contract between the employer and its own employees. The ban on access by nonemployee organizers is a rule that extends to nonemployees. Nothing strategically coercive about the contracting process gives rise to a rule banning solicitation and distribution by nonemployee organizers because the employer clearly enjoys the right to exclude them from his property. The right is so clearly a part of the employer's entitlement, and conversely so clearly not a part of the employee's entitlement, that little room remains for an analysis of strategically coercive transfers.

In other words, there is no sense in talking about whether a ban on nonemployee organizers can be viewed as a way for the employer to evade the restriction on yellow dog contracts. The theory of this Paper starts by asking whether the subject of the agreement is one that could be transferred from employees in a strategically coercive bargain. But if the subject is not originally within the set of employee entitlements, then it cannot be part of such a bargain.

One potential justification for allowing access by nonemployee organizers to an employer's property is that the organizer could play a crucial role in reducing the potential for strategic coercion. More generally, the organizer could play a role in solving any coordination problem that might lead to an outcome in which employees traded away their rights for inadequate compensation. But this argument cannot be limited to those instances in which communication away from the employer's property is difficult. This argument suggests that nonemployee organizers should always be given access to the employer's property because it is almost always easier for the nonemployee organizer to address the employees there than anywhere else.[125]

> [I]n all access cases our essential concern will be [1] the degree of impairment of the Section 7 right if access should be denied, as it balances against [2] the degree of impairment of the private property right if access should be granted. We view the consideration of [3] the availability of reasonably effective alternative means as especially significant in this balancing process.

Jean Country, 291 N.L.R.B. 11, 14 (1988).

124. Lechmere, Inc. v. NLRB, 502 U.S. 527, 537-40 (1992); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); Alaska Barite Co., 197 N.L.R.B. 1023 (1972). For a critique of *Lechmere*, see Estlund, *supra* note 14.

125. The theory of this Paper is that in certain circumstances, particularly in the case of a yellow dog proposal, the contract-making process is likely to fail as a mechanism for transferring an employee entitlement in a manner that benefits all parties. But in the case of granting nonemployee organizers access to the employer's property, we are outside the scope of employee entitlements.

That the theory of this Paper, as I have stated it, fails to provide a good justification for a rule granting access to nonemployees does not imply a limitation on the theory's usefulness; just the opposite view seems appropriate. In spite of the apparent invitation in *Babcock & Wilcox* to apply a balancing test in this area, courts have been reluctant to grant nonemployees access to the employer's property for organizational purposes. More recent cases following *Lechmere* have taken a narrow view of this right.[126] For all practical purposes, the employer is free to enforce a general ban on the distribution of literature by nonemployees on company property.

Closely related to the issue of nonemployee access is the question whether the employer can ban communication among employees that deals with the employment relationship but is not central to the collective bargaining process, the issue considered in *Eastex, Inc. v. NLRB*.[127] The Court held that the rule of *Republic Aviation* applied to communication "closely tied to vital concerns of the Act."[128] This is a sensible extension, given that the strategic coercion concern is just as applicable to this instance as to that considered in *Republic Aviation*.

2. *Indirect Yellow Dogs*.—To this point I have considered employer contract proposals that are in many respects quite similar to the yellow dog contracts of the pre-Norris-LaGuardia era. Contracts not superficially similar to the yellow dog, however, may nevertheless have similar effects. I consider the treatment of these contracts here.

a. *Assertion of Individual Contracts as a Bar to Recognition and the Opt-Out Problem Generally*.—In *J.I. Case Co. v. NLRB*[129] the Supreme Court was confronted with an employer who claimed that because of the existence of individual contracts with roughly seventy-five percent of his employees, he had no duty to bargain with the union on matters that would conflict with those contracts until they had expired. The Court held it a violation of the section 8(a)(5) duty to bargain in good faith and a section 8(a)(1) interference with organizational rights for an employer to

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126. *See, e.g.*, NLRB v. Great Scot, Inc., 39 F.3d 678, 683 (6th Cir. 1994) (discussing the heavy burden nonemployees must meet before being allowed access to employer property to picket over substandard wages); NLRB v. Windemuller Elec., Inc., 34 F.3d 384, 394 (6th Cir. 1994) (stating that employees have no right to use their employer's personal property—hard hats—to communicate a union message provided that they can use their own property for that purpose); Oakwood Hosp. v. NLRB, 983 F.2d 698 (6th Cir. 1993) (denying a nonemployee organizer access to employer's cafeteria); Sparks Nugget, Inc. v. NLRB, 968 F.2d 991, 997-98 (9th Cir. 1992) (denying nonemployee picketers access to employer's property for the purpose of communicating with customers).

127. 437 U.S. 556 (1978).

128. *Id.* at 575.

129. 321 U.S. 332 (1944).

assert individual contracts as a justification for refusing to bargain with a certified union.[130]

The question of the relationship between an individual contract and the collective bargaining agreement is an important one for this Paper; for if individual contracts could be asserted as a justification for an employer's refusal to bargain, then yellow dog contracts could be introduced by the employer through an indirect route. The strategy of offering individual contracts to employees could be used to the same effect as the yellow dog.

To illustrate, suppose the employer, aware that a union organization drive may begin at any moment, offers each employee an individual contract for three years. The employer signals to employees that failure to accept such a contract would increase the probability of dismissal in the near future. What is the likely outcome? Each employee will reason as follows: "If no one else signs the contract, then the union organization drive will be successful whether or not I sign the contract; it follows that my best move is to sign the contract. But if everyone follows my reasoning, a majority of employees will sign the contract, killing the organization drive. In that case, my best move is clearly to sign the contract." The end result: employees overwhelmingly choose individual contracts—and this even when all of the employees would prefer union representation.

The general problem raised by *J.I. Case* is the extent to which individual employees should be free to opt out of the union regime by contract. The Court's opinion suggested that the scope for such opting out is severely limited. An individual contract

> cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the [collective bargaining] agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.[131]

The individual is, however, free to continue in compliance with an individual contract that is not inconsistent with a collective agreement or is not part of an unfair labor practice.[132]

The doctrine is troubling in its implication that a superstar—a Michael Jordan, for example—could not opt out of the union regime even though he knows that it is unlikely that he would be better off as a member of the union than if left to fend for himself. Indeed, in the case of an athlete such

130. *See id.* at 337 ("Individual contracts . . . may not be availed of to defeat or delay the procedures described by the National Labor Relations Act looking to collective bargaining . . . .").

131. *Id.* at 338.

132. *Id.* at 339.

as Michael Jordan, the players' union probably reduces his welfare, because it allows less talented players to take advantage of the leverage the union gains by having Michael Jordan as a member. This is hard to defend because it suggests that the statute is designed to allow less talented or less energetic workers to expropriate a portion of the wealth generated by the more talented and energetic.

The potential for this kind of expropriation is unavoidable in any regime in which unions are permitted to exist. However, the notion that the law *aims to facilitate expropriation* is inconsistent with many of its provisions. The doctrine incorporates limits on the extent to which the wealth of the Michael Jordans of this world can be expropriated. In *NLRB v. American National Insurance Co.*,[133] the Court held that it is not a per se violation of the duty to bargain in good faith for an employer to insist on a contract provision that gives management full authority with respect to certain mandatory bargaining topics.[134] Thus, *American National Insurance* permits an employer to bargain for complete discretion over wages, hours, and other terms of employment. In light of the employer's power to seek such discretion through the bargaining process, the union generally will have a hard time using the bargaining process as a means of expropriating wealth from talented workers, for in those instances in which much of the value of the employer's output is produced by a minority of talented employees, the employer will have a strong incentive, and will also be in a strong position, to argue for discretion to award compensation according to individual productivity.[135]

b. Permissive Bargaining.—A second example of the indirect introduction of a provision having the effect of a yellow dog contract is the employer's attempt to bargain about the identity of the bargaining representative. The Court's decision in *NLRB v. Wooster Division of Borg-Warner*[136] suggests that the identity of the representative is a permissive rather than mandatory subject of bargaining,[137] and subsequent Board

133. 343 U.S. 395 (1952).

134. *Id.* at 409.

135. There are other doctrines that seem to limit the scope for expropriation—I have not attempted to survey them. For example, in resolving disputes over the appropriateness of a bargaining unit, the Board looks for a mutuality of interests in wages, hours, and working conditions. *See generally* GETMAN & POGREBIN, *supra* note 105, at 22-26 (discussing the process of determining which workers can appropriately be grouped together in a bargaining unit).

136. 356 U.S. 342 (1958).

137. The employer in *Borg-Warner* insisted on a provision that required the parties to recognize as the employee's bargaining agent the local affiliate rather than the international union which had been certified as the exclusive representative by the Board. *Id.* at 345. The Court stated that although this clause was not related to a mandatory bargaining subject and thus could not be insisted upon, it was nevertheless a lawful proposal. *Id.* at 349-50.

decisions make it clear that the representative's identity is a permissive topic.[138] The employer may therefore propose the subject but cannot condition his acceptance of mandatory terms on the union's agreement to bargain on the recognition matter.[139] In his concurring opinion, Justice Harlan argued that the subject of recognition was determined by Board procedures set forth in the statute, and that the employer's attempt to condition signing the agreement on the substitution of a representative other than that certified by the Board was a direct contravention of the statute.[140]

That recognition is permissive is consistent with the aim of preventing strategically coercive transfers of organizational rights. Restrictions on recognition bargaining are appropriate if the law is to prevent the indirect introduction of yellow dog contracts into the bargaining process. To see this, suppose the employer offers his favorite representative, the Union of United Fumblers (UUF), as a substitute for the certified bargaining representative. Suppose further that the employer deals directly with a representative who always decides according to the wishes of a majority of bargaining unit members. If the employer offers a side payment in exchange for substituting the UUF for the current bargaining unit, the situation would be equivalent to that of an employer bargaining directly with employees over a yellow dog provision.

One might argue that the union bargaining situation is more complicated because the employer does not deal directly with employees—he deals with a negotiating committee fielded by the union. But this does not make the strategic coercion result less worrisome, nor does it suggest that there will necessarily be a better outcome. The presence of a negotiating committee introduces "agency costs"[141]—costs that result because union decisionmakers may vote in a manner that is inconsistent with the preferences of the majority. The agency problem suggests that the bargaining representative may turn down the yellow dog provision even when a majority of employees would have accepted it. It also suggests, however, that the representative may accept the yellow dog when a majority would have rejected it.

The more general question is whether the bargaining representative has incentives to always vote in a manner that mirrors the preferences of a majority of the rank and file. Although it seems desirable at first glance that the representative have such a set of incentives, it is not necessarily so.

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138. *E.g.*, Simplicity Pattern Co., 102 N.L.R.B. 1283 (1953).

139. *Borg-Warner*, 356 U.S. at 349-50.

140. *Id.* at 362 (Harlan, J., concurring).

141. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976) (discussing the costs to the agent and the principal arising from the agency relationship).

As an actor that helps parties overcome collective action problems, it is preferable that the union, in some instances, *not* vote in a manner that reflects the preferences of a majority. Indeed, if, as suggested in Part II of this Paper, union organizers had adopted counterstrategies that neutralized the yellow dog contract, this was effective precisely because the organizer did not simply accept the preferences of the majority, but sought to change those preferences.

In light of the potentially conflicting roles played by the union leadership, it is understandable that the law makes recognition permissive rather than illegal. To make recognition bargaining illegal would prevent the union from accepting a bargain on recognition under any circumstances. Instead, the law merely prohibits the employer from bargaining hard for a deal on recognition, making it more difficult for a coercive transfer to take place.[142]

The theory that explains the holding in *Borg-Warner* on recognition bargaining can be extended to justify decisions making the size and composition of the bargaining unit permissive topics. Just as the employer could use recognition bargaining as a method of introducing a yellow dog, bargaining over the size and composition of the bargaining unit could be used to the same effect. The employer could propose to weaken the bargaining unit by including a majority of employees whose interests are opposed to those in the original bargaining unit. The union itself may seek to expand the bargaining unit in a way that leads to the entrenchment of officials, or enhances their power at the expense of the members.[143]

c. *Waivability by Bargaining Agent.*—Closely related to the preceding issues is the extent to which the bargaining agent may waive certain rights of employees. Recall that the Court held in *Magnavox* that the bargaining agent cannot waive the right of employees to communicate with respect to organizational matters on the employer's premises. On the other hand, *American National Insurance* authorizes the bargaining agent to waive the union's bargaining authority with respect to wages, hours, and conditions of employment. Is there some principle that explains this dichotomy between the waivability of organizational and economic interests?

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142. Thus, Justice Harlan's suggestion that the recognition clause in *Borg-Warner* was an illegal bargaining topic is not entirely consistent with the theory of this Paper.

143. I have argued elsewhere that this theory explains the Court's decision that retirees are not "employees" within the meaning of the NLRA in Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). *See* Keith N. Hylton, *An Economic Theory of the Duty to Bargain*, 83 GEO. L.J. 19, 59-60 (1994) (warning that if the bargaining unit includes retirees, more powerful current employees may bargain away the retirees' benefits for their own gain).

The thesis urged here, that a bedrock principle of labor law is the prevention of potentially coercive transfers of organizational rights, explains the dichotomy. Professor Michael Harper has explored this question in more detail, and has concluded that the dichotomy reflects a basic policy of protecting "full freedom of association."[144] This policy reflects a basic attachment, in his view, to democratic institutions, reflected in our constitution and political architecture.[145] The legitimacy of democratic institutions is dependent on the ability of participants to vote in a manner that expresses their preferences and to communicate among themselves in order to gain access to information that relates to the political process. Hence, labor law rules were adopted that seek to maximize this freedom for employees.

Professor Harper's theory works well in explaining the doctrine of waivability, but its limits are exposed when one attempts to apply it to *Babcock & Wilcox*. It follows from Professor Harper's theory that employees should have the right to hear information on the election process from nonemployee organizers, and that in order to protect this right, the employer should generally be required to allow those organizers onto his property so that they can be heard by his employees. This is an important source of information on the organization process; its availability would enhance communication on organizational matters. In order to protect employees' access to this source of information, the employer should be required to allow nonemployee organizers onto his property so that their message can be heard by his employees. All of this would seem to follow from the theory that the statute aims to protect the legitimacy of the voting process. For all practical purposes, however, the law denies nonemployee organizers access to the employer's property.

The theory of this Paper is capable of reconciling the *Babcock & Wilcox/Lechmere* and *Republic Aviation/Magnavox* doctrines. If the aim of the law is simply to prevent strategically coercive transfers of organizational interests, then surprisingly little work is needed in order to reconcile the doctrines. The goal of preventing coercive transfers makes the *Republic Aviation* doctrine necessary. On the other hand, as I have argued above, there is no need for a rule that opens the employer's property to nonemployee organizers. The NLRA seeks to prevent coercive transfers of certain recognized property rights, but it does not alter the common-law assignment of property rights.[146]

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144. Michael C. Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L.J. 335, 343-45 (1981) (quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280, 279-80 (1956)).

145. *Id.* at 345-46.

146. *See* Hylton, *supra* note 143, at 43-45.

VI. Conclusion

I have attempted to provide a theory of minimum terms in employment contracts, with an emphasis on section 7 rights under the NLRA.

The claim that minimum terms are inconsistent with employment at will is not valid because the at-will rule existed simultaneously with several common-law minimum terms. Common-law minimum terms were based largely on three theories: externality, mutuality, and incommensurability. Courts refused to enforce agreements that were socially harmful, such as price-fixing cartels, were based on opportunistic bargains, or required a party to surrender something as important and irreplaceable as liberty.

The New Deal introduced as a new minimum term the freedom to form and join unions. Since then, courts have refused to enforce anti-union promises. The justification for prohibiting anti-union promises is not an easy one, and would be considerably weaker if not for the Supreme Court's decision in *Hitchman*. Because of strategic incentives generated by the bargaining process, however, an anti-union promise may not in all cases be a device that enhances the wealth of employees. The new minimum term protecting organizational rights can be justified as a way of shielding employees from potentially harmful results generated by their own strategic bargaining incentives. If we assume this is the aim of section 7 doctrine, it becomes much easier to understand and reconcile fundamental labor law decisions on the scope of section 7.